

Update on the UK Trade Remedies Regime Client Alert | November 2021

Introduction

On 1 June 2021, the UK launched the Trade Remedies Authority (TRA) with a remit to lead the UK's new independent, post-Brexit, trade remedies regime. This regime represents a significant shift for national trade policy, with the UK now able to (i) impose its own trade remedies; and (ii) challenge foreign tariffs directly through the World Trade Organization (WTO), separate from the EU. In this briefing, we have summarised the key considerations for businesses in respect of the legal framework and process for the UK's new regime, including the following takeaways:

- This regime is specific to duties imposed under WTO trade remedies principles such to offset injury to UK business arising from prices of imports being charged through abnormal market practices and conditions; it is not simply a means of imposing duties under standard customs rules.
- Pursuant to the new regime, the UK has already begun assessing new trade remedies duties to impose and withdraw, including with respect to a number of existing duties previously imposed by the EU.
- This presents both an opportunity and threat for businesses seeking to either protect domestic market share from foreign imports or, alternatively, capitalise on exports to the UK as part of the potential liberalisation of the market post-Brexit.

1. The WTO Framework

The WTO provides the legal and institutional framework for governing the rules of trade between its member countries as well as providing a global forum for settling disputes between its members. Under the basic principles of the WTO's agreements¹, countries cannot discriminate between their trading partners. The principle of non-discrimination requires WTO Members to (i) grant the same privileges and concessions to one nation as to all WTO members countries (absent a free trade agreement) ("**Most-Favoured-Nation Treatment**"); and (ii) accord the same treatment to both domestic and imported goods and services (once they have entered the domestic market) ("**National Treatment**").

Trade remedies are effectively an exception to these principles - serving as an instrument that allows governments to take remedial action against imports which are causing injury (or threat thereof) to the domestic industry in the context of abnormal market practices and conditions. Key trade remedy measures may be summarised as follows:

¹ These include (but are not limited to): (i) General Agreement on Tariffs and Trade ("GATT"); (ii) General Agreement on Trade in Services ("GATS"); (iii) Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement); (iv) Agreement on Subsidies and Countervailing Measures; and (v) Agreement on Safeguards

- **Anti-Dumping Duty Measures (AD)** - levying a tariff on goods that are “dumped” on the importing market at prices below those being charged on the home-country market of the exporter;
- **Countervailing Duty Measures (CVD)** - levying a tariff on state-subsidized imports which are causing injury to the importing market; and
- **Safeguard Measures** - temporary restrictions on imports (i.e., tariff rate quotas) to allow a domestic industry to adapt to a sudden surge in imports meeting specific criteria.

2. The New UK Regime

Legal framework

Post-Brexit, the UK remains a member of the WTO and its trade remedies policy continues to be governed by the WTO framework - including the three types of trade remedies that it can implement: (i) AD; (ii) CVD; and (iii) safeguard measures. At national level, the UK has introduced the following new legislation to establish its own domestic regime:

- **UK Trade Act** - sets out the role of the TRA - which is taking over from the Trade Remedies Investigation Directorate (TRID) - as the public body responsible for conducting investigations, consulting interested parties and making recommendations to government ministers on UK trade remedy measures.
- **UK Taxation (Cross-border Trade) Act 2018 (TCTBA 2018)** - implements the WTO framework into UK law. Schedules 4 and 5 of the TCTBA address the principles of how each type of trade remedy investigation should be conducted and sets out the criteria for the relevant offending measures.
- **UK secondary legislation** - supplements the main legal framework with further provisions on what is required for initiating a trade remedies investigation and the scope and process for those investigations.²

There are three types of investigation that the TRA may carry out, specifically: (i) investigation of applications for new UK trade remedies to be applied; (ii) transition reviews for existing EU measures to be carried across to the UK or terminated; and (iii) reviews of other existing measures.

Criteria for applying for investigation

For any type of investigation, a UK trade remedies application must meet all of the following requirements:

- The applicant must be a UK business.
- The specific market share tests must be met - there are nuances as to how the market share tests are defined, depending on the trade remedy being sought. However, generally at least 1% UK market share is needed based on UK sales from UK production. This should be determined by volume although it may be relevant to also look at sales by value.
- The application must also be supported by producers holding at least 25% market share in the UK.
- The UK producer support for the application must be greater than producer opposition.

² These include: (i) The Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (the "D&S Regs"); and (ii) The Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019 (the "Safeguarding Regs").

Application process

- **Pre-Application** - There is an opportunity to road test a potential application with the Pre-Application Office (PAO) before the application itself is submitted. The PAO can help an applicant to decide whether a trade remedy is appropriate and assist in tailoring the submission to meet the TRA's requirements.³ The applicant must also register with the online **Trade Remedies Service**.
- **Making the Application** - The applicant should set out the grounds for why it is requesting a trade remedies investigation, identifying the trade remedy to be imposed. An investigation will only be initiated where the application contains sufficient evidence (i.e., that goods have been or are being dumped into the UK and the dumping margin for these goods are not marginal).
- **Initial assessment by TRA** - The TRA takes approximately 30-40 days to assess the application and to notify the applicant of whether it will initiate an investigation.
- **TRA investigation** - The TRA's investigation takes approximately one year although it can last longer, particularly in safeguarding cases. Once the investigation is initiated the TRA will set a period for interested parties and contributors to contact them (known as the "registration period"). During this period, the TRA may request information from a broad range of stakeholders including: UK producers of like goods, foreign governments and any other interested parties. The TRA will also conduct an Economic Interest Test (EIT) to determine if the trade remedy proposed would be in the UK's wider economic interests.
- **Imposition of duties if successful** - The TRA will publish a "Statement of Essential Facts" setting out the reasoning for how it reached its decision and interested parties will have the opportunity to provide comments and submissions. The TRA will then publish a final determination setting out its recommendation of measures.⁴
- **Appeals and challenges** - There may be an opportunity to apply for a decision to be reconsidered. Applications to reconsider must be received within a month and one day of the decision being published or (if this is a later date) coming into effect.⁵ Appeals can also be brought in the Tax and Chancery Chamber of the UK's Upper Tribunal. At an international level there is scope for possible WTO challenges by other countries.

³ The [Guidance on PAOs](#) states that "It will consider whether a draft application is properly documented but not carry out a "deep dive" into the data provided or comment on individual transaction. When considering whether an application is properly documented, we will look at whether you are providing the type of supporting evidence we would expect to see for each of the areas of the application form, from credible sources. We will highlight areas where the information may be insufficient and ask you to provide evidence to support your arguments."

⁴ <https://www.gov.uk/government/publications/the-uk-trade-remedies-investigations-process/an-introduction-to-our-investigations-process>

⁵ <https://www.gov.uk/government/publications/the-uk-trade-remedies-investigations-process/how-we-handle-requests-for-reconsiderations-of-our-decisions>

What has happened so far?

Example of UK investigation into dumping of aluminum extrusions from China

The TRA issued a **Notice of Initiation** on 22 June 2021 of an investigation into alleged dumping of aluminium extrusions imported into the UK from the People's Republic of China following an application lodged by a UK aluminium producer, made on behalf of the UK industry in aluminium extrusions. This represents the first UK trade remedies investigation initiated, following the launch of the TRA, in response to an application from a UK industry.

The goods subject to the investigation are **aluminium extrusions** constituting items such as aluminium bars, rods, tubes and pipes. The investigation will cover the 12-month period of investigation (POI) from Q4 2019 to Q3 2020, with the 36-month period preceding the POI considered to be the injury period.

Following the deadline for submissions from interested parties on 6 July, the TRA received four submissions from UK aluminium producers, 22 submissions from Chinese exporters, 16 submissions from third-party contributors (including the Chinese Ministry of Commerce), and three submissions from UK importers.

The TRA will conduct the investigation over the course of the next year with a final determination expected to be made in June 2022.

UK transition reviews of existing EU trade remedy measures

As part of the Brexit transition process, the UK Government also mapped across 43 existing trade remedies measures that were in place under the EU regime. The TRA has been conducting an ongoing transition review into each of those measures in order to determine if such measures are still fit for purpose in the UK.

The transition reviews commenced in February 2020 and 12 live reviews are currently taking place, covering imports relating to aluminum, biodiesel, glass fiber and steel. Most recently, on 7 October, the TRA initiated a transition review on the import of aluminum road wheels from China. The full list of active reviews can be found [here](#).

3. Practical Tips

Why make a trade remedies application

For UK businesses, the new regime presents a key opportunity to advocate new approaches to UK tariffs at a time when the UK - following its departure from the EU - is at a critical juncture in determining its trading relationship with the rest of the world.

In particular trade remedies may offer the opportunity to:

- a) Protect UK domestic market share from foreign competition by submitting a trade remedies application to implement tariffs on products being offloaded to the UK market at an under-value or that are being extensively subsidised by exporting countries.
- b) Conversely, if you are exporting to the UK, or procuring in the UK from overseas producers, you may consider evaluating which tariffs should be rolled back or seek to challenge new proposals from others UK producers for tariff increases as part of the TRA investigations process.

Advocating your case

To construct a compelling case (taking (a) as an example), the applicant needs to be able to provide a range of evidence illustrating the adverse effects on its business and the wider impact on the domestic UK industry. Throughout this process, robust data should be provided to justify claims - this means including prices, sales volumes, profit margins, cost data, capacity utilization and various other metrics. Additionally, a case will be all the more credible where the applicant can deploy data based on independent third party sources.

- **Identify offending dumping or subsidy (or identify cause for safeguarding)**
 - i. **AD cases:** For dumping cases, the goods need to be shown to be introduced into the importing country (the UK) at less than normal market value. This involves illustrating differences between UK prices and prices in the exporting country. Mechanisms are available to allow an applicant to impute prices from a third country where the exporting country is considered a "non-market economy state". This allows higher third country prices to be selected as a reference, ensuring that the comparison with import prices is more likely to result in a higher dumping margin, allowing for a higher anti-dumping duty.
 - ii. **CVD cases:** As well as price comparison, particular forms of state support in the exporting country must be identified for subsidy cases, such as financial contributions and other types of pricing and income support. This can be more challenging to evidence in some cases.
- **Demonstrate trade in "like goods"** - This is defined simply as meaning goods which are alike in all respects, or, where there are no such comparable items, goods which have characteristics closely resembling those of the goods in question i.e., comparing apples with apples. In identifying like goods, the TRA will consider the following non-exhaustive list of criteria:
 - i. physical likeness, such as physical characteristics resembling the goods in question;
 - ii. commercial likeness, including competition and distribution channels;
 - iii. functional likeness, such as end-use or if the goods can be substituted for each other; and
 - iv. similarities in production, such as method and inputs.
- **Show injury to UK business** - The TRA will consider whether UK producers are suffering injury as a result of the dumping, subsidy or surge of imports. To determine **material injury** several factors will be considered:
 - i. the volume of the dumped goods or subsidised imports during the injury period;
 - ii. the effect of the imports on prices in the UK market for like goods during the injury period;
 - iii. the consequent impact of the dumped goods or subsidised imports on UK industry during the injury period; and any other factors considered relevant.
- **The UK's Economic Interest Test ("EIT")** - The TRA is also required to carry out the EIT to determine whether the proposed trade remedy measure would be in the UK's broader economic interests. As part of this, the EIT considers for example:
 - i. The injury caused by the offending goods to the UK and the benefits of removing that injury.
 - ii. The significance of affected industries/consumers (in terms of Gross Value Added, turnover and employment).
 - iii. The impact of the remedy on affected UK industries/consumers, geographic areas or particular groups.
 - iv. The likely consequences for the competitive environment and the structure of markets for goods in the UK.

4. Contacts



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