The Legal Landscape for the UK’s post-Brexit Industrial Policy

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1. Introduction

The United Kingdom’s withdrawal from the European Union will change the legal landscape for the ways in which the UK government is able to influence industrial policy - that is - the set of government approaches designed to support the development and success of industry within the UK and abroad.

In its recent Industrial Strategy White Paper, the UK government moved industrial strategy to the centre stage.[[1]](#footnote-1) Previously less explicitly identified as a dedicated area of attention, industrial strategy has now moved to a position of prominence. Withdrawal of the UK from the EU has provided the opportunity for the UK to reappraise the means through which it can support businesses in a more targeted fashion. A timely intervention, given the wider current malaise regarding the progress of economic liberalisation and globalisation on regional and sector-specific development across the globe. A careful exercise in managing competing interests and objectives is necessary in the pursuit of an industrial strategy: between identifying the benefits of a largely free market while correcting market failures, providing adjustment support, and supporting conditions for the creation of a productive economic environment.

While this is clearly a priority for the UK, it is also emblematic of a trend across developed and developing economies facing the sometimes real and sometimes perceived inequalities arising from globalization. That is, there is an increasing sense that priority must be given to balance the aggregate gains from globalization with encouraging local economic growth. Thus, while the chapter focuses on the UK experience, the pressures faced by governments seeking to act to support domestic industry while still supporting rules that ensure a level playing field internationally are near universal.

The potential tension between supporting an economically liberal market system and the demand for government intervention is managed through a range of legal arrangements. In the EU context, these are some of the most rigorous: competition law and state aid law. Thus, with withdrawal now impending, there are a number of areas where it is hoped or expected that the UK will be able to support certain industries in a manner that was previously limited. EU rules on state aid, in particular, have been identified as blocks to supporting local business in some quarters, yet the UK’s new legal landscape will continue to include some form of restriction on government intervention in the market.[[2]](#footnote-2)

The topology of this landscape is the focus of this chapter as uncertainty over the content of a future agreement with the EU, and a limited appreciation of the UK’s obligations under WTO in general discourse, present a number of variables which will need to be accounted for. This chapter identifies the different regimes currently in play, possible future alternatives, and provides an analysis of the merits of these systems from a UK perspective.[[3]](#footnote-3)

When considering the types of support that government may provide to industry, this chapter focuses on two key forms: the provision by government of benefits to industry which may include direct transfers, tax breaks, infrastructure support, or other forms of economic support (i.e. subsidies), and action by government to protect industry from unfair trade practices from overseas competitors or unexpected import surges (i.e. trade defence instruments). The prioritisation of these two means of support arises from their substantive impact but also due to their prominent role in trade rules at the regional (EU) and international (WTO) levels.

This chapter proceeds as follows. First, it provides a brief overview of the current regulation in the UK of subsidisation and trade defence as a member of the EU (section 2). Second, it sets out the legal framework for both issues within the WTO for the UK as an independent member (section 3). It subsequently examines the ways in which existing bilateral EU trade agreements regulate subsidies and trade defence (section 4). Finally, having noted the characteristics of the different systems, section 5 looks to the mechanisms through which the UK is able to accommodate uncertainty in its future subsidies and trade defence landscape, noting the built-in flexibilities within UK legislation to manage a range of potential outcomes.

1. EU rules on supporting industry

As an EU member state, the UK is currently subject to EU rules on state aid and trade defence instruments. As such, the UK’s ability to support a local industry through, for example, specific tax incentives, is curtailed. The effective reach of EU law, something particularly unusual within international legal regimes, means that such obligations act as a meaningful restriction beyond their existence as *lex lata*. The EU legal doctrines of primacy and direct effect buttress a system which provides for considerably greater integration than other trade agreements,[[4]](#footnote-4) while the Commission as an institutional ‘guardian of the treaties’ reduces the likelihood of States falling into patterns of collective non-compliance where all fail to adhere to commonly agreed rules and thus lose any incentive to challenge another for fear of being challenged themselves.[[5]](#footnote-5) As will become clear, this is not the case in all rules on government support for local industry, where the WTO rules especially, provide reduced compliance mechanisms.

* 1. EU Subsidy Regulation: State Aid Rules

The EU (and its current and former incarnations) has regulated the use of subsidies by Member States since 1957. Within the EU model, the state aid regime is one half of a sophisticated system designed to reduce market distortions and support the integrity of the internal market, with the other competition law. Thus, harmful market distortions by private actors are targeted through competition law, while state aid law tackles market distortions caused by public actors (i.e. the State). It should be noted that this is a more nuanced and detailed approach to subsidies than one finds at the multilateral level where the focus is often on discourse regarding ‘fairness’ – that is, States have deep pockets and where they support their businesses who are then able to compete more effectively than they would otherwise, the State is ‘cheating’ in the competition played between private actors (industry).[[6]](#footnote-6) As such harm (understood as ‘injury’) is a core concept for multilateral trade rules on subsidies and their impact (thus limiting the application of rules where no injury is evident). In the EU context, subsidies are viewed in terms of the internal market and thus distortion of competition.

Note, the core obligations under EU state aid law, first found in Article 107 TFEU, which provides:

‘Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which *distorts or threatens to distort competition* by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be *incompatible with the internal market*.’[[7]](#footnote-7)

Though interpreted broadly, not all state aid is necessarily prohibited. Exceptions exist, for example, to support cultural industries. This is a particularly apposite example for the UK given the importance of such sectors to the British economy. The UK has long had strong interests in the music and film industries but for the last forty years it has also been a world leader in electronic entertainment. In 2014, for example, the UK received authorization to support the UK video-games industry through tax relief on production of a game. This was not on the basis of correcting market failure (which the Commission was unconvinced was a feature of the industry)[[8]](#footnote-8) but on the basis of cultural support.[[9]](#footnote-9) The impact of the subsidy on the internal market was considered, the worry was that it might spark a ‘subsidies race’ within the EU, and especially with France (the only other Member State to grant state aid to the video-games industry).

The Treaty sets out measures which are exempt from EU disciplines, including ‘(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany…’.[[10]](#footnote-10) Further exemptions are provided for elsewhere, for example on elements of public services.[[11]](#footnote-11) The General Block Exemption Regulation (GBER) excludes the requirement to notify a range of types of state aid, and declares them compatible with EU rules.[[12]](#footnote-12) The GBER applies to a range of measures, including that granted to small and medium-sized enterprises.

A subsequent range of activities are *potentially* exempt from the Article 107 prohibition. These include ‘(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment…; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.’[[13]](#footnote-13)

The system’s sophistication arises from the nuanced case-law of the EU judicial organs and the developed practice of the Commission which acts as the principal enforcer for EU state aid matters. The Commission’s powers are central to the enforcement of the state aid regime – a key difference, as we shall see, from the WTO system that is dependent on Members to enforce the rules amongst themselves. Under Article 108(1) TFEU, the Commission is to work with Member States to ‘keep under constant review all systems of aid… It shall propose… any appropriate measures required by the progressive development or by the functioning of the internal market.’

The Commission has clear enforcement powers in this field, permitting it to provide a Decision instructing a Member State to abolish or alter state aid within a fixed period of time where it finds that the provision of aid is not compatible with the internal market.[[14]](#footnote-14) Where a Member State refuses to comply, ‘the Commission or any other interested State may…refer the matter to the Court of Justice of the European Union direct.’[[15]](#footnote-15)

The EU’s state aid regime can thus be divided between its *ex ante* and *ex post* mechanisms. In practice, this entails requests for authorisation prior to a grant of state aid and investigations into the grant of aid if not caught be the prior authorisation of the Commission. This is a notable difference from other international systems that seek to regulate the use of subsidies which are customarily *ex post*.

Beyond the specific treaty obligations, more detailed provisions on the conduct of state aid investigations are found in a set of legislative instruments which set out the procedure for determining the existence of state aid, the procedures related to decision-taking, revocation of decisions, and what to do where a Member State does not comply.[[16]](#footnote-16) Further, in 2009 the ‘Code of Best Practice for the conduct of State aid control procedures (2009/C 136/04)’ was adopted to improve transparency and efficiency of investigations. These elaborations on the conduct of investigations is standard in national decision-making systems, but the level of delegated decision-making this implies for an international organization such as the EU is unusual.[[17]](#footnote-17)

The EU system is characterised by a number of key features. First, insofar as it relates to the internal market, the Commission views its obligations in enforcing state aid rules as a core objective. Some of the Commission’s most notable interventions in establishing a ‘European’ approach to the market have arisen in the context of competition law and state aid.[[18]](#footnote-18) As such, the current EU system is tied to a constructed sense of ‘European-ness’ – something that both buys in acceptance from members of a community but also potentially offers a space to reconsider assumptions for a Member State leaving the system. Second, this process in practice entails close cooperation between competition authorities horizontally (i.e. between Member States) and vertically (i.e. between Member States and the Commission). While withdrawal from the system could impact on the level of cooperation, this need not be the case – the Commission and the competition authorities of the EEA states, for example, maintain good relations.

* 1. Trade defence petitioning

Closely related to the rules on subsidies, are the rules on trade defence instruments. These instruments (customarily tariffs, quotas, or a mix of the two), allow the introduction of restrictions to trade that would otherwise violate commitments under trade law (most commonly tariff bindings under their goods schedules at the WTO).[[19]](#footnote-19) As deviations from prior obligations, trade defence instruments are necessarily prescribed in their application. They can only be applied where a Member has conducted an investigation into whether the industry that seeks support is to be injured by goods that have been subsidised, dumped, or unexpectedly flooded into the market. As such, trade defence instruments allow government to support domestic industry but, and this is a key element, they also serve as potential penalties for industries that have been supported by their own government. They are both a support and a *de facto* penalty.[[20]](#footnote-20) Where industries that would otherwise be harmed by unfair trade practices of trading partners or import surges, trade defence instruments are a key tool. The EU maintains a system to allow industry to petition for relief from the Commission in these cases.[[21]](#footnote-21)

Within the EU system, trade defence is the shield to the sword of market access. Industry may petition the Commission where it finds itself being injured (or under threat of injury) as a result of the import of subsidised goods, dumped goods (those below their ‘normal’ value), or a sudden increase in imports as a result of unexpected circumstances. For each condition, a quasi-self-help remedy exists: countervailing duties, anti-dumping duties, and safeguard measures respectively.[[22]](#footnote-22)

While there are differences between trade defence instruments, in general terms the system functions as follows: an industry petitions the Commission which in turn conducts an investigation into the situation.[[23]](#footnote-23) Where the Commission finds that the criteria have been met, it proposes the introduction of appropriate measures to protect industry: countervailing duties, anti-dumping duties, or safeguard measures.

The EU has a number of advantages when investigating and then applying trade defence instruments. The first is that it has developed a high-level of skill in conducting such investigations. While WTO members have petitioning procedures of one form or another, the EU is among those with the greatest technical capacity – unsurprising given its resourcing. Also, as a large market the impact of such measures can be strong: access to the European market is coveted and while in theory trade defence instruments seek to ‘correct’ negative behaviour rather than punish it (for example, the level of a countervailing duty is to the amount of the subsidy, or often to the amount necessary to prevent injury, whichever is lower, rather than a higher level to penalise the provision of prohibited financial support), in practice for exporters the introduction of TDIs can be seen as a penalty. This is especially the case where exporters may wish to challenge the veracity of the investigations findings but have neither time nor resources to lobby their government to raise a claim to the challenge the measure at the WTO.[[24]](#footnote-24)

Thus, for the UK, this will entail increasing the skill-base and creating new institutions for such investigations (see Section 5 below). This is a (comparatively) simple challenge in that it is a resource question, and indeed the UK has already begun the process of creating a new Trade Remedies Authority to fill the role of the Commission in this field. And while the UK presents a smaller market (and thus its measures potentially have a smaller impact), the smaller size of the UK market also means that UK industry is more likely to reach the threshold of economic relevance to ensure protection by the UK investigative authority. Reflecting on the concerns over the impact of globalization discussed in section 1, this development may well permit greater responsiveness to the needs of UK industry faced by changing market conditions or unfair trade practices from other WTO Members.

1. WTO rules

As a founding member of the WTO, the UK is already bound by the relevant rules applicable to subsidisation and trade defence. However, the EU’s exclusive competence under the common commercial policy leads all issues of compliance to the Commission’s door rather than the UK’s. On withdrawal, it will be for the UK to manage these obligations. Whereas the EU has comparatively detailed rules and an advanced administrative apparatus for enforcing rules on subsidies and trade defence, the WTO is (for all its advances), a more traditional international organization. The WTO Secretariat is not comparable to the Commission: it is far smaller, less resourced, and most importantly, is not endowed with either investigatory or disciplinary powers. As a ‘Member-driven’ organization, the WTO has no guardian of the treaties save the collective will of the membership. This difference is felt throughout the application of rules that can impact on industrial support, first on subsidies (a) and then on trade defence instruments (b).

* 1. Subsidies rules under WTO

Under the GATT subsidies were regulated indirectly.[[25]](#footnote-25) That is to say, they were subject to limited direct disciplines. Article VI provided for the imposition of countervailing duties, thus regulating subsidies principally through self-help remedies. A limitation of countervailing duties is that they are only effective within the territory of the Member applying them. This opens the question: if domestic industry is attempting to export to a market where its competitors are subsidised, what use is a countervailing duty applied back home? Thus, Members sought to develop rules that would manage subsidies in a broader sense. Though advances where made in some sector-specific areas (for example, on large civil aircraft), it was not until the Uruguay Round that talks around a comprehensive set of rules to discipline subsidies at the international level were developed.[[26]](#footnote-26)

While the GATT was light on the detail of specific detail of what constituted a subsidy and how they were to be disciplined, the WTO Agreement on Subsidies and Countervailing Duties (ASCM) marked a notable advance.[[27]](#footnote-27) First, the ASCM provides a definition for a subsidy, marking the boundary between permissible government activity and impermissible ‘interference’ in the market. Under the ASCM a subsidy exists where a ‘financial contribution’ by ‘government or any public body’[[28]](#footnote-28) confers a ‘benefit’.[[29]](#footnote-29)

Financial contributions can take the form of direct transfer of funds, but can also entail the provision of infrastructure not of a general nature, the failure to collect taxes where otherwise due, or where Members directs a private body to perform one of these acts.[[30]](#footnote-30) The donor of such contribution must be a ‘government or any public body’ – a category determined (principally) by whether the function of the act in question is governmental in nature.[[31]](#footnote-31) Though the nature of the body (eg, whether it is part state-owned or state-controlled) may be relevant, it is not in and of itself a determining feature.[[32]](#footnote-32) Whether the financial contribution provided by government or public body has conferred a benefit is determined by reference to the market, calculated by whether or not the financial contribution received is on better terms than the equivalent publicly available to private actors.[[33]](#footnote-33)

Though not a definitional element of a subsidy, the concept of specificity is also important. Without a specificity requirement, which involves a subsidy targeting an enterprise, industry, or region,[[34]](#footnote-34) a far wider range of potential government support might be caught by the ASCM. As such, without a determination that the subsidy is specific, only those subsidies considered the most economically harmful (prohibited subsidies) are automatically considered to be specific.[[35]](#footnote-35)

Similar to the EU state aid regime, the ASCM distinguishes between prohibited and actionable subsidies.[[36]](#footnote-36) Prohibited subsidies are those that are perceived to be the most harmful in international trade: subsidies which have as their aim the increase in exports (export subsidies) and subsidies which require the use of domestic over imported products (local content subsidies).[[37]](#footnote-37) Actionable subsidies are those that are potentially harmful. Where an actionable subsidy is ‘specific’ and causes ‘adverse effects’, a Member may challenge the measure through dispute settlement.[[38]](#footnote-38) Adverse effects fall into three categories: (1) ‘injury’ to a domestic industry caused by subsidized imports;[[39]](#footnote-39) (2) ‘serious prejudice’ which is an indicator of adverse effects such as where (for example) a product is subsidized over 5% of its value,[[40]](#footnote-40) or instances of debt-forgiveness,[[41]](#footnote-41) or where the subsidization reduces the ability of a member to compete in the subsidizing member’s market, or third markets;[[42]](#footnote-42) and (3), ‘nullification or impairment’ of benefits where the subsidisation in question has undermined the expected benefits from a bound tariff reduction.[[43]](#footnote-43) The procedure for challenging actionable subsidies through dispute settlement is also faster than usually provided for by the Dispute Settlement Understanding.[[44]](#footnote-44)

While the ASCM provides for dispute settlement procedures for instances of subsidisation, remedying the limitations of countervailing duties, in practice direct litigation at the WTO on this basis is rare. The long running EU-US dispute over subsidies to Airbus and Boeing is an example where WTO members have raised claims over the specific measures directly, but it is also an example of how such litigation has not provided a meaningful resolution to the dispute which, as in the case of the vast majority of WTO disputes, is resolved diplomatically through negotiated settlement. In the vast majority of cases, however, members act unilaterally through the use of countervailing duties.

Whereas the EU provides for a system of *ex ante* authorisation, the WTO does not provide an equivalent system (at least in industrial goods, for agricultural goods the existence of ‘pre-approved’ green box subsidies in theory might act as a blanket pre-approval though in practice members rarely subsidise to the level of their green box commitments). While in theory Members notify the SCM Committee of their subsidies,[[45]](#footnote-45) in practice compliance with this provision is varied at best. It is a particular weakness of the multilateral system that no such pre-approval exists, requiring Members to seek compliance after the fact.

* 1. Trade Defence Instruments under WTO law

Historically, as with other areas of international law, self-help remedies were essential elements of trade relations. Countervailing duties were a cornerstone of the colonial regime for trade in sugar, seeking to address concerns over subsidies.[[46]](#footnote-46) Safeguard measures, meanwhile, formed an integral part of US trade policy from the Second World War onwards, most notably forming an essential component of the 1942 US – Mexico reciprocal trade agreement which marked a new model of trade agreement for the US (negotiated under delegated powers from Congress) and a reconciliation between the two States following the nationalizations of Lazaro Cardenas in the 1930s.[[47]](#footnote-47)

It has been mentioned that the EU criteria for the introductions of trade defence instruments reflect the WTO obligations. How then does the WTO regulate the use of such measures, and what challenges or opportunities might such a system have for the UK outside of the EU should it not coordinate its trade defence policy with the EU? The two key differences from the UK perspective relate to enforcement and clarity.

On enforcement, currently the EU manages disputes arising from the application of trade defence instruments. So, for example, where a Chinese exporter is unhappy with a Commission finding, ultimately (after internal EU engagement) it must convince the Chinese government to raise a claim against the EU directly at the WTO. After withdrawal, the principal legal mechanism for challenging trade defence instruments imposed by the UK will be, first, a legal challenge within the UK courts or tribunals (dependent on the appropriate administrative law framework for such decisions), and second, through dispute settlement at the WTO.[[48]](#footnote-48) While the procedures will be very similar to those currently undertaken by the EU on the UK’s behalf, the high prevalence of disputes over trade defence instruments at the WTO makes the likelihood of having to defend the technical investigations at the WTO quite likely.[[49]](#footnote-49)

On the second difference, clarity, WTO rules are less detailed than one might like. In the face of near-paralysis in the negotiating arm of the WTO where new rules could be developed and existing ones elaborated, it has fallen to the WTO’s Appellate Body to clarify the scope of the agreements. However, given that this brings it in tension between its obligation to resolve a dispute before it, and the limits placed upon it by the Dispute Settlement Understanding not to add or diminish rights or obligations under the WTO agreements for Members,[[50]](#footnote-50) there has been considerable push back by Members, most notably the US.

In the case of safeguards, for example, the Appellate Body has been subjected to well-documented criticism for its interpretation of some tests, notably causation requirements which require a Member to demonstrate that the increase in imports was caused by unforeseen developments, and that the increase in imports has caused injury to domestic industry.[[51]](#footnote-51) The ‘unforeseen developments’ requirement has been especially contentious as, while included in the GATT 1947 under Article XIX as an element to demonstrate in order to introduce a safeguard measure[[52]](#footnote-52) (reflecting developments in US law and general practice), the WTO Agreement on Safeguards dropped this provision, requiring only that:

‘A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.’[[53]](#footnote-53)

While the general view at this time was that the ‘unforeseen developments’ clause had fallen out of use, was no longer a legal requirement (if every it was) and had been superseded by the new WTO-era rules, the WTO Appellate Body nonetheless confirmed the clause’s applicability. It noted that it had to give effect to the wording of the treaties,[[54]](#footnote-54) and given the purpose of the Agreement on Safeguards was to reassert control over the multilateral disciplines on safeguards, the provision was thus to be applied cumulatively with later rules.[[55]](#footnote-55)

Similarly, under the ASCM, the interpretation provided by the Appellate Body on the scope of ‘public body’ under Article 1.1(a)(1) has been criticised for given economically interventionist Members too much leeway to use quasi-governmental structures to provide illegitimate support to enterprises.[[56]](#footnote-56) China has been the key object of criticism for this type of behaviour, but other States such as Malaysia and India are also accustomed to using state-owned enterprises (including state-owned commercial banks) to direct industrial strategy. This has raised concerns from a range of members that unclear legal texts have been misapplied or interpreted by the Appellate Body, and subsequently sparked wider discussions regarding the need for reform of subsidies rules at the WTO.[[57]](#footnote-57)

From the UK’s perspective, the key point to note is that the lack of clarity of the content of the legal obligations under the relevant covered agreements means that a simple ‘cut and paste’ of the text may not suffice. Managing the scope of uncertainty in international rules, especially where they are enforced by a compulsory dispute settlement mechanism such as at the WTO, is a challenge for all Members, and the UK will be no different. It is interesting to note (discussed further below) that the current expected legislative framework for the UK offers a practical method for accommodating this uncertainty while ensuring that industry is still able to identify the relevant for criteria as to whether they may petition for support.

1. EU Free Trade Agreements

The exact nature of the future relationship between the EU and UK is unclear. There are a number of possible options or comparators, from shallow free trade agreements to comprehensive trade agreements, from customs unions to no agreement outside of the WTO at all. Nonetheless, it seems likely that whatever the outcome of negotiations, in the future the EU and UK will negotiate some form of bilateral agreement. This is relevant for the purposes of industrial strategy as free trade agreements often contain rights and obligations that may impact on the provision of industrial support, somewhere between the existing EU and WTO systems. While it is beyond the scope of this chapter to provide a comprehensive review of all models of bilateral agreement the EU has concluded, there are some interesting examples that can be drawn from a representative sample.

* 1. State aid under EU Free Trade Agreements

The EU has concluded a range of free trade agreements, some with its neighbours designed to segue toward full membership, others to accommodate close trading relationships within the continental sphere, others accommodating historical developments, and yet others with trade partners across the globe. As one might expect, the rules on subsidies vary considerably depending on the depth of the agreement. The EU-Singapore FTA[[58]](#footnote-58) and EU-Ukraine Association Agreement[[59]](#footnote-59) serve as illustrative examples of comparatively recent agreements that present different approaches to subsidy disciplines.

Under the EU-Singapore FTA, the focus is on coordination. While competition provisions are modelled on generally accepted obligations under each other’s systems, the state aid provisions echo the WTO rules and build on them (so-called WTO+), rather than repeat the EU’s state aid rules. Thus, the disciplines under the ASCM are referenced but expanded to include certain subsidies on services which the WTO rules do not cover. These include (in general terms), bail-outs for businesses unless they are intended to respond to an economic crisis.[[60]](#footnote-60)

Unlike the EU-Singapore FTA, the EU-Ukraine Association Agreement (AA) contains more stringent rules on subsidies, modelled more explicitly on the EU’s state aid rules. Here the agreement sets out clearly:

‘Any aid granted by Ukraine or the Member States of the European Union through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the proper functioning of this Agreement insofar as it may affect trade between the Parties.’[[61]](#footnote-61)

Just as this echoes the EU’s internal rules for state aid, so do the subsequent exceptions (including aid ‘having a social character’) and the potentially exempt categories (including promotion of ‘culture and heritage conservation where such aid does not adversely affect trading conditions contrary to the interests of the Parties’).[[62]](#footnote-62) The Ukraine also commits to the creation of an internal legislative and institutional framework to ensure compliance with the state aid obligations under the AA.[[63]](#footnote-63)

While the obligations on Ukraine are more onerous under its AA with the EU than those placed on Singapore under its FTA, equally, Singapore could be considered to be closer to the EU in terms of regulatory development. The UK finds itself in an interesting middle ground, where there is a desire for close cooperation with the EU and an existing EU state aid framework in place but also an acknowledgement that the WTO rules alone would not match the current levels of economic leverage each party currently maintains to secure a level playing field in terms of intervention in the affairs of companies.

* 1. TDIs

The starting position for the use of trade defence instruments within an FTA is arguably that they should not be used. FTAs are, by their nature, discriminatory: they provide advantages to members that are not automatically granted to all other members thus violating the most-favoured nation principle, enshrined in Article I GATT. Article XXIV GATT, which provides the exception that permits the formation of preferential agreements (both FTAs and customs unions).[[64]](#footnote-64) Under FTAs the parties to the agreement must eliminate ‘duties and other restrictive regulations of commerce’ on ‘substantially all the trade’ between them.[[65]](#footnote-65) Custom unions have the added requirement that the parties share a common external tariff and apply substantially the same regulations of commerce to third parties.[[66]](#footnote-66) In the case of both FTAs and CUs, the level of protection cannot be ‘on the whole’ higher than was the case prior to the creation of the FTA or CU.[[67]](#footnote-67) This is intended to ensure (in theory) that the RTAs do not undermine the gains from non-discriminatory multilateral trade without contributing to meaningful liberalisation.[[68]](#footnote-68) The existence of trade defence instruments within a free trade area would *prima facie* appear to run counter to this requirement.

Further, in the case of customs unions, the requirement to maintain a common external tariff would appear to present a clear limitation on the use of TDIs vis-à-vis third countries. Nonetheless, in the case of the EU-Turkey customs union there is nominally coordination but in practice each party introduces TDIs as and when they consider it appropriate. While this was not common practice in the early years of the EU-Turkey agreement, more recently divergent trade defence instruments have become common given the scope for possible trade diversion.[[69]](#footnote-69)

Nonetheless, FTAs often include provisions for internal safeguard measures *in extremis*, though these are sometimes tailored very specifically for a particular industry (the EU treatment of parts of the automotive industry in the EU-Korea FTA is one such example).[[70]](#footnote-70)

While internal trade defence instruments may not be desirable for legal and economic reasons (compliance with Article XXIV and the gains from avoiding trade diversion and encouraging greater liberalisation), they can still serve an important political purpose where they give negotiating parties the space in which to conclude an agreement that might otherwise be unsellable to their home constituents.[[71]](#footnote-71)

On the application of external trade defence instruments (that is, a measures introduced by one party of an agreement to a third party), there are concerns. While in the case of customs unions, this should not be possible (i.e. the application of such measures should be across the union) in practice this is not always the case.[[72]](#footnote-72) Given the increasing awareness of these challenges, it may be that greater limitations might be agreed in terms of coordination to ensure such problems do not arise. This is as yet unclear, however.

1. Concluding Remarks: Accommodating Legal Uncertainty

We have seen how the UK has to face uncertainty in a number of forms: the nature of its future relationship with the EU which will have an impact on how it is able to engage with industries within the UK, and the lack of clarity in rules at the WTO level where the system is now being stress-tested by Members unhappy with the direction of travel that the Appellate Body has taken. The new legislative framework being introduced by the UK government manages these uncertainties in a range of different ways. Two in particular are of note: the creation of new institutions able to manage new obligations, and the flexibility in incorporating international obligations that are to become part of the UK’s normative landscape.

The arrangements for the creation of a new UK Trade Remedies Authority is a paradigmatic example of how the legislative framework embeds sufficient flexibility so as to be able to manage changing circumstances. The Trade Bill provides for the creation of an independent agency, the Trade Remedies Authority which shall conduct investigations into whether the circumstances have been met for the introduction of safeguard measures, countervailing duties, or anti-dumping duties.[[73]](#footnote-73)

The Taxation (Cross-Border Trade) Act 2018 sets out the criteria for making such determinations. Schedule 4 provides guidance and definition on determining instances of subsidisation or dumping, while Schedule 5 does the same for increases in imports that cause serious injury to UK producers. Importantly, the Act provides for further regulations to provide detail on the process for conducting such investigations and the precise methods for making the determinations. On these issues, the Secretary of State is to consult the Trade Remedies Authority before making a regulation under Schedule 4 or 5.[[74]](#footnote-74) This is important as it provides the necessary flexibility to be able to respond to changes in the broad overarching obligations, in particular those at the WTO.

This is not a hypothetical problem – the US has been affected deeply by the change in the conventional understanding of the requirements for safeguards and anti-dumping duties. The UK can manage such shifts in the case-law, should it wish, through a relatively uncomplicated process that still enjoys Parliamentary scrutiny.

Industrial strategy is just one of many parts of the UK legal system and policy framework which will have to adapt to a new post-EU landscape. The uncertainty faced by the UK is unusual in its dominance in public discourse, however, it is part of a wider challenge faced by all States as they manage competing legal obligations across multilateral, regional and bilateral trade agreements and shifting public demands. As such, confronting uncertainty head-on by embedding a certain degree of flexibility within a legislative framework offers interesting possibilities for the UK’s future trade policy, and potential lessons for others seeking greater resilience in a post-hegemonic world.

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2. On the impact of state aid rules on UK policy, see the analysis presented in House of Lords European Union Committee report, ‘Brexit: Competition and State Aid (2 February 2018) HL Paper 67. [↑](#footnote-ref-2)
3. This chapter examines the role of industrial subsidies, not subsidies to agriculture or aquaculture which present a range of related but separate challenges and are regulated in part by different rules at both the EU and WTO. [↑](#footnote-ref-3)
4. Cf, The Common Market of the Southern Cone (MERCOSUR) where the organization’s rhetoric echoes that of the EU in terms of common projects and integration, yet the legal frameworks allow individual Members to delay implementation of bloc-wide measures. See: G Messenger, ‘Reappraising the Jurisprudence of MERCOSUR: An Exercise in Regional Innovation or Malinchismo?’ 5 *Transnational Dispute Management* (2016). [↑](#footnote-ref-4)
5. In WTO terms, this is commonly referred to as the ‘glass house problem’. [↑](#footnote-ref-5)
6. Current US discourse on the need for ‘fairer’ trade agreements is part of a long tradition widely followed among trading States. [↑](#footnote-ref-6)
7. Treaty on the Functioning of the European Union (TFEU) [2010] OJ C83/47. Emphasis added. [↑](#footnote-ref-7)
8. European Commission Press Release, ‘State aid: UK video games tax relief faces Commission scrutiny’ (16 April 2013): ‘The market for developing video games is dynamic and commercially promising. It is not clear whether the taxpayer should be subsidising this activity. Such subsidies could even distort competition.’ [↑](#footnote-ref-8)
9. Commission Decision (27 March 2014) On State Aid Scheme SA.36139 (2013/C) (ex 2013/N). [↑](#footnote-ref-9)
10. Article 107(2) TFEU. [↑](#footnote-ref-10)
11. Article 93 TFEU. [↑](#footnote-ref-11)
12. Council Regulation (EC) No 651/2014 of 17 June 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 or the Treaty. [↑](#footnote-ref-12)
13. Article 107(3) TFEU. [↑](#footnote-ref-13)
14. Article 108(2) TFEU. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. For example: Council Regulation (EC) No 659/1999 of 22 March 1999, laying down detailed rules for the application of Article 93 of the EC Treaty, subsequently amended by Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty. [↑](#footnote-ref-16)
17. For all of its idiosyncrasies, the EU is nonetheless an international organization. [↑](#footnote-ref-17)
18. For example, the high profile decisions relating to Microsoft, Google, Apple, GE/Honeywell have all formed important milestones in the EU’s construction of its competition law and state aid framework. [↑](#footnote-ref-18)
19. Members ‘bind’ tariffs through the creation of Schedules of Concessions, which set out the maximum tariff applicable to a good or class of goods. Goods are identified through the Harmonized System classifications, which ensure some semblance of uniformity amongst members’ Schedules. A member’s Schedules constitute an integral part of the General Agreement on Tariffs and Trade (GATT), and thus treaty obligations (Article II.7 GATT). Members can apply a lower rate than that committed to (referred to as the applied tariff), though any reduction must applied to all like goods on a Most-Favoured Nation (MFN) basis as required by Article I GATT unless a specific exception can be provided, such as trade defence instruments, but also regional trade agreements or customs unions (see: Article XXIV GATT and Article V General Agreement on Trade in Services (GATS)). [↑](#footnote-ref-19)
20. The term ‘*de facto*’ is used because certain types of behaviour are not specifically prohibited by WTO rules but are nonetheless targeted by trade defence instruments. This is the case with anti-dumping duties where the practice of dumping – the export of goods below their ‘normal value’ was not prohibited *per se*, only discouraged under Article VI GATT. [↑](#footnote-ref-20)
21. Regulation (EU) 2016/1036 of the European Parliament and Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification) L 176/21; Regulation (EU) 2016/1037 of the European Parliament and Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (codification) L 176/55; Regulation (EU) 2015/478 of the European Parliament and Council of 11 March 2015 on common rules for imports (codification) L 83/16. [↑](#footnote-ref-21)
22. Only ‘quasi’ as the ability to access this self-help remedy is set by obligations under WTO law, subsequently incorporated into EU law, thus not truly unilateral. [↑](#footnote-ref-22)
23. The criteria applied by the Commission to determine if, for example, a good is subsidised, are mostly derived from the WTO obligations applicable to all members. [↑](#footnote-ref-23)
24. There are also instances of objectively punitive trade defence instruments: This is the case with ‘zeroing’ where anti-dumping calculations are modelled to intentionally disregard instances which would not constitute dumping over a period of time and therefore increase the level of anti-dumping duty. Another example is the case of ‘double counting’ where both countervailing duties and anti-dumping duties are applied to a single set of goods on the basis that the subsidy has reduced its ‘normal value’ which also injures industry. The legality of the measures is at best contested, but they are still used by some Members. [↑](#footnote-ref-24)
25. General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194. [↑](#footnote-ref-25)
26. Building on work that had been conducted at the OECD. [↑](#footnote-ref-26)
27. Agreement on Subsidies and Countervailing Measures, 15 April 1994, 1869 UNTS 14. [↑](#footnote-ref-27)
28. Article 1.1(a)1 SCM Agreement. [↑](#footnote-ref-28)
29. Article 1.1(b)1 SCM Agreement. [↑](#footnote-ref-29)
30. Article 1.1(a)1 (i)-(iv) SCM Agreement. [↑](#footnote-ref-30)
31. Appellate Body Report, *US – China (AV/CVDs),* WT/DS379/AB/R (11 March 2011) para 285. [↑](#footnote-ref-31)
32. Appellate Body Report, *US – Carbon Steel (India),* WT/DS436/AB/R(8 December 2014) para 4.20. [↑](#footnote-ref-32)
33. Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/R (2 August 1999) paras 157-8. Non-commercial considerations can be considered if appropriate: Panel Report, *Japan — DRAMs (Korea)*, WT/DS336/R (13 July 2007) para 7.275. [↑](#footnote-ref-33)
34. Articles 2.1-2 SCM Agreement. [↑](#footnote-ref-34)
35. Article 2.3 SCM Agreement. [↑](#footnote-ref-35)
36. A third category of ‘non-actionable’ subsidies involved subsidies for research and development, assistance to disadvantaged regions, and to support compliance with environmental regulation (Article 8.2(a)-(c) SCM Agreement). These subsidies received [↑](#footnote-ref-36)
37. Article 3.1 SCM Agreement. [↑](#footnote-ref-37)
38. Article 5 SCM Agreement. [↑](#footnote-ref-38)
39. Article 5(a) SCM Agreement. Injury is understood as: ‘material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry’ (FN 45, Article 15 SCM Agreement). Evidence of injury may include effects on prices or domestic production (Article 15.1-6 SCM Agreement). [↑](#footnote-ref-39)
40. Article 6.1(a) SCM Agreement. [↑](#footnote-ref-40)
41. Article 6.1(d) SCM Agreement. [↑](#footnote-ref-41)
42. Article 6.3 SCM Agreement. [↑](#footnote-ref-42)
43. Article 5(b) SCM Agreement. [↑](#footnote-ref-43)
44. Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, 1869 UNTS 401 (DSU). [↑](#footnote-ref-44)
45. Article 25 ASCM. [↑](#footnote-ref-45)
46. See: Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge University Press 2014). [↑](#footnote-ref-46)
47. See: G Messenger, *The Development of World Trade Organization Law* (Oxford University Press 2016) p90-91. [↑](#footnote-ref-47)
48. In practice, concerns will be raised at the relevant WTO Committee where members customarily raise questions in an attempt to avoid formal disputes and settle them bilateral via withdrawal of the measure or some form of negotiation. [↑](#footnote-ref-48)
49. Over half of WTO disputes are now raised over the use of trade defence instruments. [↑](#footnote-ref-49)
50. Article 3.2 DSU. [↑](#footnote-ref-50)
51. A Sykes, ‘The Safeguards Mess: A Critique of WTO Jurisprudence’, (2003) 2(3) *World Trade Review* 261. [↑](#footnote-ref-51)
52. Article XIX:1(a) ‘If, *as a result of unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.’ Emphasis added. [↑](#footnote-ref-52)
53. Article 2.1 Agreement on Safeguards, 15 April 1994, 1869 UNTS 154 (AoS). [↑](#footnote-ref-53)
54. Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products* (14 December 1999) WT/DS98/AB/R, para. 82 [↑](#footnote-ref-54)
55. Ibid., para. 88 [↑](#footnote-ref-55)
56. In particular: Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011); and Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, para 4.23, WT/DS436/AB/R (Dec. 8, 2014) [↑](#footnote-ref-56)
57. Canada and the European Union have proposed reappraising rules on subsidies, in particular their applicability to state-owned enterprises. [↑](#footnote-ref-57)
58. EU – Singapore Free Trade Agreement, expected to enter into force in 2019, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> [↑](#footnote-ref-58)
59. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [OJ L 161] 29 May 2014. [↑](#footnote-ref-59)
60. Chapter Eleven, Article 11.7, EU-Singapore FTA. [↑](#footnote-ref-60)
61. Article 262(1) EU-Ukraine AA. [↑](#footnote-ref-61)
62. Articles 262(2)(a) and 262(3)(d) AA respectively. [↑](#footnote-ref-62)
63. Article 267 AA. [↑](#footnote-ref-63)
64. Article XXIV.8 GATT. [↑](#footnote-ref-64)
65. Article XXIV.8(b) GATT. [↑](#footnote-ref-65)
66. Article XXIV.8(a)(ii) GATT. These definitional features constitute the first requirement for a member claiming Article XXIV as an exception under the GATT (that is, a member must demonstrate that it *is* indeed an FTA or CU): Appellate Body Report, *Turkey – Textiles*, WT/DS34/AB/R (22 October 1999) paras 58-9. [↑](#footnote-ref-66)
67. Article XXIV.5(a)-(b) GATT. [↑](#footnote-ref-67)
68. The seminal work on concerns arising from preferential agreements: J Viner, *The Customs Union Issue* (1950). [↑](#footnote-ref-68)
69. See: World Bank & European Union, ‘Evaluation of the EU-Turkey Customs Union’ Report No. 85830-TR (28 March 2014), p40-42. Available at <http://www.worldbank.org/content/dam/Worldbank/document/eca/turkey/tr-eu-customs-union-eng.pdf> [↑](#footnote-ref-69)
70. See: Regulation (EU) No 511/2011 of the European Parliament and of the Council of 11 May 2011 implementing the bilateral safeguard clause of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea [OJ L 145]. [↑](#footnote-ref-70)
71. The insight presented in: A Sykes, ‘Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations’, (1991) 58 *University of Chicago Law Review* 255. [↑](#footnote-ref-71)
72. Note the EU-Turkey situation identified previously, but also MERCOSUR which constitutes an incomplete customs union and where its members introduce trade defence measures independently of one another. [↑](#footnote-ref-72)
73. Clauses 9-10, Trade Bill [HL Bill 127, 57/1] [↑](#footnote-ref-73)
74. s32(12) Taxation (Cross-Border Trade) Act. [↑](#footnote-ref-74)