

The Role of Trade Defence Instruments in EU Trade Agreements: Theory versus Practice

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A. Introduction

Bilateral trade of the European Union (EU) with its trade partners accounts for a big part of its imports and exports. In 2017, no less than 38.2 % of all EU exports and 33.7 % of the imports of goods were traded with partners of the EU who have an implemented or concluded Free Trade Agreement (FTA).¹ Another 38.7 % and 30.5 % respectively could be added onto this, if future EU FTAs were also counted.² Art. XXIV of the General Agreement on Tariffs and Trade of 1994 (GATT) allows members of the World Trade Organization (WTO) to conclude Regional Trade Agreements (RTAs) in order to liberalise trade beyond multilaterally agreed levels.

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¹ European Commission, DG Trade Statistical guide, June 2018, p. 56.

² Ibid.

An overly use³ of this exception to the Most Favoured Nation principle (MFN) increased the importance of bilateral trade in the WTO, including for the EU.

At the same time, the EU had multiple trade remedy measures in place in 2017, namely 99 anti-dumping and 13 anti-subsidy measures.⁴ This includes measures against free trade partners.⁵ The EU's Trade Defence Instruments (TDI) framework adopts the WTO rules on trade remedies.⁶ These rules enable the European Commission to challenge unfair trade *inter alia* by imposing tariffs on dumped or subsidised goods.⁷ Anti-dumping and anti-subsidy/countervailing duties impose an additional duty on dumped or subsidised goods entering the EU market. As a consequence of their frequent imposition, trade remedy measures are, historically seen, also the subject of a very high percentage of the challenges before the Dispute Settlement Body (DSB).⁸

This article combines both parallel yet contrary developments: bilateral trade agreements liberalise trade beyond MFN-levels, whereas TDI measures put a break on free trade by re-instating tariff barriers on trade in goods. The importance of TDI provisions in EU trade agreements can therefore be a major discussion point in the free trade negotiations, but is in other cases hardly mentioned.⁹ The aim of this article is to set out an up to date overview of the state of play of the EU trade agreements and to add predictions regarding Brexit and the future of the EU-UK trade relationship. It starts by interpreting the legal basis Art. XXIV GATT, then provides a current overview of TDI provisions in EU trade agreements and identifies patterns, which are finally used to draw conclusions for the future of EU-UK trade relations post-Brexit.

3 See *World Trade Organization*, Regional Trade Agreements Information System (RTA-IS), <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (09/07/2018). To date, 459 agreements are gathered in this database that have been notified or of which an early announcement has been made. See also *Voon*, Elimination Trade Remedies from the WTO: Lessons from Regional Trade Agreements, *ICLQ* 3/2010, p. 630.

4 See *European Commission*, Anti-dumping, anti-subsidy, safeguard statistics covering the first month of 2018 (Commission Statistics on TDI 2018), 16/02/2018, http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156607.pdf (09/07/2018).

5 See *infra*, section C.III.

6 The Basic Anti-Dumping Regulation (Regulation (EU) 2016/1036, OJ L 176 of 11/06/2016, pp. 21-54) and the Basic Anti-Subsidy Regulation (Council Regulation (EC) No. 597/2009, OJ L 188 of 11/06/2009, pp. 93-126) adopt the provisions of the Arts VI and XVI GATT, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement or ADA) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement or ASCM) respectively.

7 In addition, safeguard measures react to unforeseen increases in imports, which are injurious for the EU market.

8 *Johannesson/Mavroidis*, EUI Working Paper RSCAS 2016/72, December 2016, p. 36.

9 *Prusa*, Trade Remedy Provisions, in: *Chauffour/Maur* (eds.), *Preferential Trade Agreement Policies for Development. A Handbook*, 2011, p. 181.

B. The Theory: Interpretation of Art. XXIV GATT

Allowing trade remedies in RTAs, be it in line with the WTO rules or with the addition of slightly modified rules, conflicts with a literal reading of Art. XXIV:8 GATT. The provisions foresee definitions of free trade agreements (and customs unions):

‘A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.’¹⁰

The text of this provision can be interpreted in different ways.¹¹ Interpreted literally, parties to an RTA are required to eliminate *all* trade restrictions on *substantially all* trade. In this view, the forbidden ‘other restrictive regulations of commerce’ include trade remedies, as they are measures re-instating tariff walls between trade partners. To the contrary, trade restrictions stemming from the Articles listed in the provision are still permissible.¹² As the articles in the list do not contain any of the relevant GATT provisions on trade remedies (Arts VI, XVI and/or XIX GATT), these trade restrictions have to be eliminated. Based on this interpretation, FTA partners are obliged to prohibit the use of trade remedies in their trade relations and should abolish the instrument in its totality. Whether this constitutes a legal obligation to eliminate is not clear from the wording alone. This depends on the illustrative or exhaustive nature of the list. When following the literal reading of the article, the list must be seen as exhaustive. However, when *not* following a literal reading of the wording of the provision, obvious exceptions, such as the national security exceptions, speak in favour of an illustrative, rather than an exhaustive list. In addition, a *lex specialis*-argument in

10 Art. XXIV:8(b) GATT (emphasis added). See similarly Art. XXIV:8(a) GATT for the same provisions about custom unions.

11 See *Gobbi/Estrella/Horlick*, Mandatory Abolition of Anti-dumping, Countervailing Duties and Safeguards in Customs Unions and Free-Trade Areas Constituted Between World Trade Organization Members: Revisiting a Long-standing Discussion in Light of the Appellate Body’s Turkey – Textiles Ruling, JWT 5/2006, pp. 909-944; *Sagara*, Provisions for Trade Remedy Measures (Anti-dumping, Countervailing and Safeguard Measures) in Preferential Trade Agreements, RIETI Discussion Paper Series 02-E-13, September 2002, pp. 37-38; *Marceau*, Anti-Dumping and Anti-Trust Issues in Free-trade Areas, 1994, pp. 312 ff.; *Ahn*, Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules, JIEL 1/2008, pp. 120-121; *Pauwelyn*, The Puzzle of WTO Safeguards and Regional Trade Agreements, JIEL 1/2004, pp. 125-128; *Van den Bossche/Zdouc*, (fn. 11), pp. 679 f., *Matsushita/Schoenbaum/Mavroidis/Hahn*, The World Trade Organization: Law, Practice, and Policy, 2015, pp. 521-523; *Müller-Ibold*, TDIs and EU-FTAs. Is Past Experience an Indication for the Future? Implications for Brexit, in: Bungenberg et al. (eds.), EYIEL Special Issue: The Future of Trade Defence Instruments. Global Policy Trends and Legal Challenges, 2018, forthcoming.

12 The list includes Art. XI (General Elimination of Quantitative Restrictions), Art. XII (Restrictions to Safeguard the Balance of Payments), Art. XIII (Non-discriminatory Administration of Quantitative Restrictions), Art. XIV (Exceptions to the Rule of Non-discrimination), Art. XV (Exchange Arrangements) and Art. XX GATT (General Exceptions). These restrictions are still permissible, even between partners in an FTA or CU.

favour of applying Art. VI GATT over Art. XXIV GATT, as two exceptions to the MFN-principle, can also be made.¹³

This issue has not been clearly decided in the WTO jurisprudence. With regard to safeguards, the Appellate Body (AB) left the possibility open for internal safeguard measures both in FTAs and in customs unions.¹⁴ This case law seems to favour the illustrative nature of the list. The AB allowed ‘some flexibility’ albeit limited in the sense that restrictions must be eliminated ‘with respect to substantially all internal trade’.¹⁵ Consequently, it has been argued that the AB confirmed that the mandatory abolition of trade remedies is the only possible way to read this provision in a manner that conforms to the Vienna Convention on the Law of Treaties (VCLT).¹⁶

A literal reading of Art. XXIV GATT speaks in favour of an obligation to abolish TDI in trade agreements. However, the case law of the AB has maintained some ‘fuzziness’ since its early decisions, leaving the possibility to not eliminate TDI in trade agreements in practice.¹⁷

C. The Practice: Provisions on TDI in EU Trade Agreements

In practice, not all EU trade agreements abolish trade remedies. Usually, a confirmation of the possibility to impose trade defence measures in accordance with the WTO-rules is foreseen. Only when a sufficient level of market integration is reached, the possibility exists that the EU abolishes TDI. This can be illustrated by an overview of the trade agreements of the EU. The reasons behind allowing trade remedies in bilateral free trade relations are of a political, rather than a legal nature.

I. Depth of Market Integration and the Abolition of TDI

The likeliness of abolition of trade remedies in RTAs depends on the level of market integration: the deeper the market integration, the more likely trade remedies are abolished.¹⁸ A deep level of market integration creates a suitable environment where trade partners deem trade remedies unnecessary. Two prerequisites are thereby re-

13 Müller-Ibold, (fn. 11), forthcoming.

14 Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 14/12/1999, paras 99-114 and Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 22/12/2000, paras 93-100.

15 Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19/11/1999, para. 48.

16 For an analysis, see *Gobbi Estrella/Horlick*, (fn. 11), p. 944; *Van den Bossche/Zdouc*, (fn. 11), pp. 679-680.

17 *Matsushita/Schoenbaum/Mavroidis/Hahn*, (fn. 11), p. 523.

18 See, *inter alia*, *Prusa*, (fn. 9); *Teh/Prusa/Budetta*, Trade remedy provisions in regional trade agreements, WTO Staff Working Paper No. ERSR-2007-03, September 2003; *Voon*, (fn. 3); *Marceau*, (fn. 11); *Farha*, A right unexercised is a right lost?: Abolishing antidumping in regional trade agreements, *GJIL* 1/2012; *Hoekman*, Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements, World Bank paper.

quired, to achieve a deep level of market integration: the adoption of common policies (harmonisation) *and* appropriate mechanisms enforcing these policies.

First, the adoption of common policies can take several forms. Competition policy is largely accepted to be able to substitute trade remedies, anti-dumping in particular.¹⁹ Still, it has been argued that where trade remedies are abolished and competition rules are established, there is no causal relationship between both policies.²⁰ However, it cannot be denied that both anti-dumping and competition are disciplines with similar purposes; they not only indicate a deepened market integration, but also in their effects, challenge unfair trade. Debates on regulating competition matters at the WTO level have been going on for years. There are already mentions of competition policy at the multilateral trade level,²¹ but work on the interaction between trade and competition policy is not on the WTO agenda anymore.²² Similarly, the existence of a harmonised state aid legal framework can prevent the need to include anti-subsidy rules.

In addition, research has also shown that formulation of general (economic) policies renders the existence of trade remedies unnecessary and leads to a suitable environment for their abolition. This means that not only competition policy and state aid policy, but also the adoption of common standards and sanitary and phytosanitary (SPS) measures, mutual recognition rules, macro-economic and micro-economic policies, the creation of a single market and the creation of a monetary union or a political union can facilitate abolition of trade defence instruments.²³

Second, a necessary corollary of harmonised common policies is an effective enforcement mechanism. Indeed, the effective application of common policies also demands a functioning enforcement mechanism to be relevant in substituting the need for trade remedies. This exists of procedures and institutions on an administrative level as well as on a dispute settlement level. Many trade agreements include an institutional framework and/or judicial procedures for enforcement.

19 *Prusa*, (fn. 9), p. 191; *Voon*, (fn. 3), p. 630; *Teh/Prusa/Budetta*, (fn. 18), p. 27.

20 *Hoekman*, (fn. 18), pp. 13, 38-39 and 40; *Farba*, (fn. 18), pp. 242 ff.

21 *Desta/Barnes*, Competition Law in Regional Trade Agreements: An Overview, in: Bartels/Ortino (eds.), *Regional Trade Agreements and the WTO Legal System*, 2006, p. 243; see Art. 9 TRIMs, Arts 8, 31, 40 TRIPS, Art. VIII and IX GATS, 1996 Paper on Telecommunications.

22 In 1996, at the Singapore Ministerial Conference, the Working Group on the Interaction between Trade and Competition Policy was founded. This working group studied various issues relating to the interaction between both fields. In 2001, their tasks were further defined in the Doha Ministerial Declaration. In 2004, however, the General Council of the WTO decided to dissolve the Working Group. The Working Group is inactive ever since. See also *Marceau*, (fn. 11), pp. 281 ff.

23 See, for instance, *Teh/Prusa/Budetta*, (fn. 18), pp. 28-29; *Hoekman*, (fn. 18), p. 35; *De Araujo/Macario/Steinfatt*, Antidumping in the Americas, CEPAL-SERIE Comercio internacional No. 12, March 2001, pp. 9-10; *Wooton/Zanardi*, Antidumping versus Antitrust: Trade and Competition Policy, in: *Choi/Hartigan* (eds.), *Handbook of International Trade*. Volume II: Economic and Legal Analyses of Trade Policy and Institutions, 2004, pp. 341-342.

In sum, only when sufficient depth of market integration is reached, EU trade agreements abolish the possibility of using trade remedies with its trade partners. The deeper the market integration, the more likely TDI will be abolished.

II. Reasons for Including TDI Provisions in Trade Agreements

Many FTAs that do not reach a deep level of integration merely confirm their obligations under WTO law as regards trade remedies. The question arises, why is this possibility kept?

The main reason for including trade remedy provisions in RTAs is the political economy of protectionism.²⁴ Through various multilateral rounds of negotiations, tariffs within the WTO are already very low. Members look for other means of protection of their own economy. The use of trade remedies can be such an instrument, sheltering the local economy from unfair trade practices. The use of trade remedies allows states to protect their local industry as the ‘second best alternative’.²⁵ Trade remedies are a more attractive tool than other means of protectionism for governments to shelter the domestic industry.²⁶

Another reason is that trade remedies act as a pressure-release instrument against the newly established liberalisation. The inclusion of trade remedy provisions balances out the costs incurred to achieve trade liberalisation, at least on a political level.²⁷ They are supposed to be a tool to combat the economic danger resulting from trade liberalisation.²⁸ Here too, a relation to the depth of the market integration is noticeable. The deeper the trade relation is anticipated *ex ante*, the more of these ‘escape clauses’ are built in the agreement to use *ex post*.²⁹ In addition, the anticipatory inclusion of trade remedy provisions gives parties who are hesitant to sign a trade deal that leads to substantial trade liberalisation the assurances they need to make the agreement politically acceptable.³⁰ In this fashion, trade remedy provisions in RTAs serve an important purpose: they give a political possibility – not an obligation – to protect the economy from trade harming or injuring influence, by setting a specific line of conditions to be met.

24 *Tharakan*, Political Economy and Contingent Protection, in: *The Economic Journal* 1995, pp. 1550-1564.

25 *Prusa*, (fn. 9), p. 180; *Teh/Prusa/Budetta*, (fn. 18), p. 3.

26 See *Busch/Pelc*, Law, politics, and the true cost of protectionism: the choice of trade remedies or binding overhang, *WTR* 1/2014, pp. 44-46. The imposition of trade remedy measures is found an attractive tool for import-dependent countries. The alternative choice of using binding overhang (*i.e.* raising the applied tariff, which is possible because for some countries there is a gap between applied and bound tariffs) is less attractive. Either way, both measures are trade-restrictive and hurt the economy.

27 *Jackson*, The World Trading System. Law and Policy of International Economic Relations, 2nd ed. 1997, pp. 175-177.

28 *Farba*, (fn. 18), p. 213.

29 *Teh/Prusa/Budetta*, (fn. 18), p. 4; *Bown*, Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?, *JLS* 2/2005, p. 527; *Hoekman*, (fn. 18), p. 10.

30 *Bown*, (fn. 29), p. 527; *Prusa*, (fn. 9), p. 180.

In addition, importers and import-dependent industries also advocate for the inclusion of TDI provisions in trade agreements for the same reason: as ‘a stick behind the door’ against total liberalisation. This is again irrespective of the actual use of the trade remedies; it is the mere possibility that assures this pressure release.

The inclusion of trade-restricting provisions in FTAs that aim at liberalised trade, like provisions that allow trade remedies in RTAs, is driven by political reasons to shelter the local economy and counterwork the effects of trade liberalisation, at least on a political level. Both state administrations and the industries that benefit from the measures advocate for them, in order to find a new balance in the newly opened markets.

III. Overview of the European Union Trade Agreements

What follows is an overview of the most important or illustrative trade agreements of the EU and their respective provisions relevant to trade remedies and trade defence. The European Commission formulates three main categories of EU trade agreements.³¹ First, custom unions abolish internal customs duties and establish a joint external tariff charged at the borders of both partners. The EU itself is a customs union (section 1) and has entered into customs unions with the European microstates and more importantly, with Turkey (section 2). Second, FTAs only abolish internal tariffs, without formulation of a common external tariff. The European Free Trade Agreement (EFTA) and the Agreement on the European Economic Area (EEA) establish deep integration outside EU membership (section 3), the ‘new generation’ of FTAs establish trade relations all over the world (section 4), FTAs can be found in Association Agreements (section 5) and some *ad hoc* bilateral relations in this context will also be addressed (section 6). Third, other trade agreements are non-preferential and only provide a framework for bilateral trade, without necessarily affecting tariffs (section 7).

1. European Union Customs Union Itself

The European Union is itself a customs union in which all three forms of TDI have been successfully abolished. Since the Treaty of Rome in 1957, TDI measures were not allowed within the EU. Nevertheless, anti-dumping measures were allowed dur-

31 See *European Commission*, Commission Statistics on TDI 2018, (fn. 4).

ing a transitional period upon authorisation of the Commission.³² However, this possibility has not been used in practice.

Today, Art. 28(1) TFEU foresees a ‘prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect’ in the framework of the EU customs union. In return, the internal market ensures full liberalisation of trade in *inter alia* goods and harmonised policies in competition and state aid matters. In addition, an enforcement mechanism protects the whole system: the Commission on an administrative level and the Court of Justice of the European Union (CJEU) on a judicial level. Therefore, there are sufficient other mechanisms present, which render TDI unnecessary within the EU.

In case of an EU enlargement, *i.e.* accession to the EU customs union, candidate countries are required to adapt the whole *acquis communautaire*: harmonisation of the regulatory frameworks on all substantive EU issues and acceptance of the EU’s enforcement mechanisms. This includes the abolition of all TDI, although only after the lapse of a transitional period. For instance, upon Croatia’s accession to the EU, the free trade agreement in force at the time ended and was replaced by the EU rules and procedures.³³ In addition, the anti-dumping measures against imports of pipes and tubes, iron and steel from Croatia that were in force at that time were abolished overnight.³⁴ Before that, the so-called Europe-Agreements with Eastern-European countries did not abolish TDI, even though they aimed specifically at accession to the EU.³⁵ It was only following the ‘Big Bang’ enlargement of the EU in 2004, that all anti-dumping measures in force against the 10 acceding countries were abolished overnight.³⁶

32 Art. 91 (1) Treaty of Rome: ‘If, during the transitional period, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised within the common market, (...) the Commission shall authorise the injured Member State to take protective measures, the conditions and details of which the Commission shall determine.’

This provision was located after the anti-trust provisions (‘rules applying to undertakings’, current Arts 101-106 TFEU) and before the state aid rules (‘aids granted by states’, current Arts 107-109 TFEU) under the heading on competition rules. This indicates the inter-connectedness of these disciplines and their common goal to challenge unfair trade.

33 See, for instance, the impact assessment sheet of the European Commission with regard to TDI in the relation between the EU and Croatia. *European Commission*, Enlargement: Impact on Trade Defence, 20/03/2013, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=880> (09/07/2018).

34 *Kasteng*, The Abolition of Antidumping Measures in the EU: An Example and Inspiration for the TTIP, in: Bhagwati/Krishna/Panagariva (eds.), The World Trade System: Trends and Challenges, 2016, p. 349.

35 *Maresceau*, Het nieuwe juridische kader van de betrekkingen tussen de Europese Unie en de landen van Centraal- en Oost-Europa, 1995, pp. 16-17. See, for instance, Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (Europe Agreement Poland), OJ L 348 of 31/12/1995, Art. 28.

36 *Kasteng*, (fn. 34), p. 326.

2. Customs Unions of the EU

The EU has abolished anti-dumping in its customs unions with San Marino³⁷ and Andorra.³⁸ As provided for in the EU-San Marino Customs Union Agreement, for instance, San Marino ‘shall apply in respect of countries not members of the Community: (...) the common commercial policy of the Community.’³⁹ As part thereof, the prohibition to impose restrictions of Art. 28(1) TFEU – including TDI measures – applies the same within these countries as it does in the EU, leaving no room for application of TDI measures.

This contrasts with the customs union of the EU with Turkey. After entering into an Association Agreement,⁴⁰ a customs union was created, based on a decision of the (then) EC-Turkey Association Council, which abolished the internal tariffs and instated a common tariff for the external borders.⁴¹ Agricultural goods and coal and steel are, however, excluded from its material scope.⁴²

The EU and Turkey aligned important policies, including competition policy and state aid. However, there is no abolition of the possibility to impose anti-dumping and anti-subsidy measures. The reason why the possibility for imposing TDI is retained is connected to the absence of sufficient enforcement mechanisms.⁴³ The EU-Turkey customs union gives the Association Council the power to review the application of anti-dumping and anti-subsidy measures. However, the Association Council is a body founded by the parties, with representatives from both sides and with a decision criterion of unanimity. The power of the Association Council is dependent on Turkey’s adoption of competition rules with an equal level of enforcement as compared to the EU.⁴⁴ These have never been adopted and therefore the EU did not move on to abolishing TDI, despite the extensive alignment of common policies.

³⁷ Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino (EU-San Marino CU), OJ L 84 of 28/03/2002, pp. 43-52.

³⁸ Agreement in the form of an Exchange of Letters between the European Economic Community and the Principality of Andorra – Agreement between the European Economic Community and the Principality of Andorra – Joint Declarations (EU-Andorra CU), OJ L 374 of 31/12/1990, pp. 14 ff.

³⁹ Art. 7 EU-San Marino CU.

⁴⁰ Agreement establishing an Association between the European Economic Community and Turkey (Ankara Agreement), OJ L 217 of 29/12/1964, p. 3685.

⁴¹ Decision No. 1/95 of the EC-Turkey Association Council of 22/12/1995 on implementing the final phase of the Customs Union (EU-Turkey CU), OJ L 35 of 12/02/1996, pp. 1-46.

⁴² For agriculture, Art. 2 EU-Turkey CU excludes agricultural goods explicitly. Instead, bilateral concessions apply. See Decision 1/98 of the EC-Turkey Association Council of 25/02/1998 on the trade regime for agricultural products, OJ L 86 of 20/03/1998, pp. 1-2. For coal and steel, an FTA was established in 1996. See Agreement between the European Coal and Steel Community and the Republic of Turkey on trade in products covered by the Treaty establishing the European Coal and Steel Community, OJ L 227 of 07/09/1996, pp. 3-35.

⁴³ Müller-Ibold, (fn. 11), forthcoming.

⁴⁴ Art. 44(1) EU-Turkey CU.

Consequently, there are both anti-dumping and anti-subsidy duties in place on imports from Turkey in force today⁴⁵ and on exports to Turkey.⁴⁶ The safeguard provisions also enable the parties to impose safeguard measures in case of serious disturbances of their economies.⁴⁷ The EU took up the ambition of modernising and expanding the customs union with Turkey in 2016.⁴⁸ One of the reasons for this was to stop the continued employment of trade defence instruments, which is still possible because of the lack of enforcement mechanisms.⁴⁹

3. EFTA, EEA and Switzerland

The European Economic Area is based on an agreement between some of the EFTA states (Norway, Iceland and Liechtenstein; Switzerland did not participate) and the EU and its Member States.⁵⁰ Through the EEA, the EFTA members adopted virtually the entire EU *acquis communautaire*, including the four freedoms. Common policies on competition and state aid provide a sound basis for the abolition of trade remedies. In addition, appropriate enforcement mechanisms are in place. The EFTA Surveillance Authority is the competent administrative body and the EFTA Court has jurisdiction for adjudication of disputes, following the jurisprudence of the CJEU very closely.

Consequently, both the EEA Agreement and the EFTA Convention explicitly forbid the use of trade remedies.⁵¹ However, agricultural products and fisheries products fall outside the substantive scope, which allows TDI measures in these fields,⁵² as

45 See, for instance, Council Implementing Regulation (EU) No. 78/2013 of 17/01/2013, imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain tube and pipe fittings of iron or steel originating in Russia and Turkey, OJ L 27/1 of 29/01/2013 and Commission Implementing Regulation (EU) No. 1195/2014 of 29/10/2014 imposing a provisional countervailing duty on imports of certain rainbow trout originating in Turkey, OJ L 319 of 06/11/2014, p. 1.

46 See *European Commission*, Report from the Commission to the Council and the European Parliament, Fourteenth report, Overview of Third Country Trade Defence Actions Against the European Union for the Year 2016 (Report on third country trade defence action against the EU), 27/07/2017, http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155883.pdf (09/07/2018).

47 Arts 63-64 EU-Turkey CU and Art. 60 Additional Protocol.

48 *European Commission*, Trade for all. Towards a more responsible trade and investment policy, p. 34. In December 2016, the Commission made proposals to modernise in the areas of services, public procurement and sustainable development. See also *European Commission*, Study of the EU-Turkey Bilateral Preferential Trade Framework, Including the Customs Union, and an Assessment of Its Possible Enhancement, 26/10/2016, http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155240.pdf (09/07/2018).

49 *Alkan*, The Modernization of Turkey's Customs Union with the European Union: Reasons and Possible Outcomes, College of Europe EU Diplomacy Paper 09/2017, pp. 8-9 and 15.

50 Agreement on the European Economic Area (EEA Agreement), OJ L 1 of 03/01/1994, pp. 3-522.

51 Art. 26 EEA Agreement and Art. 36 EFTA Convention.

52 Arts 17-20 EEA Agreement; Protocol 13 to the EEA Agreement on the non-application of anti-dumping and countervailing measures.

illustrated in a case concerning Norwegian Salmon.⁵³ These exceptions are an important feature, as the only provisions in other FTAs are very often an exclusion of export subsidies to agricultural products.⁵⁴ Safeguard measures, on the other hand, are not forbidden between EEA members and the EU.⁵⁵ These provisions allowing safeguard measures have, however, never been used.⁵⁶

Switzerland is not a member of the EEA, but has a whole set of bilateral agreements governing its relationship with the EU. The basic FTA between the EU and Switzerland dates from 1972.⁵⁷ The relevant provision on anti-dumping merely confirms the application of the rules of the WTO.⁵⁸ Safeguard measures, to the contrary, are still allowed, although subject to some procedural provisions.⁵⁹ There are no TDI measures in force between the EU and Switzerland.⁶⁰

4. EU FTAs of the 'New Generation'

In the 'new generation' of EU FTAs, the EU prefers to include strong language on competition policy, rather than on anti-dumping. They also usually do not include a sufficient enforcement mechanism. Therefore, no sufficient level of market integration is reached to abolish TDI. A standardised set of TDI provisions, reflecting prior conduct of the Commission in older trade agreements,⁶¹ is included with the following features:

- *Confirmation of WTO rules.* The general provision on TDI in the new generation of FTAs is a confirmation of the WTO rights and obligations.

53 Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, 16/11/2007.

54 *Teh/Prusa/Budetta*, (fn. 18), p. 22.

55 Arts 112-114 EEA Agreement. See also Arts 40 and 41 EFTA Convention for very similar provisions.

56 *Kasteng*, (fn. 34), pp. 317, 365. See also *European Commission*, Commission Statistics on TDI 2018, (fn. 4).

57 Agreement between the European Economic Community and the Swiss Confederation (EU-Switzerland FTA), OJ L 300 of 31/12/1972, pp. 191-282.

58 Art. 25 EU-Switzerland FTA.

59 Arts 24 and 27 EU-Switzerland FTA.

60 On the stance of Switzerland towards TDI, see *Oesch/Naef*, Trade Defence Instruments and Switzerland: The Big Sleep, in: Bungenberg et al. (eds.), (fn. 11).

61 See, *inter alia*, Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (EU-Chile FTA), OJ L 352 of 30/12/2002, pp. 3-1439, Art. 78; Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (EU-South Africa TDCA), OJ L 311 of 04/12/1992, pp. 3-297, Art. 23(1); Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, on the one part, and the Arab republic of Egypt, of the other part (EU-Egypt Agreement), Art. 22; and Stabilisation and association agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (EU-Bosnia Herzegovina SAA), OJ L 164 of 30/06/2015, pp. 32-547, Art. 38.

- *Transparency*. All trade remedy measures shall be imposed in a transparent way, notably through adherence to the WTO Rules on Transparency. The mechanisms include the provision of all pertinent information and bilateral consultations before the imposition of global safeguard measures.
- *Lesser Duty Rule and Public Interest Consideration*. The EU adds two substantive provisions onto the WTO rules. The lesser duty rule limits the imposed duty to the margin of dumping and the public interest test prescribes the consideration of all EU stakeholders. They stress the remedial, rather than the punitive character of the EU's approach.⁶²
- *Bilateral Safeguard Measure*. A bilateral safeguard clause enables parties to an FTA to impose a temporary, transitional safeguard measure, whenever the import increases a lot due to the newly established free trade.
- *Exclusion from bilateral dispute settlement*. The provisions on trade remedies are generally excluded from the bilateral dispute settlement mechanism within the FTAs, as well as the mediation obligations. In absence of bilateral mechanisms, the domestic courts and the WTO dispute settlement vouch for dispute resolution regarding TDI.

The first FTA of the new generation was concluded with South Korea.⁶³ South Korea aims for a WTO-plus approach in their FTAs, as it wants to achieve liberalisation through non-tariff measures.⁶⁴ Hence, South Korea adds – besides allowing WTO conform trade remedies⁶⁵ – several of these provisions in its Trade Remedies chapter, including for instance safeguards in agricultural matters.⁶⁶ Limited institutional provisions are included, establishing a dialogue forum in a Working Group on Trade Remedy Cooperation.⁶⁷

With the countries of the Association of Southeast Asian Nations (ASEAN), the EU has adopted FTAs with the individual countries, after EU-ASEAN negotiations had to be paused. The bilateral FTAs are stepping-stones towards a future region-to-region agreement between the EU and ASEAN.⁶⁸ The trade remedy provisions in the EU-Vietnam (EVFTA) confirm the WTO rules and include a bilateral safeguard mea-

62 Hoffmeister, The Deep and Comprehensive Free Trade Agreements of the European Union – Concept and Challenges, in: Cremona/Takács (eds.), Trade Liberalisation and Standardisation – New Directions in the ‘Low Politics’ of EU Foreign Policy, 2013, p. 15.

63 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (EU-South Korea FTA), OJ L 127 of 14/05/2011, pp. 6-1343.

64 Ahn, FTA policy and strategy of Korea, Taiwanese Journal of WTO Studies 2010.

65 See, for instance, Commission Implementing Regulation (EU) 2017/763 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain lightweight thermal paper originating in the Republic of Korea, OJ L 114 of 03/05/2017, p. 3.

66 Art. 3.6 EU-South Korea FTA and Annex 3: the agricultural products covered are beef, pork, apple, malt and malterting barley, potato starch, ginseng, sugar, alcohol and dextrins. See, in more detail, Ahn, (fn. 64), p. 46.

67 Art. 3.16 EU-South Korea FTA.

68 European Commission, Trade for all, (fn. 48), p. 31.

sure provision.⁶⁹ One positive effect is that Vietnam undertook commitments to reform its trade policy, *inter alia* on the topic of trade defence.⁷⁰ Further challenges for Vietnam include its dependence on China for imports of raw materials and its preferential subsidies to state-owned enterprises.⁷¹ The Trade Remedies chapter of the EU-Singapore FTA is again the standard confirmation of the WTO rules, lesser duty rule and bilateral safeguard clause.⁷² CJEU Opinion 2/15 on that FTA confirmed that trade remedies fall within the exclusive competences of the EU, as part of the Common Commercial Policy.⁷³ Furthermore, trade talks in the ASEAN region are ongoing with the Philippines⁷⁴ and Indonesia.⁷⁵ The EU currently holds duties against Indonesia and Thailand only and is subject to duties from Indonesia, Thailand, Philippines, Malaysia and Vietnam.⁷⁶

More recently, in the Comprehensive Economic and Trade Agreement (CETA), the EU and Canada reconfirmed their WTO rights and commitments '[...] under Article VI of GATT 1994, the Anti-dumping Agreement and the SCM Agreement' and 'under Article XIX of GATT 1994 and the Safeguards Agreement'⁷⁷ and also included the traditional additional provisions of the EU. Overall, despite the historic value of this trade agreement, no innovative trade remedy provisions found their way into the final text. There is little interest in abolishing TDI, as the EU did not impose any measures against Canada in the last years, but Canada held five in 2016.⁷⁸

Also in future FTAs, similar provisions can be expected in line with the current practice. Currently, negotiations are ongoing with the Gulf Cooperation Council (GCC), Mercosur and Australia and New Zealand, but no textual proposals on TDI are available at the day of writing.

69 See *European Commission*, EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, 01/01/2016, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (09/07/2018).

70 See, in detail, *Chaisse/Sejko*, The Latest on the Best? Reflections on Trade Defence Regulation in EU-Vietnam FTA, in: Bungenberg et al. (eds.), (fn. 11).

71 *Nguyen*, Vietnam-EU Free Trade Agreement: Impact and Policy Implications for Vietnam, SECO/WTI Academic Cooperation Project Working Paper Series 2016/07, pp. 21 and 23.

72 *European Commission*, EU-Singapore Free Trade Agreement. Authentic text as of April 2018, 18/04/2018, http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151732.pdf (09/07/2018).

73 CJEU, Opinion 2/15, *Singapore Free Trade Agreement*, ECLI:EU:C:2017:376, paras 42-43.

74 See *European Commission*, Proposal on Trade Remedy Chapter, 09/01/2017, http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155434.pdf (09/07/2018).

75 See *European Commission*, Proposal on Trade Remedy Chapter, 19/12/2016, http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155283.pdf (09/07/2018).

76 *European Commission*, Commission statistics on TDI 2017, (fn. 6), pp. 37-46 and *European Commission*, Report on third country trade defence action against the EU, (fn. 45), pp. 3-4.

77 Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA), OJ L 11 of 14/01/2017, pp. 23-1079, Art. 3.1.1 and Art. 3.6.1.

78 *European Commission*, Commission statistics on TDI 2018, (fn. 4), pp. 37-46 and *European Commission*, Report on third country trade defence action against the EU, (fn. 46), pp. 3-4.

5. Association Agreements Establishing an FTA

The establishment of FTAs is often embedded in deeper and more comprehensive agreements. Association Agreements (AAs) based on Art. 217 TFEU have the ambition of not only opening markets but also including competitiveness issues and far-reaching harmonisation of laws, norms and regulations so as to enable partners to meet EU standards in key sectors. What is typical for AAs, is a well-developed institutional framework and dispute resolution arrangements including consultation, mediation or arbitration. The latter includes powers for the Association Council, according to a system very similar to the WTO Panel system.⁷⁹ Despite this harmonisation of laws and inclusion of enforcement mechanisms, these ‘deep and comprehensive’ FTAs (DCFTAs) contain an identical approach towards trade defence as ‘normal’ FTAs and do not affect the TDI-approach of the European Union.

The AA/DCFTA with Ukraine, for instance, merely confirms the WTO-rules and adds the modifications of the FTAs of the new generation.⁸⁰ Consequently, there are anti-dumping measures currently in place.⁸¹ Special interest was given to passenger cars: the agreement allows Ukraine to apply safeguard measures on cars imported from the EU for 15 years.⁸² Furthermore, unlike other FTAs where WTO rules on subsidies are merely confirmed in relation to state aid, Ukraine is required to implement EU rules through an independent domestic authority.⁸³ The AA/DCFTAs with Moldova⁸⁴ and Georgia⁸⁵ largely follow the provisions of Ukraine on the topic of Trade Remedies, albeit with minor differences.⁸⁶

79 *Hoffmeister*, (fn. 62), p. 18.

80 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (EU-Ukraine AA/DCFTA), OJ L 161 of 25/05/2015, pp. 3-2137, Arts 46-50. See *supra*, section C.III.4.

81 See *European Commission*, Commission statistics on TDI 2017, (fn. 4), pp. 37-46; for instance, Commission Implementing Regulation (EU) 2017/1795 of 05/10/2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia, OJ L 258 of 06/10/2017, p. 24. See also *European Commission*, Report on third country trade defence action against the EU, (fn. 46), pp. 3-4.

82 Arts 44-45 EU-Ukraine AA/DCFTA and Annex II.

83 *Crafts*, Brexit and state aid, in: Oxford Review of Economic Policy, 1/2017, p. 106.

84 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (EU-Moldova AA/DCFTA), OJ L 260 of 30/08/2014, pp. 4-738. See Arts 158-169 for the Trade Remedy provisions.

85 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Georgia, of the other part (EU-Georgia AA/DCFTA), OJ L 261 of 30/08/2014, pp. 4-743. See Arts 37-43 for the Trade Remedy provisions.

86 *Van der Loo*, The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration without Membership, 2016, pp. 243-245.

Similarly, negotiations for an AA/DCFTA with Tunisia⁸⁷ and the agreement in principle on the modernised Global Agreement with Mexico⁸⁸ include standard TDI chapters.

6. Other Bilateral EU Agreements

Not all trade agreements follow the traditional build-up of the ‘new generation’ of FTAs. Notable examples are the negotiations with the United States (US) and the trade relations with China.

Negotiations between the EU and the US on the Transatlantic Trade and Investment Partnership (TTIP) are on hold since the end of 2016 and the future of the agreement is uncertain. In addition, in TTIP, trade defence or trade remedies were not addressed as a separate chapter like in the other FTAs above; rather, trade remedies would fall under the third part on Rules (Rules, Principles, and Modes of Cooperation). Still, it has been suggested that there is no place for anti-dumping in trade relations between the EU and the US and that TTIP should abolish all forms of trade defence measures.⁸⁹ On the other hand, subsidies and State-Owned Enterprises (SOEs) were tackled under the competition policy chapter of TTIP. In line with that, there was also a textual proposal on subsidies by the EU.⁹⁰ As this did not only entail subsidies granted to enterprises that produced goods, but also that supplied services, this proposal went considerably further than CETA.⁹¹ TTIP was furthermore characterised by an elaborate institutional framework, as well as developed dispute settlement mechanisms. There are some measures in place from the EU against the US and from the US against the EU,⁹² notably US steel and aluminium safeguard tariffs.⁹³

⁸⁷ See *European Commission*, Proposal on Trade Remedy Chapter (only in French), 26/04/2014, http://trade.ec.europa.eu/doclib/docs/2016/4//tradoc_154490.pdf (09/07/2018).

⁸⁸ See *European Commission*, New EU-Mexico agreement: The agreement in principle, 23/04/2018, http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf (09/07/2018).

⁸⁹ See *Kasteng*, (fn. 34), pp. 317-382.

⁹⁰ See *European Commission*, Textual Proposal on Possible Provisions on Subsidies, 07/01/2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153031.pdf (09/07/2018).

⁹¹ *Vranes*, The Contents of CETA, TTIP, and TiSA: The (Envisaged) Trade Disciplines, in: Griller/Obwexer/Vranes (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA, New Orientations for EU External Economic Relations*, 2017, p. 74.

⁹² *European Commission*, Commission statistics on TDI 2017, (fn. 4), pp. 37-46 and *European Commission*, Report on third country trade defence action against the EU, (fn. 46), pp. 3-4.

⁹³ For an analysis, see *Jung/Hazarika*, Trade Wars are Easy to Win?, ZEuS 1/2018, pp. 3-24.

On the contrary, the relationship between the EU and China is characterised by a very high number of TDI measures.⁹⁴ The EU wants to further open trade relations with China; it has expressed interest in deepening its relation with the EU through an FTA. Currently, the trade relationship is based on the WTO rules and framework. The priority of the EU and China is the conclusion of the Comprehensive Agreement on Investments (CAI). This Bilateral Investment Treaty (BIT) – although not touching on trade – still can potentially diminish trade remedy action between the BIT partners.⁹⁵ Regulation through BITs works, for instance, through provisions on preferential treatments to SOEs.⁹⁶

The conclusion of the CAI, in combination with continued progress towards liberalising the Chinese economy, could open up the possibilities for an FTA.⁹⁷ Indeed, the conclusion of the EU-China BIT might also be the stepping-stone to negotiating an EU-China FTA.⁹⁸ In 2016, a study already assessed a hypothetical EU-China FTA and concluded provisions abolishing TDI are not to be expected in a China-EU FTA, as the depth of the cooperation would never reach this point.⁹⁹

7. Non-Preferential Trade Arrangements

Partnership and Cooperation Agreements (PCAs) establish free trade and their level of integration is usually not deep enough to abolish trade remedies. The PCA with

⁹⁴ Currently, the EU holds 85 anti-dumping measures and 8 anti-subsidy measures in place. This makes China the biggest target of the EU. See *European Commission*, Commission statistics on TDI 2017, (fn. 4), pp. 37-46. Also China held 19 trade remedy measures against the EU in 2016, see *European Commission*, Report on third country trade defence action against the EU, (fn. 46), pp. 3-4.

⁹⁵ *Sun/Whalley*, China's Anti-dumping Problems and Mitigation through Regional Trade Agreements, *China World & Economy*, p. 104.

⁹⁶ See *Qin*, WTO Regulation of Subsidies to State-owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol, *JIEL* 4/2004, pp. 863-919.

⁹⁷ Joint Communication to the European Parliament and the Council, Elements for a new EU strategy on China, JOIN(2016) 30 final, p. 6. See also EU-China 2020 Strategic Agenda for Cooperation, p. 5.

⁹⁸ *Chi*, The China-EU BIT as a Stepping Stone Towards a China-EU FTA: A Policy Analysis, in: Bungenberg et al. (eds.), *European Yearbook of International Economic Law*, 8th ed. 2017, pp. 487-489.

⁹⁹ *Pelkmans*, Tomorrow's Silk Road: Assessing an EU-China Free Trade Agreement, Centre for European Policy Studies paper, pp. 80-81.

Russia, for instance, allows trade remedies,¹⁰⁰ a possibility used by both parties in practice.¹⁰¹

Also the EU Generalised System of Preferences (GSP) allows the use of anti-dumping/anti-subsidy and safeguard measures.¹⁰² With respect to India, for instance, several TDI measures are in place.¹⁰³ In addition, currently, the EU is investigating a possible safeguard measure regarding imports of Indica rice originating in Cambodia and Myanmar.¹⁰⁴

D. Outlook on the Future EU-UK Trade Agreement

On 23 June 2016, a 51.9 % majority of British citizens decided in a referendum that the UK should leave the EU. Consequently, on 29 March 2017, the UK government triggered the (in)famous Art. 50 TEU procedure.¹⁰⁵ Ever since, the EU27 have been involved in lengthy and complex negotiations with the UK, which is evolving more and more towards 'a free trade area for goods'.¹⁰⁶ Particularly, the question arises as to the role of trade remedies in the future of EU-UK trade relations.

Is there a possibility that TDI will be abolished in future trade between the EU and the UK? As set out above,¹⁰⁷ the relevant factor in making a prediction about this question is the depth of the market integration. On the one hand, an unprecedented level of alignment of policies and harmonisation will exist between the future trade

¹⁰⁰ Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (EU-Russia PCA), OJ L 327 of 28/11/1997, pp. 3-69, Art. 18.

¹⁰¹ There are currently 9 anti-dumping measures in place for products coming from Russia, see *European Commission*, Commission statistics on TDI 2017, (fn. 4), pp. 37-46. The most recent measure was imposed on hot-rolled flat products, see Commission Implementing Regulation (EU) 2017/1795 of 05/10/2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia, OJ L 258 of 06/10/2017, p. 24. Also Russia imposed measures against the EU, see *European Commission*, Report on third country trade defence action against the EU, (fn. 46), pp. 3-4.

¹⁰² Regulation (EU) No. 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008 (GSP Regulation), OJ L 303 of 25/10/2012, pp. 1-82, Art. 19.1(d) and 19.2 and Art. 22f.

¹⁰³ *European Commission*, Commission statistics on TDI 2018, (fn. 4), pp. 37-46 and *European Commission*, Report on third country trade defence action against the EU, (fn. 46), pp. 3-4.

¹⁰⁴ See *European Commission*, Notice of initiation of a safeguard investigation concerning imports of Indica rice originating in Cambodia and Myanmar, OJ C 100/30 of 16/03/2018, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018XC0316%2802%29#ntr1-C_2018100EN.01003001-E0001 (09/07/2018).

¹⁰⁵ Theresa May, Article 50 Notification Letter from the United Kingdom, 29/03/2017, http://www.consilium.europa.eu/media/24079/070329_uk_letter_tusk_art50.pdf (09/07/2018).

¹⁰⁶ HM Government, The future relationship between the United Kingdom and the European Union, 12/07/2018, paras 11-12.

¹⁰⁷ See *supra*, section C.I.

partners, on the other hand, enforcement mechanisms within the EU-UK trade agreement might turn out more problematic to establish.

As regards the first prerequisite, the adoption of common policies, what makes the situation of the UK particularly unique is that on the day of their departure, its rules will be identical to the EU rules. A 100 % aligned set of rules will govern both the UK and the EU market. Indeed, the UK European Union (Withdrawal) Bill foresees that ‘direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day.’¹⁰⁸ Consequently, full alignment on all relevant areas – including competition policy and state aid – will exist on ‘Brexit day’. However, a problem for the future will be how to deal with the UK legislation that will go steadily further away from the (current) EU legislation. The UK will introduce more and more legislation departing from the current almost complete alignment of rules.¹⁰⁹ Hence, to prevent re-emergence of TDI in the bilateral relationship, a close connection of the substantive rules or a sufficient bilateral enforcement mechanism must be kept.

The second prerequisite is that appropriate mechanisms should be present to enforce the harmonised policies between the EU and the UK. More problems are likely to arise in negotiations on that aspect. Jurisdiction of the Commission and the CJEU is a disputed issue: for the UK, it represents a ‘red line’, whereas the EU sets out that the autonomy of the EU legal order – the role of the CJEU in particular – should be respected in the future trade relation.¹¹⁰ Only if an acceptable solution is found on this point, sufficient grounds could exist for the EU to abolish the use of TDI in relation to the UK.

Alternatively, should TDI nevertheless still be allowed between the EU and the UK in the future, enforcement arrangements could still be problematic. Contrary to the practice of the EU to exclude TDI from the intra-FTA dispute settlement and thereby reserving jurisdiction over TDI matters for the domestic courts,¹¹¹ with regard to the UK, another enforcement mechanism would need to be created given the CJEU ‘red line’. The NAFTA Chapter 19 bi-national panel – established according to the WTO spirit¹¹² – can serve as an example. It makes enforceable decisions reviewing final anti-

108 Bill to Repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU (European Union (Withdrawal) Bill), Clause 3(1) on the Incorporation of direct EU legislation.

109 For instance, tax incentives for UK companies to stay in the country can be granted. This could already be a possible subsidisation case, which can lead to anti-subsidy action. See *Müller-Ibold*, (fn. 11), forthcoming.

110 European Council, Note from the General Secretariat of the Council to the Delegations, European Council (Art. 50) – Guidelines, 23/03/2018, <http://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf> (09/07/2018). See also *EEckhout*, Brexit and the ECJ red line, London-Brussels One-Way or Return. A cross-channel Europe blog by Piet EEckhout, 23/08/2017, <https://londonbrussels.wordpress.com/author/eeckhout/> (09/07/2018).

111 See the EU FTAs of the ‘new generation’ above, for instance Art. 3.7 CETA, excluding application of Chapter 29 CETA; Art. 3.5 and 3.8 EU-Singapore FTA, excluding Chapter 15 and 16 of the FTA.

112 Art. 1904 NAFTA. See also *Powell*, The NAFTA Alternative: Saving Korus FTA Dumping Appeals from the Dumps, CUSLJ 2015, pp. 37, 49.

dumping and countervailing duties: this means that an entire new system and implementation mechanism must be set up, but the decisions are free of bias.¹¹³ This system is protected with a procedure when national courts overturn or do not accept those rulings.¹¹⁴ Alternatively, to overcome the disadvantage of having to set up an entirely new system, streamlining the FTA procedures with WTO dispute settlement is also possible. For instance, after unfruitful consultations, parties could waive the right to object to the establishment of a DSB Panel under Art. 6.2 of the Dispute Settlement Understanding (DSU) and direct their national authorities to take action conform the decision taken.¹¹⁵

The fate of TDI in the prospective EU-UK FTA depends on the future EU-UK trade agreement and the awaited course of negotiations. In the meantime, the application of TDI measures remains forbidden between the EU and the UK, in line with the current rules of the EU customs union.¹¹⁶ Also during the transitional period, this will not change. Negotiators from both sides agreed that from 30 March 2019 to 31 December 2020, Union law will be applicable in full legal effect as to any other Member State.¹¹⁷

E. Conclusion

The rise of bilateralism in trade and the increased use of trade defence instruments are two contrary developments on the multilateral trade scene. Whereas FTAs aim to liberalise trade beyond MFN-levels, TDI measures raise tariff walls in liberalised markets. Therefore, it would be logical that FTAs eliminate trade remedies.¹¹⁸ This article reviewed the provisions on TDI in EU trade agreements, where both developments come together. It finds that, in theory, trade remedies have no place in trade agreements, based on a (literal) reading of Art. XXIV GATT. However, there remains a ‘fuzziness’ in the interpretation of the legal basis, which enables continued application of TDI in preferential trade relations in practice. Where abolition of TDI is achieved, a deep level of market integration – existing of both harmonised policies and enforcement mechanisms – are found as a prerequisite. The reason for continued in-

113 *Emerson*, Which model for Brexit?, CEPS Special Report No. 147, p. 12.

114 Art. 1905 NAFTA. This provision was included because the United States did not trust the Mexican domestic legal system. See *O'Brien*, Subsidy Regulation and State Transformation in North America, the GATT and the EU, p. 96.

115 This solution of a stripped down version of the NAFTA Bi-National Panel system was instated in the Canada-Chile FTA. See *Emerson*, (fn. 113), pp. 12-13.

116 See *supra*, section C.I.1.

117 Arts 121-122 Draft Withdrawal Agreement, see *European Commission*, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 35, 19/03/2018, https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf (09/07/2018).

118 *Horlick/Spicer*, Anti-Dumping and Preferential Trade Agreements, in: Cottier/Nadakavukaren Schefer (eds.), *Elgar Encyclopedia of international economic law*, 2017, pp. 393-394.

clusion of the possibility for trade remedies is connected to political, rather than legal reasons, even in case of agreements that reach a deep level of market integration.

Some lessons can be drawn from EU practice with regards to the future of EU-UK trade relation and the fate of TDI therein. Brexit forms a challenge for negotiators from both the EU and UK sides, also on the topic of TDI. If the UK and the EU negotiate an FTA, a deep level of market integration will be achieved. Sufficient levels of aligned competition and state aid policy can exist. However, disagreements on the role of the CJEU could lead to insufficient enforcement mechanisms, if no alternative system is found. This can prevent the necessary requirements for abolition to be fulfilled. Both sides should in that case increase efforts to prevent the re-emergence of TDI in the bilateral relationship and find a solution to ensure a sufficient level of enforcement.

If no abolition of TDI can be achieved in trade negotiations, an intermediate solution for solving the issue of TDI in FTAs of the EU – including the prospective one with the UK – exists in abolishing anti-dumping and anti-subsidies, but not safeguards; this serves the purpose of keeping a safety net for protection of the domestic economy.¹¹⁹

119 See *inter alia* Voon, (fn. 3), p. 635.