



# **UK-US Trade & Investment Working Group**

**2- 7 November 2018**

**Full Readout**



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## SME DIALOGUE

Date: **November 2, 2018**

Time: **09:00 –12:00**

### Participants

| Name                | Department/Directorate             |
|---------------------|------------------------------------|
| Kate Maxwell        | DIT                                |
| Deborah Matthews    | BEIS                               |
| Angelina Canizzarro | BEIS                               |
| Alex Nicholson      | DCMS                               |
| Sam Oakley          | DIT                                |
| Christina Sevilla   | USTR                               |
| Pat Kirwan          | USTR                               |
| Sarah Bonner        | US - Small Business Administration |
| Tricia Van Orden    | US – Commerce Department           |
| Jim Cox             | US – Commerce Department           |
| Rosalind Stewart    | US – Commerce Department           |
| Lori Cooper         | US – Commerce Department           |
| Barrett Haga        | USTR                               |

### Key Points to Note

- The feedback was overwhelmingly positive on the SME Dialogue, with SMEs from both countries saying how useful it was, and wanting to be part of future Dialogues. UK confirmed that it would host the next Dialogue but couldn't commit to a time or place – although would aim for June or July in a location outside London. USTR proposed that the next Dialogue should concentrate on a post-Brexit UK, looking at areas of change for business; an updated UK-US joint SME brochure in light of Brexit; cyber security and GDPR updates, again in light of Brexit; and feedback on the UK-US FTA.
- US talked UK through the SME Chapter of USMCA, highlighting that it was 'TPP+' with a clear cooperative focus and a commitment to SMEs from all sides in participating in regular Dialogues and information sharing. USMCA is the first US FTA to have a chapter on SMEs and is considered to be 'state of the art'. The underlying sense, although not confirmed, is that we could expect this chapter to be a blueprint for a UK FTA.
- There was brief call and discussion on marine technology and best practice regarding the US-UK pilot on SME cooperation in marine technology. It was confirmed that the Oceans Business Conference will meet in Southampton on 9th April as a key outcome.
- UK shared positive feedback from DIT and BEIS on the recent ACE 10 event in Northern California. The US invited the UK to attend the 11th Americas Competitiveness Exchange in Puerto Rico in May 2019. An action was agreed for an exchange of information on regional economic development strategies, including U.S. information on their Comprehensive Economic Development Strategy (CEDS). It was also agreed that both the US and UK will



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explore potential ‘incubator-to-incubator’ opportunities, with hubs in the US and UK possibly offering spaces to each others’ businesses.

## **Report of Discussions and Outcome**

### **Reflections on SME Dialogue**

CS (US) led feedback on the SME Dialogue of the previous day. The hosts, Paypal, thought it was a really positive event and many of the New York SMEs who had reported back thought that it was a really valuable exercise. CS (US) felt this dialogue was a good formula – with the right mix of policy and guides to tools for SMEs equally. It was useful for governments to be setting the policy stage but then to hear from actual businesses on how that operates. Additionally, the half day format was agreed to be the best way to hold people’s attention.

KM (UK) thanked the US for hosting and echoed positive feedback, particularly on the digital theme. AN (UK) reflected that it was important to use the opportunity to give practical advice to SMEs and the cyber attacks session, in particular, was viewed as particularly useful. PK (US) thought that the Dialogue as a whole may be focussing too much on goods, and that in future we should be looking to involve more services businesses – particularly given the breakdown of both UK/US economies. He added that the event partner could be crucial in getting the right people in the room next time.

AC (UK) felt it was important to allow space for businesses to raise some questions – and that the Google session, in particular, was impressive. The consensus of a number of the businesses was that it would be useful to have an entire session on the total availability of government tools. CS (US) wondered if both countries could develop a standard module for resources as well as additionally highlighting that a number of businesses involved wanted to focus on SME access to finance.

There was agreement among all that the networking session was particularly powerful and important with evidently lots of business being developed out of it. JC (US) raised the idea of future venues in the US such as Boston, Chicago or San Jose – notably in potential partnership with MIT in Boston who are already working with the British Consulate. CS (US) agreed that there is definitely a feeling that more businesses want to get involved.

KM (UK) felt that harnessing momentum is important, although Brexit can complicate things. She noted that the UK should host in 2019, potentially in June or July and should do so outside of London – perhaps in Manchester, Liverpool or Bristol.

CS (US) in raising possible ideas for a future theme suggested outlining to attendees all of the ways in which the respective governments offer help to SMEs. She indicated that many businesses would welcome a discussion of US/UK relations post Brexit. Additionally, CS (US) felt a discussion of what may feature in a potential free trade agreement would be useful, as part of a ‘doing businesses positively post-Brexit’ theme. As a side note, CS (US) indicated that the US ITC would be issuing their report on US SME barriers to entry in the UK market in July of 2019, and that they may be planning on coming over before that time.

AC and KM (UK) were both keen to indicate that things may shift in the coming months and years, but broadly agreed with the theme. AC (UK) noted that a key outcome would updating the toolkits that currently exist, particularly the ‘guide to doing business’.



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CS (US) summed up, suggesting a fourth dialogue to take place in June/July in 2019, potentially in the north west of the UK. It would be a day or half day focussing on US/UK FTA, Doing Business Post Brexit, US UK Commercial Guides, updating the resources brochure and an overall module on what has been produced thus far (cyber, privacy). CS (US) added that repeating this agenda for both UK and US audiences would be useful, opening the door to two potential dialogues in 2019.

### **SME Chapter in USMCA**

KM (UK) opened discussion by asking whether USMCA had been difficult to negotiate. CS (US) responded that it was the first chapter across the line, and had been concluded in the rounds. It is a cooperative chapter that demonstrates a lot of win-wins. It is a 'TPP+' chapter, which has led to a deeper set of existing relationships. CS (US) added that it is based on the principle of cooperation to increase trade and investment for SMEs. Such a chapter can be relatively bespoke and is about committing to partnership and improvements. CS (US) added that the references to the social aspects of inclusion received positive feedback, and particularly that SME access to capital is important.

AC (UK) noted that a divide between national and local policy is important to distinguish, with CS (US) responding that information sharing is important, as is a solid commitment to doing so. KM (UK) asked whether this has been solved within USMCA through the creation of a 'one stop shop' – CS (US) responded that export.gov covers the specifics of US/UK, with PK (US) adding that it is incumbent on USTR to make sure everyone has the information that they need. AC (UK) noted that there are different understandings of 'one stop shop' – in the UK that is perhaps an entry point and then signposting (due to other agency compatibility).

CS (US) noted the inclusion of a committee on SME issues within the chapter, with AC (UK) suggesting that it is important to make the Committee on SME issues quite visible to the outside world.

CS (US) indicated that the SME Dialogue itself is TPP+, given the obligations of the USMCA chapter to benefit SMEs. KM (UK) asked whether other chapter leads were happy for SME inclusions and CS (US) responded that within USMCA, SMEs are self-defining and that we are not talking about special and differential treatment. JC (US) added that the overriding hope is to grow out SMEs into being bigger.

KM (UK) and PK, CS (US) all agreed that SMEs represented 99% of the economy. PK and CS (US) outlined that the value of US SME exports has gone up from 27 to 33% since the 90s, which rises to 40% if you include indirect exports through supply chain. KM (UK) noted that for the US, their SME trade is Canada-heavy, with the UK third.

CS (US) noted that there is no dispute settlement mechanism within the SME chapter of USMCA. KM (UK) asked what would happen if you needed dispute settlement – would the SME Committee of government representatives talk about it. CS (US) noted that the chapter itself is all about cooperation and that, if necessary, any issue could be raised at a ministerial level.

AC (UK) asked how will the signatories know that the chapter is operating in the way that it is intended - what if the provisions in 25.4 aren't happening? CS (US) responded that that is the key purpose of the SME Dialogue, to examine where things aren't being discussed. She added that the agenda items of the Dialogue is the important way to raise these issues and a report to free trade commission is the vehicle to resolve them.



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KM (UK) asked about the reception of businesses. CS (US) noted that advisory committees and associations are very happy with it.

PK (US) asked about the UK's engagement with small businesses in return. AC (UK) outlined that there is a small business board chaired by Minister in BEIS in which business representatives all feed in. Additionally, the Secretary of State meets with the top five businesses representative organisations every week, and does so further on a discretionary basis.

PK (US) noted that a problem with CAFTA had been that it didn't have a good mechanism for feeding information into small businesses. DM (UK) was, in return, interesting in learning how the US informs SMEs of the benefits of the agreement. CS (US) highlighted that the Commerce Department, Small Business Administration, US Exporters and Small Business Development Centres are the primary arms for getting information out. JC (US) added that webinars and seminar discussion programmes are helpful. Equally, trade missions to get the word out wherever possible. PK (US) added that there is sector-specific help available, with TvO and RS (US) both adding that they are looking 'beyond the border' and the wider groups that sit alongside that.

KM (UK) asked whether this chapter is going to be the blueprint for all future US deals. CS (US) responded that this is 'state of the art' for the Trump Administration and that all agreements work on the basis of accepted precedent. She added that USTR is going to be out there promoting this chapter strongly.

KM (UK) in response noted that as a basis the UK liked the chapter and that, while the US noted it is TPP+, it is very TPP. The UK is looking to be ambitious and strong, and this chapter is common sense but it feels ambitious. CS (US) said that with TPP done in 2012 and TTIP in 2013-2015 a lot of experience existed, and the Administration felt that it was important to have an SME chapter. The key question was how do we better marry existing resources and service providers together?

AC (UK) asked whether late payments for SMEs is an issue in the US and whether it had been considered an important policy issue in the US for USMCA. SB (US) responded that it had been raised once or twice, but that it's not in the big list – counterfeiting and IP is the largest problem for SMEs. CS (US) added that it is an interesting agenda item to potentially add to an SME Dialogue. TvO (US) added that financing is also a key issue for US SMEs. AC (UK) concluded that we need to be live to issues as they come up.

### **Marine/Blue Economy**

There was a brief call with (include who Lori is) on the next steps from the previous working group regarding the marine/blue economy. CS (US) highlighted that the Southampton trade show in 2019 was a useful opportunity to demonstrate best practice. By way of further detail, it was outlined that at the Oceans Business Event on 9<sup>th</sup> April 2019, there will be a potential session on SME best practices exchange in the marine tech sector. It was noted that this would be particularly powerful given the upcoming 400<sup>th</sup> anniversary of the Mayflower.

Lori (US) noted that discussions with the UK are beginning next week (w/c 5/11) to build on the ideas and objectives laid out in September. The US are working to coordinate with the UK on comments and topics, with the hope that a session will take place on the opening day of the trade show on the 9<sup>th</sup> April. AC (UK) noted that BEIS is the lead agency on this, but that Defra should be involved too.



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CS (US) proposed that text should be agreed within the working group on what had been agreed for the SME best practices exchange in the marine tech sector. All agreed that it is good to be out there demonstrating the strength of the relationship.

### **Americas Competitiveness Exchange**

DM and KM (UK) gave a summary of the feedback from UK colleagues who were part of the delegation for the 10<sup>th</sup> Americas Competitiveness Exchange (ACE), which had taken place in Northern California in the week prior to this meeting. The UK delegation had been invited as an output from the SME working group in July.

DM (UK) noted that colleagues had found ACE extremely useful and had developed good contacts in a good location. It was felt that the University of California's involvement in tech diffusion is important and that participants were impressed by the incubator process. They were struck by the opportunities for UK businesses in new markets and impressed by the visit to a community college. KM (UK) added that for DIT the next steps were to obtain a more thorough debrief, but that the links established had been inspirational. She added particular thanks to USTR and Commerce for their flexibility during the invitation process.

BH (US) felt the experience had been positive for the UK and that the flight control tower visit had been particularly useful. In addition he offered the UK two spots for ACE 11, taking place in Puerto Rico on 18-25 May 2019. Puerto Rico is seen as a hotbed for incubators across a number of industries (notably manufacturing and biopharma).

BH (US) suggested that it would be useful, in the spirit of cooperation on SME development, for the US to share their Comprehensive Economic Development Strategies (CEDs) for regional development with the UK. He felt it would be a good way to establish potential incubator-to-incubator links, ensuring that the US can send some people to the UK and vice versa. He added that the UK could look to host its own version of ACE. KM (UK) responded that Brexit limitations are hugely significant on resources and that ACE participation is definitely valuable, but it should be a long-term ambition.

CS (US) noted an agreed action for the UK to participate in ACE 11 and for next steps on SME cooperation to be considered on a long-term basis. She summed up Barret Haga's offer of sharing the CEDs process, and the idea of incubator-to-incubator 'mini-ACE' exchange between the UK and US. It was agreed that next steps are for the US to share information on the CEDs methodology of 5 year plans, and to explore options for incubator-to-incubator opportunities. It was also underlined that the UK is now viewed as part of the ACE network.

BH (US) added that the CEDs process is recognised as hemispheric best practice for planning by the Organisation of American States. CS (US) went further that bespoke cooperation is important and that a commitment to exchange of information on CEDs (how US is doing regional economic development) is important.

### **Readout of outcomes of the meeting**

The meeting closed with an agreed text drafted on the outcomes of the meeting, as below:

"The Small and Medium Enterprise (SME) Working Group convened the 3rd US-UK SME Dialogue in New York City focusing on the topic of Digital Trade benefits for SMEs and ecommerce tools to promote SME exports, attended by over 100 US and UK SME stakeholders with government officials from USTR, U.S. Department of Commerce; U.S. Small Business Administration; U.S.



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Patent and Trademark Office; National Institute of Standards and Technology; and regional economic development offices; and UK Department for International Trade (DIT); UK Department for Business, Energy and Industrial Strategy (BEIS); UK Department for Digital, Culture, Media and Sport; and the UK Information Commissioner's Office. The U.S. and UK released joint E-Commerce guides for small businesses selling online into both markets ([link here](#)). The SME WG agreed that the UK will host the 4th SME Dialogue outside of London in summer 2019, focused on the U.S.-UK trade and commercial relationship post-Brexit. The SME WG also agreed to hold a sectorally-focused SME best practices exchange on marine technology on April 9, 2019 at the Oceans Business conference in South Hampton, UK.

The U.S. welcomed UK senior officials from DIT and BEIS to the 10th Americas Competitiveness Exchange in Northern California in October 2018, highlighting economic assets of the region including visits to the University of California system and NASA Ames research center. Next steps for the SME WG will be an exchange of information on regional economic development strategies, including U.S. information on the Comprehensive Economic Development Strategy (CEDS), by which the public sector, working in conjunction with other economic actors, creates the environment for regional economic prosperity. The SME WG will also explore potential incubator-to-incubator opportunities with centers interested in hosting UK firms on the US side and US firms on the UK side. The U.S. also extended an invitation to the UK to join the 11th Americas Competitiveness Exchange in Puerto Rico in May 2019.”

**Action Items**

- The SME working group agreed that the UK will host the 4th SME Dialogue outside of London in summer 2019, focused on the U.S.-UK trade and commercial relationship post-Brexit.
- The group also agreed to hold a sectorally-focused SME best practices exchange on marine technology on 9th April 2019 at the Oceans Business conference in Southampton.
- SME Working Group will exchange information on regional economic development strategies, including U.S. information on the Comprehensive Economic Development Strategy (CEDS), by which the public sector, working in conjunction with other economic actors, creates the environment for regional economic prosperity.
- SME Working Group will also explore potential incubator-to-incubator opportunities with centres interested in hosting UK firms on the US side and US firms on the UK side.
- The UK will review the invitation extended by the U.S. for the UK to join the 11th Americas Competitiveness Exchange in Puerto Rico in May 2019.

**Additional to note**

The full readout of the fifth trade and investment working group outlined the following with regards to the SME Dialogue and SME working group:

UK - US SME Dialogue

The third dialogue focused on the topic of digital trade. It highlighted the benefits for SMEs and the e-commerce tools to promote SME exports.

Over 100 UK and US SME stakeholders met with government officials from:

- USTR
- US Department of Commerce





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- 
- US Small Business Administration
  - US Patent and Trademark Office
  - National Institute of Standards and Technology
  - regional economic development offices for the United States
  - The SMEs also meet with officials from the United Kingdom:
  - the Department for International Trade
  - the Department for Business, Energy and Industrial Strategy (BEIS)
  - the Department for Digital, Culture, Media and Sport (DCMS)
  - the UK Information Commissioner's Office

[At the SME Dialogue, the UK and the United States released joint e-commerce guides for small businesses selling online in both markets.](#)

The UK will host the fourth SME Dialogue in the summer of 2019, focused on the UK-US trade and commercial relationship post-Brexit. In addition, the UK and United States agreed to hold a sectoral-focused SME 'best practice' exchange on marine technology on April 9, 2019 at the Oceans Business conference in Southampton, UK. The United States also extended an invitation to the UK to join the eleventh Americas Competitiveness Exchange in Puerto Rico in May 2019.

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**Lead Negotiator Analysis/Comments**

Summary:

A positive and productive meeting chaired by Kate Maxwell, DIT, which provided strong consensus on the direction for the fourth SME Dialogue, reflected broad agreement on respective UK-U.S. approaches to SMEs in a future UK-US FTA, and looked forward to continuing collaboration on a number of outcomes.

Very positive and productive atmosphere, driven by both sides. We have established a very good working relationship with both USTR and Commerce (underlined by the welcome we received from Christina, Ros and Silvia at the EU-US SME Dialogue in Vienna).

There was a desire on the US to ensure more short-term outcomes in the working group, mainly driven by Christina Sevilla.

The UK is very much aligned with the US in relation to the majority of SME issues. There is also a joint ambition to consider lighter regulatory regimes wherever possible. We agree with the text of the USMCA SME chapter in the main – there is little divergence from our core policy. The UK and US are both supportive of the future FTA including a robust and far reaching standalone SME chapter, as well as SME-friendly provisions throughout the agreement.

Very good cross-Whitehall working across DIT, BEIS and DCMS.



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## DIGITAL TRADE

Date: **November 2, 2018**

Time: **09:00 - 12:30**

### Participants

| Name                         | Department/Directorate          |
|------------------------------|---------------------------------|
| Rebecca Fisher-Lamb—RFL      | DIT                             |
| Chris Woodward—CW            | DIT                             |
| <i>Tom Dannatt—TD—Absent</i> | DIT                             |
| Victoria Donaldson—VD        | DIT                             |
| Sophie Brice—SB              | DIT                             |
| Jonny Martin—JM              | DCMS                            |
| Harry Lee—HL                 | DCMS                            |
| Jaya Choraria—JC             | HMT                             |
| Robb Tanner—RT               | USTR                            |
| Rebecca Nolan—RN             | US State Department             |
| Matt Swinehart or Sullivan   | US Treasury                     |
| Andrew Steel                 | US Department of Commerce       |
| Brian Woodward               | US Department of Commerce (ITA) |
| Peter?                       | US Department of Commerce       |
| Linda Quigley                | United States Patent Office     |

### Key Points to Note:

- A positive, technical session that built on the July TWG session in which the UK set out digital policy principles. The US discussed new and priority provisions within the USMCA digital chapter, and the UK flagged where provisions had been covered by principles set out in January. Both the US and UK remained clear on the restrictions placed by TPA and Consultation processes respectively.
- The US outlined their approach to the digital chapter of USMCA including explanations of evolutions from TPP to USMCA and which clauses remained the same. Most the digital changes that resulted in broader scope for were a result of TPP countries lobbying for additional clarity via footnotes or language which Mexico and Canada did not require. In particular, the US set out that:



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- a. Tariff free treatment for digital trade, non-discrimination, electronic signature and paperless trading are elements that did not change from NAFTA or TPP. Online consumer protection from SPAM and for personal data as well as data flow rules and prohibiting server localisation are changes from TPP. Rules for internet platforms and protection for source codes or algorithms are new in USMCA compared to all other US FTA's.
  - b. The US established baseline modern USMCA digital rules by bringing together international agreements from the WTO and OECD with key terms from US domestic law. Frequent references to WTO agreements in USMCA's digital chapter indicates that the US aims to build on existing consensus as international digital rules are formed.
  - c. The USMCA digital chapter fundamentally seeks to foster open markets and competition without infringing on legitimate government regulatory administration. The US made it clear that a similar, but not identical approach would be taken forward in future FTAs. The UK also confirmed the importance of digital rules and reiterated that the UK position is largely in an information gathering stage until more specifics of the EU Exit are firmed.
- Stakeholder engagement on the digital and e-commerce topics of the SME dialogue were positive and will continue in this area. The UK and US shared information about domestic consultation process including the prevalence that digital issues were raised by stakeholders on both sides.
  - The UK's 'digital tax' wasn't raised at all, clearly the US see this as a senior/ political rather than technical issue.

**Report of Discussions and Outcome:**

RT (US) started with an introduction and welcome to the UK officials. He explained that the US was in process of consulting with domestic industry for their positions in a US UK FTA. He was clear that the discussion about USMCA was specific to North America and the US may have different objectives with the UK.

RFL (UK) and HL (UK) echoed the sensitivity of sharing information and that the UK was still working through future policy. In particular for this session the UK was happy to consider USMCA information purely as a sharing exercise and not as a negotiation. The UK was similarly consulting with domestic stakeholders to form up positions.

RT (US) offered a tentative agenda for the session by picking and choosing from the USMCA digital chapter highlighting the server article, platform liability, source code protection, cyber security, tariff and non-discriminatory measures for digital products and data protection.

RFL (UK) confirmed the UK was content to take US points of change and then offer points based on questions from other FTAs and countries approaches that the UK has found as part of a large information gathering effort in DIT. The first question was about the name change from previous US FTAs having an e-commerce chapter to USMCA holding a digital trade chapter instead.

**Historical Development of Digital Chapter**

RT (US) Digital chapter name evolved out of historically what was the e-commerce chapter, although defining the digital aspects of the chapter is always a challenge. The US FTA approach includes a 5-chapter models that focuses on services, investment, cross border trade, telecommunications and e-commerce. The e-commerce chapter has existed since the US-Singapore FTA. In that first iteration it was called electronic commerce, as the internet has



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changed the global economy the US chapter has evolved. The name change from e-commerce to digital trade was partially a branding decision because there is still debate on what e-commerce means. For the US e-commerce is a broad set of disciplines as opposed to the approach of other countries where e-commerce simply ends at the internet used for sales. The US view was always that e-commerce or the new digital trade chapter was horizontal across the FTA with broad applications beyond services. The US has engaged in some of the multilateral and bilateral conversation, although the view now is that those conversations are less productive and less useful. The US preference is to engage in trade or transformative policy that engages with actual problems.

RFL (UK) and CW (UK) agreed that it was helpful to understand the substance and nominal change from e-commerce to digital trade. CW confirmed hearing about the argument that says the lack of definition of digital trade prevents solid rules from being created. He asked if the OECD work on defining digital trade was linked to the US understanding of digital trade.

RT (US) said that important work has been done adding to the Services Trade Restrictiveness Index (STRI), but the OECD work has also been a bit of a learning process. The US is unsure about how their work will be reflected in final product, but agree that it is useful especially to explain trade distortions. USTR has done and is collecting barriers qualitatively, but it is a challenge. Ultimately the OECD definition will be a helpful baseline definition. The WTO will be more of a challenge. The US advocated for additions to the trade policy review and is now receiving the first one. The review is important and critical for understanding better services statistics.

### **USMCA Walk Through**

RT (US) there are two articles that fundamentally solves problems for cloud services in USMCA article 19.11 cross-border transfer of information by electronic means. The US has received complaints from cloud companies that their decisions were made based on borders instead of market of efficiency and the US addressed the concerns in the digital trade chapter. The US goal was to include space for governments to regulate while maintaining rules for commerce. The digital trade chapter in USMCA was modelled after TPP.

On data flows, the critical element highlighted by the US was agreement that no parties will restrict information. In the US eyes, a legal prohibition of restriction exists in order to prevent an absolute ban. The USMCA rules do not inhibit a government's ability to regulate, these rules are specific to cross border instances. The line "for the conduct of business" exists to limit the scope and add clarity for when there are cases where the data transferred across borders has nothing to do with commerce. The wording for "covered persons" indicates financial services being separately called out. Ultimately for data flows, the US have kept exception language. In the instance where countries have conflicting regulatory policy the US would fall back to a GATS Article XIV defence. Article 19.11 exists so that USMCA member can legitimately regulate domestic sectors for a public policy objective as long as it does not apply additional discrimination or restriction to trade.

The USMCA language is almost identical to the Technical Barriers to Trade Agreement. The approach was to lift up TPP language closer to article 14 standards. TPP has some similarities in article 2 in data flows and facilities. When the US started TPP talks they didn't think data flows clauses needed to be address, but as the talks went on the US got cautious and decided it was good to add. The nature of the TPP talks made it necessary to add significant exceptions. Digital elements were new and there was anxiety from Southeast Asian countries which required concessions in the form of appearances of flexibility. Typically, the US approach is to write text legally tightly by provides some limits, and some robust clauses. The US had concerns with EU



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Indonesia trade deal and raised them with EU Directorate-General officials. The US characterized the EU approach as self-judging and difficult. The US said the EU was not in position to negotiate on GDPR with the EU, though the US would appreciate the EU be present with a more open ambitious mind. Ideally, the US would want to give Europeans assurance that GDPR would not be subject to attack in digital cooperation.

There are couple of articles in digital trade chapter on personal information protection (Article 19.8) as well. The US does not always propose them in FTA's, but they do see value in them. USMCA personal information protection came out of a US Australia conversation. Point 2 specifically obliges parties to provide protection, which is different from TPP language. The US thought more about what the three North American countries could do, which was easier than with the broader TPP group of countries. The US is hopeful that international bodies (OECD and APEC) will agree and carry similar texts forward. Paragraph 3 is entirely new in USMCA. It was added to lend specificity to paragraph 2. The language employed was important, it reads "recognizes" in order to grant flexibility. Paragraph 4 is standard non-discriminatory language applied to digital trade. Paragraph 5 is a transparency article on remedies and compliance practices.

Paragraph 6 is slightly different from the TPP text. It puts emphasis on mechanisms to allow business to comply with laws in regimes they to business within. Interoperability is key to solving problems where countries can maintain privacy regimes for the US. APEC recognizes that countries have legal differences and there is support across APEC to create a similar baseline clause on enforceable action. From the US perspective, GDPR needs article 42 in order to engage with the rest of the world.

**New USMCA Items.**

**Platforms:**

CT (US) Interactive computer services (Article 19.17) is the term for what is commonly known as platforms. The EU and US have common approaches on platform issues which the rest of the world lacks. The US approach was to look for where TTIP and TISA overlap. The wants to work with EU to come up with principled baseline reflecting both approaches. TTIP negotiations ended before platform rules could be meaningfully discussed. The US raised TTIP to be clear that lots of thinking within the US is being devoted to be accommodating US and EU law, which may make current UK conversations with the EU smoother on platform rules. The US will carry forward a similar USMCA approach, although they conceded that USMCA language isn't perfect. The texted is structured with an ask of Mexico and Canada not to adopt a positive law. Canada currently has precedent in judicial system consistent with US asks in USMCA. While Canada future courts could deviate, right now both Canada and Mexico are in full compliance of USMCA requirements. Footnote 8 exists to further comfort and clarity Canada that Canada and Mexico are in compliance right now.

The US approach is based on domestic law which was stripped out of a wider piece of legislation. The rest of the act was stuck down by US courts based on censorship concerns and 1<sup>st</sup> amend rights. In the early 1990s, Senator Wyden (D-OR) saw problem with precedent of newspaper and transition to digital medium. Ultimately the US agreed that publishers have right to edit, Bookstores do not edit based on shelving and therefore are not liable. The same law established that content is created by 3<sup>rd</sup> party with no role from the platform, then the platform does not share liability.

"Good Samaritan" language is also included in this section to help platforms to take action without being liable. There has been some concerns that "Good Samaritan" language is too permissive,



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but Congress is still discussing options. The US approach was not to require Mexico and Canada to replicate US section 230. Part of the approach was to imagine changes in other countries and in the future. The platform language is narrower than US domestic law. If you have a law that says when user a harms user b that platform is liable. Platform cannot be liable. Broadly the US is flexible regarding the creation of rules about platforms, but they do have an affirmative obligation for hate speech and defamation. US domestic law is more detailed and more restrictive than USMCA language. USMCA language on platform protection was a challenge because Canada wanted to think it through and Mexico needed convincing that it was good for industry.

There are exceptions to the platform rules, specifically in the US system there is separation between platform rules and IP issues. The IP chapter deals with wider range of issues and significant work was done to make sure the platform section did not touch on IP issues. The US does not view platform rules as criminal law enforcement area. Historically the government has given shield for platforms against law. The US wants to be clear it is not intending to link USMCA commitments with criminal law enforcement. 4C under platform rules seems obvious, but was added at the request of law enforcement agencies. Annex 19-A is very specific to Mexico's desire for a compliance period to pass legislation. US doesn't see conflict between network neutrality and USMCA. The normal industry practices are for net neutrality, but Mexico felt more comfortable with the addition of Annex 19-A.

**Source Code:**

RT (US) explained that source code protection language was initially from Japan, but has evolved in TPP and since TPP. There are large differences in USMCA including the added idea of algorithms to international rules. The simple answer is that USMCA source code protection remedies against the behaviour of some countries. In the US perspective rules preventing source code turnover are critical for fostering a fertile business environment and those rules should be extended similarly to algorithm based on the potential to damage to competitive advantage. The US finds the WTO conversation on defining whether or not algorithms are IP unproductive and unhelp, the US wants to protect algorithms regardless of whether or not it meets IP definitions. The Language changes from TPP were to eliminate some of the carve outs, In TPP talks the US was initially sceptical that the language was necessary at all. During consultation for NAFTA talk the US decided to move away from the big carved out concessions from TPP. The main carve out in USMCA protects government rights on regulation with respect to conducting investigations. The US approach attempts to put standards in rather than undo the rule of law.

**Open Government Data:**

CT (US) said open government data was an important measure of modernization that was initially proposed by Mexico. The thrust of the text is about increasing the value of government information by opening the information to the public as computers have become more widespread. In the last 10 years the US have benefited from academia and consumer group having access to data and driving policy forward too. The actual text uses "recognize" in order to maintain broadness and ensure no action is strictly required.

HL and RFL (UK) agreed it was interesting to hear that Mexico proposed the section and that the thrust of the provision quite familiar to UK government.

**Non-Discriminatory Treatment of Digital Products:**

CT (US) said that non-discrimination text is the oldest article in US practice. The new element is application to digital trade and the aim is for future US FTAs to skip definitions for the sake of eliminating duties.



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As sales move from physical to digital spaces there is a risk of losing WTO protections. The US is trying to extend application to things that are not digital that had previous protection. If all countries could agree, it would ideally be very helpful for business to maintain level fields across borders. The ecosystem around phone and apps is particularly relevant because apps created by small teams. The US approach prioritizes the example of apps by imagining a world where location or nationality of developer is an impediment to app development. The mentioned extending the negative list model to the digital chapter.

RFL (UK) noted that the UK supported non-discriminatory practices at the WTO

**Online Consumer Protection:**

CT (US) said USMCA contains a competition chapter which includes consumer protection. The digital chapter cross references the competition chapter. Historically, recognizing the importance of consumer protection is critical to fostering digital trade in the US. The US Federal Trade Commission fed into the consumer protection language to ensure fraudulent and deceptive activities are comprehensively covered. The US approach is specific to the trading partner interests and the US recognizes that sometimes it is not helpful to formalize consumer protection in FTAs.

**Paperless trading clause**

CT (US) said that TFA at WTO makes some of the language in USMCA duplicative. The US had already asked Mexico and Canada to make much more substantial commitments. Access and use of Internet for digital trade required some neutrality elements. There are layers paperless trading recognizing that the world is changing, and consumers have far more access with the spread of personal devices. The USMCA language is partially from the Federal Communications Commission, although it is not intended to reflect commitment to specific telecoms rules for any of the three countries. Paperless trading is a challenge in the US domestic space.

**Unsolicited Commercial E Comms (SPAM).**

CT (US) explained that there are options to tackle SPAM problems and USMCA slightly different from TPP language. The US deems some commercial messages as legitimate as opposed to countries which require an opt in affirmation. The US preference is a system that allows consumers to opt out, but still recognized that some rules for SPAM are necessary. Rules for emails are different from the rules established for mobile devices and telephone generally, though the US has concern with apps like “Whatapp” which blur the line between digital and telecommunication.

RFL (UK) explained that the opt in approach is the EU strategy and there is interest in the UK to ensure trade agreements delivering benefits for consumers

RT (US) said the previous conversation on cyber in London was very productive and little changed since then. There is cooperation element that is similar to past practices included an APEC references.

**Conclusion of USMCA review:**

RT (US) US direction is flexible and pragmatic after agreement on USMCA. The US is eager to keep options open if need. The US view is that digital trade portion of USMCA is particularly useful because it combines past practices and future interests.



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RFL (UK) the UK has been looking at other types of digital chapters in last 2 years to understand changes and is very excited to see the real evolution in trade policy. As laid out in the UK industrial strategy, the UK is excited to learn and contribute to the newest and most innovative policy in digital trade.

**UK Consultation and Conclusion:**

CW (UK) suggested a session in the next work group on emerging technology and foreign firm technology.

CT (US) Said there was space to talk about both and asked about the UK consultation process.

RFL (UK) explained lots of research was being gathered to form portion of future policy. The process started 2 years ago as DIT began gather information through town hall meetings and one on one engagements. It is clear that the British public is very interested in trade with the US and the knowledge level is growing significantly. More recently stakeholder conversations have shifted from general questions to the UK government gathering specific stakeholder positions including some subcommittee structures. Digital trade has been a top focus from the British public.

SB (UK) explained that the consultations with the public on trade with the US, New Zealand, Australia and potentially exploring CPTPP formally launched on July 20 and closed Oct 26. Privately the UK has received 160,000 responses from US consultation. Less were bespoke individual responses and many more were from campaigns which has themes that were expected based on TTIP: NHS protection, high food standards, and ISDS challenging sovereignty. The UK government will not response to every comment, but instead will publishing a government response to concerns and opportunities including how the government will consider them in future trade talks.

**Questions on USMCA**

*HL (UK) is 19.12 a different rule than GATT 14. Or is there more comfortability with an appeal to USMCA 19.12 or GATS? Is it about the US policy regime?*

RT (US) said there was less concerns with server rules and more concern with data flows. The US understanding is that there is need to have flexibility, which creates less concern with an appeal to GATS. Broadly the server rules are more about looking at the US policy regime and needing to accommodate. Domestically the US does not have strict rules on data flow. Footnote 6 in Article 19.11 2b further qualifies all restrictions specific to cross border data flows.

*CW (UK) TPP and USMCA language has provisions recognizing regulatory rights?*

RT (US) part of the language ensuring regulatory rights was to reassure other countries in TPP. In USMCA Canada and Mexico did not need as much of that reassurance.

HL (UK) asked about the difference between personal data and private data

AS (US) answered that personal data is directly to a person, whereas private data can be broader. Most of the time the two are the same.

*HL (UK) asked about the linguistic difference between “recognize” and “take into account?”*





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RT (US) pending legal advices, the US mostly does not see a difference. “Recognize” sees value and notes the situation, where as “take into account” is a slightly different structure.

*CW (UK) asked if the non-discriminatory article is targeting practices the US has seen emerging?*

RT (US) said that all the countries agreed to make commitment to non-discriminatory with some a tacit understanding that none of the three countries are entirely non-discriminatory. The intention was to make the commitment and be kept accountable if one country has a clear pattern of moving in the wrong direction.

*CW (UK) asked about the references to APEC and OECD in USMCA’s digital chapter. Are there standards or principles you have in mind when drawing those together?*

RT (US) no parties are obligated to APEC or OECD references through USMCA. In USMCA, the US is demonstrating that APEC and OECD are illustrative examples, not binding clauses of USMCA.

**Platform protection questions:**

*CW and HL (UK) asked about enforcement regarding defamatory posts and instances of hate speech. Is there an affirmative requirement for platforms to remove posts? Does the US have space to include the affirmative requirement?*

RT (US) said that some of the platform protection language in this instance was a political outcome with some legally clever work. Ultimately for the US, as long as a measure was aimed at the platform there would be no problem for the US. There might be a problem would be when platform becomes liable for damage from another citizen. The US goal is not to protect the worst of worst, but rather empower platforms.

*HL (UK) asked if American system is more restrictive and if there have been more cases where platforms are more liable or outcomes where they are not?*

RT—US has courts have made some common law to deal with platforms. The power lies with Congress, and without Congress changing the law, the US is unable to impose more restrictive regulation on platforms.

*CW (UK) asked why “interactive computer services” is used instead of “internet platform” or something else.*

RT (US) interactive comp service term comes from US domestic law where broad terms are applied. This is an instance of where e-commerce is different than digital.

*CW (UK) asked a question about interactions with IP and digital trade. There is a similar provision in JSI at WTO, but a noticeable difference between US and EU approaches.*

RT (US) said that IP issues are in one section and digital issues are in another section. The US wants to separate the two because it becomes easier to provide protection for copyright. This is due to where each provision is drawn from in US domestic law (i.e. DMCA for IP and Sec 230 for platform liability)



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LQ (US) added that digital millennium copyright act qualified safe harbour different depending on activity. Some safe harbour is granted by being in the category defined in the act, but other required specific actions to qualify for safe harbour.

*CW—Platform or content provide?*

LQ (US) -- Could be either

CT—if you don't renew, can be pushed out a safe harbour. Also clear to emphasise that there was no restriction on affirmative obligations in domestic law. A platform needed to register a valid agent. Notice to take down. Good faith obligation. IP chapter leads might be more useful. Language on trade side is high level. Not able to explain US.

Dept Commerce —we landed closer to US domestic law than ever before

*VD (UK) asked if the exceptions apply to entirety of article. Footnotes 9 and 6 seemed to skirt around paragraph 3 and footnote 9 exempts something from para 2 if it falls in 4c2. What is the structure?*

CT (UK) said the footnote was added during negotiations. There are situations where a site is run through another site's services. The US still wanted to be covered in interpretive situations. The US views is that exceptions and footnotes are not inconsistent with paragraph 2. In the talks Canada and Mexico raised that they thought it was problematic which resulted in the footnote to make the language it clearer.

*HL (UK) asked if a country can get around paragraph two of the platform section 2 by empowering law enforcement?*

CT—yes, but it's not likely because it is direct law in Mexico and there are there legal obstacles where it immediately applies. In US, the implementing text is where these issues gets scrubbed out.

**Source code questions:**

JM (UK) asked a question about protecting trade secrets which CT (US) agreed to send follow up information to respond.

*JC (UK) asked about the application of source code protection to financial services?*

CT (US) said financial services are subject to their bespoke section of USMCA. Broadly, the source code protections covers everything. If there are references to covered persons in the language, it typically means that financial serves has been carved out.

CT (US) also commented that government procurement is not covered by the source code protection, but the US is not opposed to thinking about it. To date the US hasn't had interest from trading partner on it, but the US is open and willing to engage.

*CW (UK) asked about why algorithm protection was covered in the digital chapter instead of the IP chapter?*



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CT (US) said that algorithms are not always considered IP in every country because of the creativity element, but the commercial element of algorithms made sense to group their rules in digital trade.

*CW (UK)—TPP and USMCA language. Provision 3. Ask Chris question. Justification for removing? Rights inherent?*

*CT (US)—don't think there's a rule that prohibits private contacts?*

*CW (UK)—TPP reference judicial authority in patent disputes? Was intention to make it broader?*

CT (US) —Japan's concern from TPP. Wasn't particularly helpful now. All rules says is can't require transfer for getting into business place. Article 2 helpful. Not prohibited from article 1.

CW (UK) —TPP change on software code change language in USMCA.

CT(US) —again, not totally necessary in NA as w. TPP group. General rule to see source code is bad. Transfer is worse. If its w.in scope of legitimate government exercise its open.

**Digital Non-discrimination questions:**

*CW (UK) asked if there was a customs duty point and if there was a specific target of expansion of that language change from TPP?*

CT (UK) historic evolution in the text from the Singapore text to the USMCA text. The intent is the same, the US wants to capture formal customs duties and other charges that are discriminatory. The US does not have a strong desire to expand or contract the language compared to TPP.

*CW (UK) asked about a TPP language change on the cultural carves outs*

CT (US) said that the cultural carve out made some of the agreement slightly irrelevant and explains some of the changes from TPP. USMCA is structurally different from NAFTA because of carve outs that previously existed.

CT (US) said a number of articles did not change including maintenance of UNCITRAL and accepting electronic signature. The US Federal law is a model law that 29 individual states have adopted to commit to non-discriminatory. In contrast to EU approach, which has government endorsement of validity of signatures, the US has no interest to endorse some third-party signature verification. The important aspect is that government cannot deny a form based on electronic signature.

**Consumer Online protection questions**

*CW (UK) asked if "In use of Public interest" intending to incorporate article 14 of GATS coverage.*

CT (US) said no, but that the phrase was commonly understood in the US legal system

**Paperless trading questions:**

*CW (UK) asked about the footnote for TPP that recognized something, which was removed in USMCA?*



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CT (US) said that the language was included a concession to Singapore, but the US doesn't view it as a legal concern necessary for USMCA.

**Key Actions and Next Steps**

VTC to be planned as a follow up between this session of the working group and the next one

RFL—joint discussion with colleagues on consumer online protection across government for the next session

CT and Chris Woodward to have a further chat on details

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**Session Lead Analysis/Comments**

*Suggested issues for Session Lead to add:*

- Atmosphere of the meeting (relaxed, but content focused)
- Areas to push in future working groups (digital element of procurement)
- Pushback from counterparts, as well as the potential implications (GDPR approach v APEC approach)
- Initial thoughts on the success of the meeting/the extent to which objectives were achieved

Chris Woodward – Deputy Head of Services – Digital, DIT

The session was positive and fairly relaxed. With both the US and UK setting out their domestic sensitivities around referencing 'offers' or 'established positions' at the outset, the session was held very much in the spirit of information sharing. The US was very keen to sell the benefits of their new digital chapter from USMCA, which USTR are clearly delighted at having landed (having lost the deliverable of the ambitious digital package from TPP).

While much of the chapter echoes CPTPP provisions, and there are some 'natural evolutions' of ambitious coverage, it was definitely notable that there were many US wins in the new chapter that were reflective of US domestic laws and regulations. USTR were quite keen to play these down during their presentation of new provisions, though the targeted questioning we were able to utilise in the session was very helpful to break down justifications and precedents. Some of the US messaging was occasionally crossed (e.g. around proactive versus reactive carve outs), and clearly the result of stakeholder lobbying on the US side. Clearly US were not happy with the breadth of the Canadian cultural carve out, though this was not discussed.

HMG dynamic in the room was quite positive, with both DIT and DCMS leads asking some probing questions. DCMS provided detail comments where need on the UK system and asked probing questions on the US system, while DIT leads were more familiar with the USMCA material and how it varied from other FTA precedents, asking detailed questions on drafting that drew out some key differences in the US approach and tactics that we can expect to play out in a UK-US negotiation. A helpful dynamic with clear and different roles for everyone one in the room. Clear cross over with IP and Gov procurement that will need further policy development across TPG.



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## OPENING PLENARY SESSION

Date: **November 5, 2018**

Time: **09:00 – 10:30**

### Participants

| Name  | Department/Directorate  |
|---|---|
| <b>Chaired by</b>                                   |   |
| <b>Dan Mullaney</b>                                 | <b>Assistant USTR for Europe</b>  |
| <b>Oliver Griffiths</b>                             | <b>Director, Americas Negotiations and Strategic Engagement, Department for International Trade</b> |
| <b>All members of UK and US delegations present</b> |   |
|   |   |

### Key Points to Note:

**Dan Mullaney (DM)** opened the Plenary Session and offered his condolences on the passing of Cabinet Secretary, Jeremy Heywood. He then highlighted that there would likely only be one more TIWG before the end of March 2019. We therefore needed to make as much progress as possible to target 1<sup>st</sup> April 2019 as the potential start of negotiations.

**DM** then ran through an update US trade policy. USTR Lighthizer has written to **Congress notifying of the Administration’s intent to start trade talks with the UK** (EU and Japan). This was a formal part of Trade Promotion Authority (TPA) and had to happen at least 90 days before negotiations commenced. The next step was a federal register notice, kick-starting a public consultation period – including a public hearing [*Comment: the federal register notice was posted on 16 November and the public consultation is open until 15 January 2019, with a public hearing on 29 January*]. Following this, USTR will have to issue its detailed negotiating objectives for a UK-US FTA 30 days before negotiations start. If 1 April was the target, objectives would need to be sent to Congress no later than 27 Feb. We could however continue to “lay the groundwork” for a potential FTA.

**DM** said that the Administration was pleased with the results of the recently agreed **US-Mexico-Canada Agreement (USMCA)**. The agreement was currently going through a legal scrub. Factsheets on were available on the USTR website, including on the “new and innovative” parts of USMCA (digital trade, SME, innovation policy). **DM** highlighted that USMCA gave a good indication of the Administration’s priorities for future trade agreements. That said, USMCA was designed to address some issues particular to the US-Canada-Mexico trading relationship: A UK-US FTA would focus on issues specific to the UK.

On **EU-US talks**, USTR had been working “aggressively” with the Commission to identify NTBs which could be eliminated in the short-term, outside the scope of an FTA. USTR Lighthizer and Commissioner Malmstrom were due to meet again on 14 November [*Comment: now happened*]. Cooperation on 3<sup>rd</sup> country issues, for example **China**, were also being discussed. Where the WTO rules were judged to have been infringed upon, the US was working directly with the EU. In areas outside the scope of the WTO, US was using its trilateral discussions with the EU and Japan to discuss how to address international rules to deal with China. The Administration was focussed on how the US and allies could increase the leverage on China to change its prejudicial behaviour now. Whilst international rules were important, they could take a



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long time to negotiate and it was also questionable whether China would ultimately comply with them. The focus therefore had to be on how to change China's behaviour now. DM indicated that discussions were progressing, but that the Administration wanted more ambition.

**Oliver Griffiths (OG)** followed by updating on recent events in the UK. **The UK consultation** on the US, NZ, Oz and CPTPP had closed on 26 October. There had been unprecedented levels of interest with approximately 650,000 responses overall, of which 160,000 had been specific to the US. Some responses had been related to campaigns led by NGOs, with echoes from TTIP (NHS, ISDS, food standards). There had however been over 6,000 substantive individual responses specific to the US. The aim was to publish a government response to the consultation within 12 weeks – this would however be difficult to meet. HMG would also likely publish its outline approach to a UK-US FTA (analogous to USTR's detailed negotiating objectives to Congress) at same time as outcome of consultation. The timing had yet to be confirmed.

On the **Trade and Customs Bills**: the Customs Bill had received Royal Assent on 13 Sept and was now the Customs Act; the Trade Bill was on a slower timeline and was unlikely to get assent this year.

**DM** then stated that the US wanted an ambitious FTA with the UK and would therefore be **watching the UK's negotiations with the EU carefully**, particularly on the Future Economic Partnership and any free trade area for goods and a common rulebook which went with it. The Administration was concerned that this could limit the scope of any UK-US agreement on regulations (e.g. SPS). We needed to remain vigilant and creative to ensure there was enough space for UK-US FTA – this would be very important to Congress.

On **Short Term Outcomes (STOs)**, **DM** and **OG** agreed that the **3<sup>rd</sup> UK-US SME Dialogue** had been a great success with: both UK and US SMEs helping each other find ways forward; and enabling the UK and US governments to showcase all the resources available for SMEs (with the latest focus on digital trade). Both were looking forward to the **inaugural Legal Services Roundtable** the next day. **OG** highlighted **the joint economic study on IP** – and the desire to agree a deadline for completion – as well as the new work-stream on non-trade STO being driven by the **Economic Working Group**.

**DM** and **OG** also agreed on the importance of the work on taking place on **Continuity Agreements** – for both a “deal” and “no-deal” scenario.

**Rhys Bowen (UK)**, **Director International Agreements and Trade**, **Department for Exiting the EU** then gave an update on **Brexit**. The UK was trying to conclude two agreements: i) the Withdrawal Agreement - a Legal Treaty setting out terms of the UK's exit from the EU; and ii) the Future Framework – a political declaration setting out broad parameters of the UK's future economic and security relationship with the EU.

On the **Withdrawal Agreement**, the most difficult parts had been left until the end. Lots of good progress had been made, including on some tricky issues (Cyprus SBAs, Gibraltar, other technical issues). Agreement was almost complete, with the main sticking point being Northern Ireland. Here, lots of issues had been resolved, including the Common Travel Area. The main outstanding issue was over the “back-stop”. The “back-stop” reflected a very strongly held and shared objective by the UK, Ireland and the Commission that it was imperative for any arrangement vis-à-vis Northern Ireland to support the Good Friday Agreement, which meant having no hard border. The UK government believed that in the long-term, this could be achieved through the future relationship. This was the aim of the Chequers Agreement. The “backstop” dealt with scenario whereby there was not quite enough time in Implementation Period (IP) to



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finalise these arrangements, meaning that there might be a need to fall back on a separate set of arrangements for a small period of time. The PM had been clear that the “back-stop” was merely an insurance policy and that she did not intend to use it – if it was necessary, it would only be used for a very short period of time. There were currently two issues blocking agreement on the “back-stop”: i) the scope of the UK-EU customs relationship – the Commission had published a proposal which saw Northern Ireland in isolation remaining in the EU Customs Union. The PM had rejected this as sovereignty issue – no British PM could agree to separate Northern Ireland from the rest of UK (a position which held unanimous support in Parliament); and ii) duration – the EU was proposing an “all weather back-stop”. It was very important for the UK that the “back-stop” was not indefinite and that we could not be held in it against our will

The **Future Framework** was a political declaration designed to provide overall guidance on what future UK-EU relationship would look like on both economic and security issues. The UK’s objective was to ensure a deep and meaningful relationship with the EU, including via frictionless trade; upholding the Good Friday Agreement and therefore peace and stability in Northern Ireland; and allowing us the freedom to do future trade deals with third countries. This Future Framework was in a good place overall and once the Withdrawal Agreement had been finalised should fall into place quickly.

Once both the Withdrawal Agreement and Future Framework had been finalised and agreed by EU Leaders, the PM would need to take the deal to Parliament for a “meaningful vote”, which would likely take place within two weeks of any European Council. This was likely to be a very intense time in British politics. [*Comment: the UK and EU have now reached agreement in principle, subject to agreement from EU Leaders at an extraordinary European Council*].

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## CUSTOMS

Date: **November 5, 2018**

Time: **16:00**

### Participants

| Name                   | Department/Directorate                                |
|------------------------|---|
| Neil Feinson (Chair)   | DIT   |
| Adam Fenn              | DIT   |
| Rhys Davies            | DIT   |
| Tim Ward               | DIT   |
| Cleo Bourote           | DIT   |
| Wyndham North          | HMT   |
| Philip Bower           | HMRC  |
| Rhys Bowen             | DEXEU   |
| Megan Roberts          | HMT   |
| Mojgan Ahmad           | HMRC  |
| Christina Kopitopoulos | US Customs  |
| Daniel Mullaney        | USTR  |
| Sushan Demirjian       | USTR  |
| Tim Wedding            | USTR  |
| Alexandra Whittaker    | USTR  |
| Yuliya Gulis           | Attorney advisor for valuation and special programmes |

### **Key Points to Note:**

This session was Chaired by Neil Feinson and covered both the development of the FCA and a first preparatory discussion on a future UK-US Customs and Trade Facilitation Chapter.

### **Facilitated Customs Arrangement**

The US asked the following questions on the FCA, which were answered by the HMT and DIT team:

- How will products going to the US via UK from EU be treated? For example, how could the US ensure preferential treatment to UK originating products was not extended to EU products?
- DIT explained that these would not be treated any differently than under a standard US FTA, and origin could be verified by supplier declarations.
- How do you anticipate new or existing EU FTAs being treated under the FCA?
- HMT explained that the FCA gives the capacity for separate UK and EU customs policy.
- The US explained they have seen EU reaction and concerns about UK officials collecting duties on behalf of the EU. They asked what other issues are the EU raising about the applicability of the FCA.
- HMT explained that it is an ongoing negotiation





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- When do you envisage being able to create an independent UK Tariff Schedule?
  - DIT/DEXEU explained that the intention was to create an independent schedule following the IP, but that this would depend on our negotiations with the EU
  - The US asked how we would treat import taxes.
  - HMT explained that this would be dealt with separately and we would seek to align with the EU on cross border import taxes.

Outcome: Overall it was agreed this had been a useful discussion, with the UK able to answer all of the US questions, albeit at a high-level. The UK reiterated that it was keen to continue feeding US input into the design of the FCA. No firm follow-up was agreed to this part of the session.

### **Customs and Trade Facilitation**

The US gave an overview of its approach to C&TF in bilateral agreements, which is to:

- Take what has been agreed in global agreements, such as the TFA, and set further obligations in bilateral agreements that will help enhance the implementation of these agreements.
- Try to address concerns from stakeholders and use this to enhance and improve the implementation of global agreements

The US set out that areas of interest in bilateral agreements were:

- Cost Effectiveness and time. The cost of compliance, documentation processes etc. Trying to reduce data and document processes that do not enhance compliance. Focus on quick release of the goods and procedures that reduce time and admin burden.
- Look for commitments in automation as a way to achieve these efficiency goals.

The US also set out that the USMCA represented the most up to date example of a model US customs chapter, alongside the customs related elements that appear in the Market Access chapter of USMCA.

Outcome: While short, it was agreed that this session had been a very useful first discussion of the sorts of issues that it would be useful to cover in a more detailed session at a later date. No firm actions were agreed. However, the US stated it would share some background on the principles that underpin the single window described in USMCA. The UK also stated that it would be happy to provide more details on what a future UK independent customs regime looked like, in any future session with the US. Caveating this by saying that some of this detail was still in development.

### **Report of Discussions and Outcome**

#### **Facilitated Customs Arrangement (FCA)**

To set the scene for the FCA discussion RB (UK) gave a brief overview of the Brexit presentation he had given in the plenary.

WN (UK) then gave a short overview of the design of the FCA and the principles it is built on, which balance both the UK's future relationship with the EU and the UK's future independent trade



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policy. Furthermore, WN gave an explanation of how the FCA will function in practice. To which the US asked the following questions:

*Within a customs bill is there discussion of how EU FTAs would factor into a customs union?*

WN explained that the key element of the FCA, is that it is not necessary to be fully aligned with EU trade policy. This proposal gives the UK the Flexibility of two separate trade policies and ensures that tariffs are only applied where appropriate. AF(UK) continued that, the ability to implement UK and EU trade policy is not limited to tariffs but also other aspects of FTAs e.g. RoO. Therefore, a distinction between the implementation of EU and UK trade policy can be seen.

*The US have understood that the customs union agreement between Turkey and the EU has recently been reopened. Turkey have complained that the FTA partners were able to ship duty free via the customs union with Turkey but Turkey did not hold similar benefits. Similarly, what role would FTAs play in a customs arrangement that the UK envisions with the EU?*

WN explained that the situation is slightly different for the UK, as the UK is not proposing to apply a common external tariff with the EU. Therefore, if the EU signed a new FTA the UK would not face risks similar to Turkey as described in the scenario.

*Are you anticipating a transition period of some kind and how long would this be?*

WN explained that the UK are hopeful to agree an Implementation Period with the EU. It will be necessary to take a phased approach to the implementation of the FCA. The UK is currently considering how can we best manage these phases to be able to operate an independent trade policy as soon as possible.

*How do you anticipate maintaining control of goods coming into the UK via Ireland or elsewhere in the EU? What procedures do you anticipate to maintain origin of goods that come under preferential treatment?*

AF explained that there would not be a difference to a standard FTA. In an FTA evidence is required for a 'value add' rule. This is often provided by supply declarations. A supply declaration would demonstrate whether the value of a product had increased either in the UK or as non-originating content. In this way, supply declaration could be used to assess whether the rules that had been agreed between the UK and the US had been met.

*With reference to the response to the above question, please describe how you anticipate this would work with the Irish border. Minimal customs control at the border would raise questions over how you could verify the origins of the goods that have passed through that border.*

AF continued that from a purely Rules of Origin perspective, the UK does not consider that the solution to the Northern Ireland border will impact goods travelling to and from the UK as a part of the FCA. The focus would be upon following the chain of supply and where value has been added to a product. The Irish border under the FCA is not different to how we would treat other borders e.g. with France. There is no proposal to introduce new checks or measures at borders with France or Ireland. The Intention is to produce frictionless trade, and this can be done by verifying goods via evidence and declarations rather than checks at the border.

*The way you are envisioning this is that in cases where products come in destined for the UK market, the tariff duty assigned to the product would be less than the EU rate. Thus, a rebate can*



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*be issued to the importer. However, in a situation where the EU has negotiated new agreements and the products entering the UK subject to the EU deal would be lower than the UK rate. I assume you would charge the higher rate and the importer of the product ultimately going to the EU would need to demonstrate the need for a rebate if this product was transhipped via the UK.*

WN explained that this was correct. The FCA would work in reverse. The importer could use special procedures such as transit to avoid this.

*What issues are the EU raising about the applicability of the FCA.*

WN expressed that the UK believes that the FCA is legally possible and WTO compliant. The UK recognises the EU's concern to ensure that the right level of governance and trust is in place. A framework has been set up to discuss how this would work and how the correct governance can be put in place to ensure that all parties have the right level of trust.

SD(US) expressed that the FCA is a good idea. However, they ask that the UK ensure that the processes are transparent and cost effective i.e. using advanced technology and or automation to ensure that goods continue to move freely.

*Currently, tariffs are aligned with the EU. When do you expect to create UK tariffs?*

NF explained that there are a range of potential scenarios based on EU negotiations. However, the UK anticipates that at the end of the implementation period we would be in a position establish our own MFN tariff.

The US expressed their thoughts that within the FCA approach, the UK is taking on the administrative burden between the EU and RoW. It would appear that the UK would now be in the position to take a leadership role in automation, where the EU has fallen behind. Movement towards automation would be a key factor in determining whether the UK remains a viable place of transshipment. The failure of the UK to move towards automation will make the UK a less desirable transshipment location.

*Do you plan to handle taxes in the same way as duties e.g. VAT?*

Tax will be handled slightly different. The UK proposal is to align on cross border VAT rules with the EU so that goods can continue to move smoothly across the border without the need to make VAT declarations. Current processes for RoW would remain in place.

### **Customs and Trade Facilitation**

SD (US) outlined the US approach in a bilateral FTA. The US seek to achieve two objectives:

- Take what has been done globally and improve in this area. By setting further obligations that will help enhance the implementation of these agreements.
- To address concerns from stakeholders and use this to enhance and improve the global agreements

The US have set a new standard for C&TF in north America, as can be seen in the latest USMCA agreement. The focus is on transparency, i.e. information available online to exporters regarding exporting rules, fees and taxes. Preserving due process is also a key priority for the US. Protecting the rights of traders and ensuring that their rights and obligations are known and respected by appeals and advance ruling. SD highlighted current work that the US is undertaking in penalties as an example of this. The US has a successful voluntary disclosure programme, in which traders can admit to having made a mistake in customs declarations and pay any money



owed. This does not count as a penalty as they have come forward voluntarily. Traders find this valuable and successful.

Finally, SD outlined US interests in cost effectiveness and time. The US seek to reduce data and document processes that do not enhance compliance. Their focus is on the quick release of goods and procedures that reduce time and admin burden. E.g. AEO Schemes.

NF questioned whether there were any elements of C&TF that cause problems in negotiations even when countries agree to their benefits.

SD explained that there is always an element of what countries are willing to commit to on paper. Countries may not wish to be responsible for knowing where all their fees are going. The US has found that generally including an article in a bilateral agreement will improve the domestic situation. E.g. a key US concern is express shipments, by adding automation to FTAs they have been able to improve this domestically. The US when negotiating a new bilateral agreement would be disappointed to see anything less than the ambition that they have already achieved.

*RD questioned whether there are areas where it would be useful to exchange information e.g. fees and charges or US experience on how they created a single window.*

SD responded that in terms of preparatory conversation it would be beneficial if the UK shared where their current stages are in automation and how far they are willing to take this. In particular whether the UK could share Data specifics to the UK that the EU would not hold.

**The UK agreed to share information in this area at a future meeting.**

SD continued that in areas of EU legislation, the EU commitment is generic, and the details of implementation is left to member states. The US would be interested to hear UK plans e.g. an appeal system to return duties, *what will penalties look like what is the new process?*

**The UK agreed to share information in this area at a future meeting.**

RD asked whether the US could discuss their involvement in the TFA and how they have built upon these principles. SD explained that in early US FTAs e.g. Singapore/Chile most customs commitments revolved around advance shipments, appeals etc. The TFA reflects many of these customs areas, but also commitments that would not normally be found in a bilateral customs chapter e.g. inward processing can be found in an FTA but not necessarily in the customs chapter. Since the TFA the US has negotiated TPP and US MCA. These FTAs contain articles that go beyond TFA e.g. Publication. Previously the requirement has been that information must be published in a Gazette, this is now required to be published online as this is more useful to traders.

SD continued that there are other valuable articles that the US utilises that have not been included in the TFA, e.g. standards of conduct. USMCA contains the obligation that a customs officer should not use penalties in a way that would benefit the officer. It should be clear that no remuneration of a customs officer should come from giving penalties. Officers should not have any conflicts of interests between work and personal life.

AF mentioned that the TFA crosses over several areas, what would you give us as an example of the best US customs chapter. SD answered that the USMCA is the most recent and up to date example of US ambitions in an FTA customs chapter.

### **Key Actions and Next Steps**



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- No Key actions were agreed in this meeting

**Session Lead Analysis/Comments**

As set out above, a useful couple of meetings, friendly in tone and helpful in preparing the ground for future engagement but no urgent follow up. We agreed to aim to share more information about our likely future customs regime at a future unspecified meeting, subject to the large dependencies on EU negotiations, but this was a soft commitment in recognition of the uncertainties about the development of the future regime.



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## INVESTMENTS

Date: **November 5, 2018**

Time: **10:45 – 17:00**

### Participants

| Name                | Department/Directorate                  |
|---------------------|---|
| Lola Fadina         | DIT – DD Investment                     |
| Matt Ashworth       | DIT Investment                          |
| Chrysoula Mavromati | DIT Legal                               |
| Rebecca Fisher-Lamb | DIT – DD Services                       |
| Johanna Michael     | DIT – Services                          |
| Jaya Choraria       | HMT                                     |
| James Flannery      | HMT                                     |
| Ian Bhullar         | BEIS                                    |
| Lauren A. Mandell   | USTR - Deputy Asst. USTR for Investment |
| Emily Kilcrease     | USTR - Investment                       |
| Thomas Fine         | USTR - Services                         |

**Also in attendance at margins:** US officials from US Treasury, State Department, Dept. of Commerce, Small Business Administration.

### Key Points to Note:

- USTR presented on the key provisions of the USMCA Investment chapter, and how the US's thinking has developed compared to previous practice. There was a particular focus on the implications of the changes to US approach to ISDS, minimum standard of treatment, national treatment and most favoured nation. Other areas discussed included the US thinking on right to regulate and provisions around CSR and Senior Management and Board of Directors (SMBD) within the chapter.
- The mood of the session was highly collaborative, and the US welcomed the opportunity to spell out clearly why it has adopted the positions within USMCA noting this was a negotiated outcome. The US was respectful of the fact that the UK's policy positions on investment are still under development.
- The US was particularly robust on the opposition to the EU's proposed Multilateral Investment Court (MIC) ('a seriously flawed approach') and that adopting such an approach in a future UK-US FTA is 'untenable with US preferences'. They were clear that the 'traditional ad hoc tribunal' approach is their favoured method, particularly as it is the system in which they have won 17/18 litigation cases. US equally clear that a 'one size fits all approach' MIC, which can 'enshrine misunderstood precedents', is not the way forward and they would look to 'convince the UK otherwise' in any negotiation. If the UK preferred a court mechanism it would be a 'high level concern' for USTR and Ambassador Lighthizer personally. The US specifically questioned the UK's ability to manoeuvre during any IP and at the 1st-5th April UNCITRAL meetings and in multilateral negotiations going forward given the duty of sincere co-operation with the EU.



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- On areas such as CSR inclusions, the US was eager to point out that while the provisions in USMCA cover the OECD guidelines on Multinationals, domestic law should bear most of the weight of these provisions, and not the text of an FTA. US continues to have concerns around recent trend for agreements to include separate articles on the “right to regulate” given this exists under international law and is also enshrined in the preamble of the agreement.

### **Report of Discussions and Outcome:**

#### **USMCA**

LM (US) outlined the investment provisions in USMCA. He had led on the investment negotiations and said that the final text broadly reflected traditional US principles on investment protections, such as national treatment and MFN, minimum standard of treatment (‘MST’) but also some improvements. Aon both the defensive and offensive side: the former include mainly clarifications to the different provisions, which can also be found in (CP)TPP, to assist tribunals in their interpretation; improvements on the offensive side include, among others, barring incentives for companies to use local technology, in stark contrast with previous US practice. On investor-state dispute settlement (ISDS), the US took a new approach with USMCA. The provisions only apply between the USA and Mexico, while disputes between Canadian investors and the US or vice versa will be referred to state-state dispute settlement. With respect to Mexico, there are two approaches: a) Annex 14D which applies to ‘all investors/all sectors’ disputes. In this case, investors may only bring claims for post-establishment National Treatment, MFN, and Direct Expropriation (as opposed to previous US practice which also covered pre-establishment NT and MFN, MST and indirect expropriation). Foreign investors must pursue local remedies in the host state for at least 30 months before bringing a claim or until they obtain a final judgment before that time; b) Annex 14E covers disputes arising from contracts with the federal government in a limited number of sectors (oil and gas, power generation, transportation and infrastructure) and allows for ISDS claims based on the totality of the UMCA investment protections, whilst pursuing local remedies will not be a prerequisite. Again, this only applies to the US and Mexico. Interestingly, under (b) full protection is granted to the affiliates and subsidiaries operating in the same sector even if this other investment is not conducted under the same contract.

LF (UK) asked if the changes to ISDS signalled a change to the US approach for future FTAs. US replied that USMCA should not necessarily be seen as setting a precedent given specificities of these negotiations and the ease with which US companies could relocate to Mexico. For example, some changes were consistent with provisions agreed in TPP and other changes were a “negotiated outcome”. CM (UK) asked how the US envisaged the state-state mechanism to play out in practice, including whether this could possibly prejudice access of SMEs to dispute settlement given that investors will need to lobby the government as in the case of WTO disputes. The US replied that their goal has always been to ensure that US companies have access to dispute settlement, but where ISDS was eliminated USG could need to engage to make sure companies were fairly treated. The US had not yet come to a view as to how to ensure that the traditional redress (including compensation) available through ISDS could be delivered through state to state mechanism. UK asked about ISDS coverage for financial services claims and US replied that they’ve never had ISDS provisions for the full scope of financial services claims, though US bilateral investment treaties provided some coverage. Reactions to the USMCA ISDS provisions has been mixed, with US business glad that there are some ISDS provisions, though some were unclear as to how some sectors had been chosen and some wanted broader application.



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Other ISDS-related novelties in USMCA include the definition of ‘claimant’ in chapter 14 which specifically excludes an investor that is owned or controlled by a person that the other Party considers to be a non-market economy. LM (US) further pointed to Article 32.10 on non-market economies, which provides that if one of the other treaty partners seeks to negotiate with a non-market economy, there is a requirement to present the text to the other party whilst the latter maintains the right to terminate the agreement should the agreement with the non-market economy enter into force. “It’s a broader concern with non-market economies using the benefits of the Investment chapter to use ISDS against the United States and a broader concern that they don’t follow the rules, engage in practices that are significant enough that they shouldn’t have access to these tools. We don’t want to give investors from those jurisdictions access to those tools, due to the threat they pose. The fact is that even if there are few or no enterprises that meet this definition currently, there could be enterprises that meet this moving forward,” explained LM (US). US specifically name-checked China in this respect.

LM (US) also referred to certain amendments to the provision on awards. These include a clarification that an investor may only recover based on satisfactory evidence for loss that is not purely speculative. This is an affirmation that there must be an evidentiary basis for the award of damages. The other change is Footnote 26, regarding remedies that a tribunal may order. Essentially, tribunals may only award monetary relief. Stakeholders have looked for specific language, such as this, to make clear an award does not trigger changes to laws and regulations. LM (US) further explained that the ‘for greater certainty’ language is intended to calibrate the meaning of certain contentious provisions.

As it relates to the concern of “double hatting,” where arbitrators concurrently serve as counsel, both sides agreed that the situation raises potential conflicts of interest. However, LM (US) noted that a sweeping ban would “eliminate the diversity of the pool of arbitrators” and that a “wide choice [of arbitrators] is very important.” He also noted that it would negatively affect young arbitrators ... you may want a mix of young and old arbitrators. LF (UK) stated that “it’s useful to understand the real impact on cases and the outcomes of tribunals; this is what we are interested in.” While not perfect, pointing to the International Bar Associations rules on conflicts of interest (“IBA Rules”) and supplemental guidelines, they are “the best we have,” said LM (US). He also mentioned that a lot of work is being done as it relates to the Code of Conduct for arbitrators, i.e. ICSID/UNCITRAL work.

### **Minimum Standard of Treatment (“MST”)**

LM (US) noted that the US approach to MST is “distinct” from that found in other investment agreements in that the US links MST to customary, international law (CIL). “For us, this is a critical concept,” said LM (US). He explained that from their perspective where the standard language on MST/FET is provided without tying it to CIL, tribunals have a lot of unchecked discretion to interpret what that means. To lift any uncertainties regarding the content of the MST, the NAFTA Commission (made up of the Trade Ministers of Canada, the United States, and Mexico) issued in 2001 a binding note of interpretation, which provided that the MST is linked to the CIL and thus is distinct from an autonomous standard. The US has made clear in their submissions before arbitral tribunals that the MST is an umbrella concept reflecting a set of rules that, over time, has crystallized into CIL which requires establishing State practice and *opinio juris*. According to the US, there are two standards that have been fully formed under the CIL: the denial of justice and full protection and security standards.

The Trans-Pacific Partnership (“TPP”) agreement was raised as another example of trade deal clarification. In TPP, there was another clarification on legitimate expectations, which has been incorporated in the USMCA too. The language sets out that the mere breach of an investor’s legitimate expectations does not result in a breach of MST. This clarification was added in





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response to the *Bilcon* case, where the tribunal placed a great deal of importance on the investor's legitimate expectations to make a finding of the MST breach.

Another clarification that has come up in the context of litigation is this relating to the burden of proof. The claimant bears the burden of proving certain state conduct is violating the CIL. The US has repeatedly made this point in the submissions before arbitral tribunals.

LM (US) also discussed the 'open vs "EU" closed list' approach to the provisions on "fair and equitable treatment". The US questioned what is the theory of having a closed list and whether this is about providing greater rights to investors. Although their understanding is that this has been intended to provide a narrower scope, the concepts contained in the closed list are subject to a great amount of subjectivity, which could result in providing investors with wider protections and lead to increased claims than originally envisaged. CM (UK) noted that NAFTA tribunals have not always consistently interpreted the MST, pointing to certain NAFTA awards. In response, LM (US) explained their view that in those cases where the US has been a respondent, the tribunals have consistently interpreted the MST because of the consistent way the US has been pleading its cases, most recently in the *Glamis* and *Apotex* cases, whereas other tribunals might have not been as consistent because of the inconsistent way other NAFTA states have pleaded their cases.

LF (UK) noted that as the UK looks to previous practice and the EU's closed list idea provides an opportunity to further clarify this. Though she cautioned that "we haven't moved away from our previous treaty approach." This will be something to discuss in due course.

### **National and Most-Favoured-Nation ("MFN") Treatment**

LM (US) noted that the MFN treatment rule is parallel to the national treatment rule. The US noted that the non-discrimination standard is intended to protect the full life cycle of the investment. They also referred to the distinction between 'in like situations' language that appears in older US treaties and 'like circumstances' noting that these are used interchangeably and there is no actual difference in their meaning. Whether treatment is accorded in like circumstances depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors on the basis of legitimate public welfare objectives. The US noted that the 'in like circumstances' requirement has been interpreted with a remarkable degree of consistency by investment tribunals. "Post-2004 and in the USMCA, we explicitly clarify that you cannot invoke ISDS under other agreements. We would want to do the same in the UK-US FTA," LM (US) specified. This aligned with MA's (UK) description of UK emerging policy thinking on MFN and ISDS if it were to be included in future agreements. USMCA also contains a clarification of the term 'treatment' which may include measures adopted in connection with the implementation of substantive obligations in other agreements but explicitly excludes the provisions themselves. CM (UK) asked why they have introduced this clause in the dispute settlement chapter (which only applied between the US and Mexico) as opposed to the substantive part, where it normally appears in other agreements. LM (US) replied that they consider this to be a unique ISDS issue that is not expected to arise in the context of State-to-State dispute settlement because it would raise questions of treaty-shopping that no government would argue on behalf of their investors.

On burden of proof, LF (UK) asked for clarification on the burden of proof standard required by complainants. LM (US) pointed to the *United Parcel Service of America, Inc. (UPS) v. Government of Canada* case, which articulates the three-step standard. In line with this, a complainant has the burden of proving nationality-based discrimination.



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The US went on to explain the distinction between ‘best in-state’ vs. ‘best out-of-state’ treatment. “Our normal practice is state-level treatment, you compare state-to-state, not state-to-federal,” said LM (US). “Traditionally, the US goes for the ‘best out-of-state’ treatment: foreign investors get the best treatment that Florida accords to investors from other states. We do comply with this rule,” said LM (US). The US also noted that they can move to provide “best in-state” but this would be subject to negotiated NCMs.

On pre-establishment ISDS claims, LF (UK) explained that traditionally the UK (and EU) have not opened up ISDS to pre-establishment claims, as opposed to the US, and asked why under Annex 14D pre-establishment NT and MFN is out of the ISDS scope. LM (US) responded that the goal was not to “admit purely speculative claims.” He also explained that emphasis has been put on the rebalance of ISDS and FDI incentives: they don’t want (US) manufacturing companies to move across the border (to Mexico) only to benefit from pre-establishment protections. This is to avoid non-market incentives for US investors, which is why protections are only limited to ‘extreme’ state conduct such as direct expropriation and violation of the NT/MFN post-establishment.

He then pointed to the Keystone Pipeline case as a pre-establishment case example. In Keystone Pipeline, contracts were in place and infrastructure was developed in preparation to receive approval to make the pipeline operational. However, LM (US) said that they haven’t identified a purely “pre-establishment” national treatment case.

**On Addressing Corporate Social Responsibility (CSR), Human, Labour and Environmental Rights Using Trade Agreements**

LM (US) set out that, “If you look at the preamble of the USMCA, we always have very strong language stating that we view the obligations across the agreement that it protects sovereign rights, labour, etc.” He also said that the way to strike the right balance – when signalling – is accomplished by “how you draft the rules, the definitions. And we point to litigation on how these provisions function. There are a lot of tools that we use to explain our approach,” according to LM (US). The US was critical of a separate standalone right to regulate carve out, noting that this could have unintended consequences: if there is an explicit provision in the investment chapter does that mean that the right to regulate does not exist with respect to other chapters of the FTA? This goal is better served by introducing strong preambular language that recognises states’ powers and extends to all chapters of the FTA.

According to LM (US), their trade agreements do not typically address corporate social responsibility (CSR), nor do they impose obligations on investors, because domestic laws are best placed to regulate investors’ behaviour and including such provisions would suggest that there is some limitation in domestic laws. However, he explained “governments are recognising that it’s important to encourage enterprises to act according to corporate responsibilities that both countries endorse,” and stakeholders (such as NGOs and other groups that examine US treaty practice very carefully) find value in this. He said that the US looks to OECD guidelines on this matter. In fact, corporate responsibility codes of conduct were included in USMCA, LM (US) pointed out.

When asked by CM (UK) why the US did not adopt the language of “subject to laws of the host country,” LM(US) replied that there are other ‘well-established’ doctrines under CIL such as the ‘unclean hands doctrine’ which would bar a claim that is based on the wrongful act of the investor. LM (US) further added that this language lacks the nuance between failure to adhere to certain formalities and cases where the investor has committed more serious offenses (e.g. corruption). He also mentioned that the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”) was the first negotiation where the US included the first corporate responsibility provision, which was carried into the USMCA.



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When CM (UK) asked why bottom-to-race provisions on labour and environment were not mentioned in the investment chapter of the USMCA, LM (US) pointed to Environmental Labour chapters: “The language appears in the Environment and Labour chapters of the FTA that apply across the agreement. Just because it’s not reflected here doesn’t mean that it’s not important to raise,” said LM (US).

### **On Senior Management and Boards of Directors (SMBD)**

This rule tends to be less contentious for both the US and its treaty partners, and prohibits a host country from requiring a foreign investor to appoint senior management of a specific nationality. However, the rule allows a Party to require that a majority of the board of directors is of a particular nationality or to reside in the territory provided that the requirement does not ‘materially impair the ability of the investor to exercise control over its investment’. When CM (UK) asked LM (US) what the rationale of this rule is and whether he could provide examples of US legislation that provide for such cases, LM (US) said that he would look at their practice and get back to UK with an answer. The UK further queried whether the nationality requirement could possibly be a condition for admitting an investment that is subject to screening and the US explained that indeed such a condition might be imposed as a matter of practice, although not explicitly envisaged in any statute.

### **On Multilateral ISDS Reform; the UNCITRAL Reform Effort**

LM (US) noted that the US and UK are both members of the UNCITRAL Commission and that Working Group III has debated reform of ISDS procedures for the last one and one half years. Both the UK and US delegates had just returned from the Vienna Working Group where the parties had reached agreement that there are some concerns with ISDS and that reform was desirable. UNCITRAL has considered concerns related to consistency and predictability of the interpretation of treaties, ethics, arbitrators, and the cost of ISDS procedures... Now the question will be to consider what reforms to pursue. LM (US) also noted that it hoped that having left the EU, the UK and US would be able to cooperate during the next working group from 1-5 April 2019... The US continued to have severe concerns with respect to the EU’s proposals for a Multilateral Investment Court (MIC) and reiterated previous statements that the US Government would be very concerned at any indication that the UK was in favour of a MIC, they were clear that this would undermine the ability of the US to work with the UK in other forums including in the context of the FTA.

LF (UK) advised that the UK was aware of the US position and would remain actively engaged in the UNCITRAL process but would not prejudge the outcome. As an EU member state, the UK remains subject to the duty of sincere cooperation. MA (UK) then asked LM (US) what his perspective on work plans are, in terms of what the US would suggest. LM (US) flagged the US would seek to focus on: parallel proceedings, transparency, and ethics, as “these are things that don’t exist in 95% of trade agreements”.

### **Key Actions and Next Steps**

- Noting usefulness of discussions to date, agree to further exploration of outstanding issues and respective positions on key provisions at the next TIWG. UK to provide a further update on policy development at the next session, building on emerging policy principles.
- On Multilateral ISDS Reform: UK and US will to continue to work together on this – similarly to the UK-US Trade and Investment Working Group forum – in the various multilateral fora considering this topic.



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**Session Lead Analysis/Comments**

- *The mood of the session was highly collaborative, and the US welcomed the opportunity to spell out clearly why it has adopted the positions within USMCA noting this was a negotiated outcome. The US was respectful of the fact that the UK's policy positions on investment are still under development.*
- *The US specifically questioned the UK's ability to manoeuvre during any IP and at the 1st-5th April UNCITRAL meetings and in multilateral negotiations going forward given the duty of sincere co-operation with the EU. NB guidance and/or LTT from DExEU on this point would be appreciated.*



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## INTELLECTUAL PROPERTY RIGHTS

Date: **November 5, 2018**

Time: **13:15 –16:00**

### Participants

| <b>Name</b>           | <b>Department/Directorate</b>              |
|-----------------------|--|
| Sophie Brice          | DIT  |
| Maryam Teschke-Panah  | DIT  |
| Mark Prince           | DIT  |
| Paras Junejo          | DIT  |
| Gavin Jaunky          | DIT  |
| Anthony Christodoulou | DIT  |
| Victoria Donaldson    | DIT  |
| Adam Williams         | IPO  |
| Thomas Walkden        | IPO  |
| James Ham             | IPO  |
| Jonny Martin          | DCMS                                       |
| Sung Chang            | USTR                                       |
| Nancy Omelko          | USPTO                                      |
| Rachel Salzman        | US International Trade Administration      |
| Linda Quigley         | USPTO                                      |
| Sarah Bonner          | US Small Business Administration           |
| Benjamin Levin        | US Legal                                   |
| Paolo Trevisan        | USPTO                                      |
| Anne Snyder           | US Department of Health and Human Services |
| Jennifer Blank        | USPTO                                      |
| Elizabeth Kendall     | USTR                                       |
| Kevin Amer            | US Copyright Office                        |
| Ed Gresser            | USTR                                       |

### Key Points to Note

- Introductions to the new team at USTR and an overview of key achievements to date.
- Highlighted collaborative work to date on the US-UK SME Dialogue, in particular noting the success of the IP toolkit. Further thought is being given to how the toolkits can be incorporated into outreach efforts by both the US and UK. Over 100 stakeholders from both the US and UK were in New York on 1 and 2 November for the third SME Dialogue, and engagement was positive.
- The US gave an overview of the key provisions of the US-Mexico-Canada Agreement (USMCA), speaking in detail about trade secrets, copyright and patents.



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- The UK gave an overview of their approach to copyright, speaking about the Broadcasting Treaty, Artists' Resale Rights and the Copyright Directive.
- There was agreement that the Joint Economic Study (JES) should be published at the next TIWG in February 2019. The final action is to draft the conclusion and clear the completed JES through the relevant channels. It was agreed that the countries would continue to use the processes that they have used thus far, and that the completion and publication of the JES is a significant outcome of the TIWGs.

### **Report of Discussions and Outcome**

#### **Introductions and a recap of achievements to date**

SC (US) noted that as himself and Michael Diehl (not present) are new to the portfolio, it would be helpful to highlight the achievements of the US-UK Trade and Investment Working Groups (TIWG) in the past year.

RS (US) stated that both countries have put out a set of reciprocal SME Toolkits on IP. This has been a collaborative process, and text and data has been shared. The toolkits have been published on the UK IPO and USPTO websites, and were presented at both previous SME Dialogues. The US and UK are working together to think about how to incorporate the toolkits into outreach work by both countries. SB (US) added that over 100 stakeholders from both countries participated in the third SME Dialogue held in New York City on 1 and 2 November. There are plans for a sector-specific best practice exchange in April 2019, as well as work on additional exchanges regarding economic development.

MTP (UK) agreed that the SME Dialogue has been one critical part of a good set of discussions with the US and the SME Toolkit was one of the first key deliverables from the TIWGs. The TIWGs themselves have emphasised the positive discussions being held on IP, which has been on the agenda of every TIWG since July 2017. MTP also highlighted the Joint Economic Study (JES) as another short-term outcome that had been agreed early on.

#### **Overview of US-Mexico-Canada Agreement (USMCA)**

EK (US) stated that the negotiations on the USMCA concluded at the end of September 2018, and that this had been a relatively fast-paced negotiation for the US. The US is very proud of the outcome on the IP chapter, as it reflects the US's priorities in this area.

##### *Trade secrets*

EK (US) noted that trade secret misappropriation had a basis in NAFTA, and in TPP the US had committed to negotiating criminal penalties, which they were able to build on in the USMCA. The text also includes civil and criminal remedies. Canada and Mexico are both revising their laws on trade secrets.

MP (UK) asked about the overall thinking and policy intention behind criminalisation of trade secret misappropriation, particularly in relation to government officials and state-owned enterprises (SOEs). EK (US) stated that the US has seen trade secret theft in many different contexts and had identified SOEs as particularly problematic in China; Canada and Mexico understood this and the US wanted to articulate a high standard in the agreement. Economic espionage and business-to-business problems have been concrete examples. Trade secret theft is an IP concern that crosses many industries. Regarding criminal protections, EK (US) stated that the USMCA text is of a higher standard than the TPP text, and they were able to tighten the language of the TPP text with fewer carve outs for Canada and Mexico.



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AW and MTP (UK) asked if there had been any consideration of regulatory equivalents of protection? EK (US) stated that due to the strict timeline, there were a number of steps to take in order to make the process productive, with limited room for 'creative drafting'. The US do seek text that reflects as closely as possible in US law, but had they had more time, they might have tried to articulate more general models. They have to consider how prescriptive or descriptive to be, and there may be a narrative that draws on practices and regulations. More precise text is usually a mesh of both countries' FTA language. It also depends on the political charge – if they get approval for something entirely new, then they will seek this. EK (US) noted that every country is different, and every trade negotiation is different. The specific objectives will be set by the political direction.

MP (UK) asked about the evidence gathering process throughout the negotiation of the USMCA, and how the three countries came to a similar view. EK (US) explained that there are hearings and submissions, as well as giving stakeholders the opportunity to comment on notices that are published. The Department of Justice and Department of Homeland Security are sources of information, but are not necessarily public. When conducting stakeholder engagement, there is often information that is confidential to businesses. This makes it more challenging when negotiating an agreement because information and examples provided must be more general. Mexico's stakeholders indicated that they do not use trade secret laws, but would do so if they had more confidence in the domestic litigation process.

*Biologic medicines*

EK (US) stated that US law provides for 12 years of data protection for biologic medicines, and USMCA stipulates ten years. This was a particularly difficult issue to negotiate. This was an area of high priority for the US, but the language does not include everything that the US (or Canada or Mexico) brought to the table.

*Copyright and related rights*

EK (US) noted that full national treatment with no derogations was a priority and had been a point of friction between the US and Canada for a number of years. Copyright term was also a priority and the USMCA has exceeded the standard set in both TPP and NAFTA. Canada is required to change its laws accordingly. Other copyright elements of note are enforcement, technological protection measures (TPMs) and rights management information (RMI), and safe harbour provisions. Regarding safe harbour provisions, non-IP safe harbours have been included in the USMCA text for the first time. Canada have chosen to address the US notice and takedown regime through a system of 'notice and notice' and statutory liability.

AW (UK) asked how the US balanced policy objectives on term extensions with user needs and innovation, as this is always an area of tension in copyright. EK (US) stated that the US Supreme Court has consistently applied the theory that copyright is not just for economic good, but also for social good. The negotiation team received clear guidance from Congress and had precedents from previous FTAs. Copyright term is standard provision that the US seeks in other markets.

MP (UK) asked about how the US have moved TPMs forward. EK (US) stated that there were very detailed provisions on TPMs and RMI in previous FTAs, and Congress was not comfortable with much deviation from that level of detail. The protection of TPMs and RMI has led to further innovation, and gaps in these provisions would affect market opportunities. EK also noted that Mexico is seeking to implement the WIPO Internet Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty). The provisions on TPMs and RMI in the USMCA are more prescriptive than the provisions in TPP. EK also explained that the language in the



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USMCA goes beyond an expressive link to copyright equivalent. EK stated that this is an important trade objective for the US.

MP (UK) asked about the expected economic impact of the provisions on camcording in cinemas. EK (US) stated that it will have a huge impact because Mexico was identified as the second-largest source of camcording piracy.

### UK and US approach to Copyright

TW (UK) stated that the UK is looking at initiatives in FTAs that increase the cross-border availability of content services, while ensuring appropriate protection of IP rights. The UK would be looking for its trading partners to sign up to the WIPO Internet Treaties and the Paris Act of the Berne Convention, without reservations – this would be as a means to achieve consistency across all IP rights, and not just copyright. AW (UK) stressed the importance of recognising a balance of consumer interests in copyright, mainly as it is described as the right of the creator in various European languages. TW (UK) noted particularly that the UK is keen to see progress on the Broadcasting Treaty and indicated the UK's interest in hearing how the US sees this progressing. He also mentioned Artists' Resale Rights (ARR) and the recent American Royalties Too (ART) Bill, and stated that the UK is interested in bringing a level playing field across as many areas of copyright as possible.

MTP (UK) gave an update on the consultations in the UK on trading with the US, Australia, New Zealand and CPTPP. The consultations closed on 26 October and the submissions are expected to reflect the need for balance as mentioned earlier. The UK has a strong creative sector, who responded to the consultations; but there have also been submissions from civil societies and consumer groups, which show the balance in responses. The UK is also conscious of the need to look at areas which overlap with digital. MTP noted that there is clearly a strong digital component to copyright, but there is a need to also look at setting out provisions which are 'future-proof'.

SC (US), as a general matter, echoed what had been said about policy goals for copyright in FTAs. He stated that the JES shows that copyright-heavy industries play a large part in the US economy. With regards to the WIPO Internet Treaties, the US sees TRIPS as a starting point, but have many TRIPS+ provisions in the USMCA.

Regarding the Broadcasting Treaty and SCCR, LQ (US) stated that there are some issues that need further consideration and working out, and expressed an interest in hearing UK ideas on how to resolve any open conflicts on this subject.

Regarding ARR, KA (US) noted that the US Copyright Office had conducted a study on ARR some years previously; at the time, ARR in the UK was limited to living artists and later subsequently extended to heirs. The ART Bill has been introduced in the Senate and House of Representatives a few times, but there was currently no specific news to report on the progress of the Bill.

AW (UK) gave an update on the EU Copyright Directive – the draft text of the Directive is going through the European trilogue process and the focus of the Austrian Presidency of the EU is to see this Directive approved during their term. AW also noted that as a regional bloc, the EU has copyright protections that do not exist in the rest of the world; for example, *sui generis* database rights and the country of origin rule. Copyright is a property right and there are legacy rights which the UK will have to protect. There are technical notices on copyright in the event of a no deal with the EU, which the UK agreed to share with the US.





LQ (US) asked about the UK's interest in specifically articles 11 and 13 of the Copyright Directive. AW (UK) stated that if the Directive is agreed before the UK leaves the EU, it would depend on the length of any agreed implementation period as to whether or not the Directive would be transposed into UK law. The UK is very much interested in the subject matter, as it is important and will inevitably shape global behaviour in this area. UK stakeholders are particularly interested in articles 11 and 13 on the press publishers' right and value gap which, TW (UK) noted, are the two most controversial. The UK supports the European Council's approach to both articles.

SC (US) suggested that it would be useful to have an exchange on domestic copyright regimes in the US and the UK, for a better understanding. MP (UK) noted that case studies have been conducted in other areas, and that this may help to facilitate the discussion.

### **Joint Economic Study**

SC (US) noted that since his predecessor's departure, he has been trying to shepherd the procedural aspects of the Joint Economic Study (JES). The initial aim had been to have the JES finalised and ready for publication by the current TIWG, but unfortunately this was not possible. SC suggested a new publication date of February 2019, at the next TIWG, as well as a joint press release.

MP (UK) agreed with SC but noted that the parties would need to factor in time for clearance processes. He suggested a final draft be produced in January 2019, pencilling in TIWG 6 as a target publication date. Regarding the suggestion of a joint press release, SB (UK) stated that the parties should follow TIWG precedent and asked them to consider whether they would wish to do a joint press release or target a joint statement at relevant industry bodies as part of TIWG stakeholder events. SC (US) further suggested a stakeholder meeting following publication (if in February at TIWG 6) where stakeholders can put forward questions about the study. The completion and publication of the JES is a significant outcome for the TIWG, and the US and UK should maximise the impact this will have.

SC (US) also agreed that the parties would need to factor time for the formal process of sharing and clearing the study through the relevant channels. He agreed that the text should be finalised by early January. SC put forward the question of final editing and the agreement to harmonise the writing style as best as possible. TW (UK) stated that the IPO's Chief Economist has agreed to find the budget for editing, but it was noted that this would mean the study will be written in UK English; previously, the IPO has used copy editors. SC (US) agreed to discuss this internally and feed back at the next VC meeting.

It was agreed that the UK would take on the first draft of the conclusion. SC (US) suggested holding at least two VC meetings before 2019 – the first in the week following TIWG 5, and the second in early December, by which point the parties should have a clear idea of the timeline for finalising the JES. MP (UK) suggested that matters of editing and project management should run in parallel to completing the draft.

SC (US) raised one outstanding comment from the last VC meeting in mid-October – the US had asked the UK to provide UK-specific data. TW (UK) stated that the study containing the relevant data was near completion and that the data could be input in time for the February publication date.

GJ (UK) stated that the most recent comments from the US on the JES would need to be considered in detail, but the discussion has been encouraging. SC (US) stated that many of the comments on the study were simply agreeing with the UK's previous comments, and that the US



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had tried to include the additional sources and citations that the UK had asked for. MTP (UK) noted that the Economist Group was due to meet on Wednesday 7 November and the conclusions on JES from the current session would be fed into that meeting. GJ (UK) agreed to feed back to the Economist Group.

### **Other areas for cooperation**

SC (US) asked if there were other areas of cooperation that can be highlighted at TIWG 6 in February 2019. He suggested a potential deep dive on enforcement. MTP (UK) pointed out that there had been substantive and in depth discussions on enforcement at TIWG 4 in London in July, but the parties could plan for further discussion of any specific areas of follow up. Beyond enforcement, most areas of IP rights have been covered at TIWGs, aside from trade marks and designs.

TW (UK) noted that TIWG 4 had been a deep dive on enforcement from a UK perspective, where enforcement experts talked about online infringement and counterfeiting, the justice system, IPEC and access to justice- this included detail on the takedown of websites. He suggested that it may be useful to think about the US perspective on these issues.

SB (UK) asked if there were any areas where it might be useful to overlap IP and digital, as there had been some discussions at the SME Dialogue in New York. JM (UK) suggested trade secrets and algorithms in the USMCA. SC (US) agreed to discuss this with the Services Office. He also stated that he would discuss internally if there are any specific areas of enforcement that the US feel need further attention. He suggested the possibility of holding a stakeholder roundtable at TIWG 6 in February 2019 with those stakeholders who are common to both the UK and US. AW (UK) stated that the parties need to be conscious of stakeholders' priorities regarding Brexit at the end of March 2019, but also that the parties should focus on the JES.

MP (UK) agreed to update SC (US) on the short term outcomes (STOs) progress table. SC (US) asked if a private sector workshop on enforcement had taken place. TW (UK) stated that it would be useful for both parties to follow up on this; IPO enforcement colleagues had held initial discussions with the FBI, and the parties should get a high-level update.

### **Key Actions and Next Steps**

- Parties to review IP SME Toolkit and update if required.

#### **Overview of USMCA**

- UK internal discussions on approach to IP chapter, in particular trade secrets.

#### **UK approach to Copyright**

- Copyright follow-up at stakeholder meeting with USPTO representatives on 6 November.
- UK to share IP technical notices with the US.
- US to consider a case study of US copyright protection for the UK to comment on and provide views on how it would apply under UK law.

#### **Joint Economic Study**

- Parties to work together towards completion and publication at TIWG 6 (February 2019); UK to draft conclusion and address US comments on last draft.
- Parties to continue fortnightly working level VC meetings and monthly steering VC meeting.



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- Parties to initiate work on editing and project management; in particular, language (UK or US English) and publication format (online and physical).
  - UK to discuss internally with central US team regarding joint press statement and launch of JES on publication.

**Other areas for cooperation**

- Parties to discuss further collaboration on enforcement and follow up internally on IPO-FBI cooperation initiated in late 2017 by TIWG.
- Parties to consider a private sector enforcement session at future TIWGs or SME Dialogues.
- MP (UK) to speak with SC (US) about short term outcome (STO) progress chart and explain some of the initiatives that have been undertaken.

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**Lead Negotiator Analysis/Comments**

- Following the departure of the previous USTR IP lead after TIWG 4, this was the first opportunity to meet face-to-face with Sung Chang (SC) (USTR, Director, IP, Europe & Middle East) and Mike Diehl (MD) (USTR, Senior Director, IP, Europe, WTO and China). We held an initial informal side meeting and developed a good rapport with SC. MD was pulled into other meetings for most of the TIWG, concerning other parts of his portfolio.
- SC's role incorporates responsibility for the preparation of the annual S.301 report (published April) and Off Cycle Illicit Markets Report (published December).
- SC and MD have split IP rights between them for UK engagement – SC (Patents and Trade Secrets) and MD (Copyright and Enforcement).
- SC was keen for opportunities to collaborate in third countries. We could consider if there is anything we can do in relation to the Middle East subject to TPG resource. This may be useful to build our relationship with SC.
- There was recognition that the responsibility for the delays in the Joint Economic Study (JES) largely lay with the USTR. SC repeatedly apologised and committed to renewing efforts from USTR to drive this towards completion by February 2019.
- Overall, throughout both informal and formal sessions there was enthusiasm from USTR to build on the already positive relationship that has been established since the beginning of the TIWG engagements.
- The DIT-IPO combined strategy of holding a meeting at USPTO the day after our TIWG 5 IP session was particularly effective, enabling us to address Copyright in sufficient detail and to build relationships across the US agencies involved in IP FTA chapters.
- Our focus for TIWG 6 and during the interim will be to explore further detail on priority areas such as Patents via VCs and engage on topics that have not featured in TIWG meetings to date such as Trade Marks, Designs (by VC) and New Plant Varieties. Our priority is to complete the JES so that it is ready for publication at TIWG 6.
- The IP session was followed by a series of positive bilateral stakeholder meetings with the American Creative, Technology, and Innovative Organisations Network (ACTION) for



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Trade, the Pharmaceutical Research and Manufacturers of America (PhRMA), the Association of American Publishers (AAP) and the Association for Accessible Medicines (AAM). DIT and IPO met with representatives from each organisation to discuss USMCA and priorities for each stakeholder for future trade agreements.



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## GOOD REGULATORY PRACTICE

Date: **November 5, 2018**

Time: **13:00**

### Participants

| Name              | Department  |
|-------------------|---|
| Kate Maxwell—KM   | DIT   |
| George Radice—GR  | DIT   |
| Kim Wager—KW      | BEIS  |
| Rachel Shub—RS    | USTR  |
| Alex Hunt—AH      | US Office of Information and Regulatory Affairs       |
| Wendy Liberante   | US Office of Information and Regulatory Affairs       |
| Silvia Savich—SS  | USTR  |
| Matthew Jaffey—MJ | USTR  |
| Henry Furlong     | US Environmental Protection Agency                    |
| Joe Farranti      | US Environmental Protection Agency                    |
| Kate              | US State Department Trade Officer (US Embassy London) |
| Donald            | US Department of Agriculture                          |
| Carol             | US Department of Commerce                             |
| Robert            | US Department of Commerce                             |
| Rosalyn Steward   | US Small Business Administration                      |

### Key Points to Note:

- The majority of the working group session was spent on discussion around the GRP chapter of the USMCA. The US described GRP as a new element to US FTAs in TPP, but explained that the negotiated TPP language was weaker than they preferred, and so the GRP chapter in USMCA is much stronger and more ambitious.
- The US noted that this chapter had elements that will be carried forward in other US FTAs, such as the application of dispute settlement. When asked, the US said they prefer the text of USMCA than the TTIP GRP approach.
- The US requested that the next working group include further discussion on GRP with regulatory bodies present.

### Report of Discussions and Outcome:

#### **Updates from both Parties on public consultations, and KM (UK) updated on Brexit.**

Update from UK on the public consultations, which closed on 26th October. It is unclear at this moment how many responses are GRP/Regulatory Cooperation-related.

The US will be going out to public consultation shortly on the objectives of the FTA negotiation with the UK. The US has a statutory obligation to include GRP in its FTAs as a tool to improve domestic implementation of FTAs, and because GRP is seen as a key aspect in reducing non-tariff barriers to trade.



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## USMCA chapter

### Overview

RS (USTR) – Trade Promotion Authority has a statutory obligation to promote GRP. The GRP chapter in the USMCA is seen as a supplement to the SPS, TBT, Services and other chapters. It is an improvement on TPP, and inference from RS was that this would be their preferred text on GRP going forward.

The GRP chapter in USMCA is binding. It is full of obligations and subject to dispute settlement (please see below). Every clause is obligatory unless specified.

### Articles

The definitions are there for clarification, and to encourage USTR to coordinate with other areas of government.

Article 28.4: Internal Consultation, Coordination, and Review 1 (d) was inadvertently left out of TPP. It derives from the WTO after the Uruguay round.

Article 28.5: Information quality is very important for US government. The article is a distillation of major elements across sectors in order to support evidence-based decision making. The US private sector approves of the text, including a minimum standard of what governments should have guidance on.

Articles 28.6-9 : The US wanted to be practical with Canada and Mexico, and all three countries agreed it was important and useful to have baseline standards for public notice and a website. Early planning calls for an annual list of prospective legislation. RS said it was helpful to companies to know what was coming up.

Notice and Comment (Transparent Development of Regulations) – this is at federal level, across all agencies. Text of regulation must be publicly available for at least 60 days, accompanied by an impact assessment, an explanation of the objectives of the regulation, the rationale for the regulation, explanation of the accompanying data, and any alternatives to the regulation that were considered. Impact on trade to be considered.

Article 28.11: Regulatory Impact Assessments - AH (US) explained that an impact assessment is required of all US regulation – the threshold is \$100M of any cost benefits/transfers. It triggers compliance with OIRA Circular A4. However, evidence-based decision making is still required, even if the threshold is not triggered.

Article 28.12 – Final publication of final RIA (or other document) to explain how the regulation achieves the Party's objectives. RS said it was an evidence-based decision-making requirement. It also serves a challenge function.

Article 28.13: Retrospective review – The US does not require annual reviews of the stock of legislation, but statutory 5-yearly reviews are required in certain sector such as transportation, environment, etc. Agencies have similar requirements for retrospective reviews. Only provisions for small enterprises (less than 500 employees).



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Article 28.17: Regulatory cooperation – the article helps to coordinate the Agencies as well as USTR, and to facilitate trade. The article includes suggestions for regulatory cooperation, drawn from OECD IRC guidance, and the EU-US 2002 Agreement.

Article 28.18: Committee on GRP. There is a requirement in USMCA for a committee of government departments and regulators to meet at least once a year with a view to trade facilitation, and provide an annual report. Can include government representatives from other chapters of the USMCA, such as TBT and SPS. On the US side, it is coordinated from the North America office of USTR, as there is no joint USMCA Secretariat.

Article 28.19: Application of Dispute Settlement. It should only be used where there is either a fundamental change in policy by one of the Parties, or if there is sustained inaction or disregard of the obligations set out in the chapter.

**Additional Questions on USMCA**

- KW (UK) asked about the single accessible website because the UK has two sites that hold regulatory info. Why one website? Have that already or active decision?
- RS (US) said that 28.9 paragraph two allows for multiple websites as long as they are linked together.
- KM (UK) asked about the definition of small enterprises. RS (USTR) said that US had no problem with the term SME, but the unclear WTO definition stops the US from giving special treatment to SMEs. RS (US SBA) said that the small business administration defines small businesses as 500 employees or less with some qualifications on the industry and profits. The US does not acknowledge special treatment for medium companies. Giving SMEs fewer obligations is not the approach the US government takes, but something that could be considered.
- KM (UK) asked if dispute settlement would continue to be applied to GRP chapters going forward in other FTAs and RS (US) confirmed it would be carried forward in future US FTAs.
- KW (UK) asked about the US preference between TTIP and USMCA versions of GRP. RS (US) said that US prefers USMCA to TTIP text on practicality.
- KM (UK) asked about the advisory GPR committee and who advocated for it.
- RS (US) said lots of chapters have advisory committees. The US says that it institutionally decided a committee wouldn't be right approach. The US proposes a meeting mixed with policy makers and regulators without needing to establish a formal committee.
- KM (UK) asked if GRP is only on a federal level. RS (US) said yes because of divided powers in the federal and state level. While many states have an administrative procedure act, the federal government cannot enforce requirements.
- KM (UK) asked about how the negotiations on GRP in the USMCA went and RS (US) said that GRP was a priority from the outset. The US was eager to prevent GRP from being "dumbed down" like TPP or, as an afterthought, CETA. GRP finished in round 7 of the talks and the trilateral nature made it easier because everyone was ambitious, and everyone saw clear benefits to GRP.



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**Key Actions and Next Steps**

- The US requested that the next working group include further discussion on GRP with regulatory bodies present. KM asked if there were any particular regulators in mind, and RS mentioned Transportation, food, Agri, FDA, and EPA. We didn't commit to this, but will DIT and BEIS (BRE) will consider this further ahead of the next TIWG.

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**Session Lead Analysis/Comments**

A positive and productive meeting.

Most of the US attendees hadn't been present at the plenary so I gave an update on the consultations and Brexit, and on the amendments to the Better Regulation Framework. All were positively received.

The US gave us quite a detailed walkthrough on the GRP chapter, often explaining the rationale behind certain sections of the text. Indication was that this would be their preferred text going forward. Lots of food for thought, especially in relation to the application of dispute settlement to the chapter. The US seemed more ambivalent in relation to a regulatory oversight body for the chapter, but I expect them to come down on the side of having one. Overall, the session was very useful from a UK point of view.

The US requested that there be further discussion on the USMCA at the next working group, but with our own (appropriate) regulatory bodies in the room, so the US can understand any issues they may face. No commitment from the UK side - we'll need to discuss further with BRE





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## AGRICULTURE

Date: **November 6, 2018**

Time: **14:00– 18:00**

### Participants

| Name                | Department/Directorate |
|---------------------|------------------------|
| Ceri Morgan         | Defra                  |
| Russell Stokes      | Defra Legal            |
| James Dunn          | Defra                  |
| Sophie Brice        | DIT                    |
| Jennifer Groover    | BEW                    |
| Julie Callahan      | USTR                   |
| Roger Wentzel       | USTR                   |
| Mara Burr           | USDA                   |
| Joe Babb            | USDA                   |
| Silvia Savich       | USTR                   |
| Kate Skarsten       | US Embassy London      |
| Anne Kirschner      | USDA                   |
| Jessica Simonoff    | USDA                   |
| Matthew Jaffe       | OGC                    |
| Alexandra Whittaker | OGC                    |
| Sam Russo           | USTR                   |
| Dana Du Bovis       | USDA                   |
| Trevor Kolodny      | FSA                    |
| VTC                 |                        |
| Sinjini Mukherjee   | Defra                  |
| Geoff Richards      | Defra                  |
| Emma McCarthy       | Defra                  |
| Simon Allcock       | Defra                  |
| Kulin Patel         | APHA                   |
| Phil Munday         | Defra                  |
| Paul Dray           | Defra                  |
| Bob Firmin          | Defra                  |
| Annah O'Akuwanu     | Defra                  |
| Jack Moreton-Burt   | DIT                    |
| Rebecca Schneider   | DIT                    |
| Meg Trainor         | DExEU                  |



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**Key Points to Note:**

- We have mutually agreed the Veterinary Equivalency Agreement will lapse, instead committing to a process to establish continuity for identified good-will elements of the agreement.
- The Wine Agreement is still problematic, and may ultimately need political intervention to achieve continuity
- We have shared the Entry into Force text for the Spirits Agreement. We expect completion by end November
- We were notified of a successful inspection for the Organics Arrangement in September and have instigated next steps, including a timetable for exchange of letters
- The USMCA discussion was not as in depth as in other sessions, with the US unprepared to discuss technical detail, and advised not to by General Counsel in the room. We have requested a follow up telecon after the 90 day period.

**Report of Discussions and Outcome:**

The session was split into three parts: a discussion on continuity texts; a discussion on US policy areas and; a presentation from Defra on future domestic reform.

**Continuity Agreements**

**1. Veterinary Equivalency:**

The US opened with a broad summary of progress to date, reiterating the position of the US and the EU that this text was fundamentally not necessary to trade.

The UK agreed with this position, following appropriate cross-Whitehall sign off. We proposed to let the text lapse, noting the strong work from both teams to date, but only with a commitment to explore options for continuity regarding the principles of the agreement, as well as good-will mechanisms (such as swift responses and zoning protocols in the event of disease outbreak).

The US accepted this position, echoing the work to date. Defra will follow up shortly with a telecon date to establish form of the continuity statement and discussion on content.

**2. Wine Agreement**

The US, overnight, had sent wording for two Articles (Article 1 and Article 10). The UK accepted the wording on Article 1 and reserved its position on Article 10 while we work through the proposal.

The UK offered follow up from our October 23rd call on Articles 4, 5 and 7. The UK will shortly send further information, although the US are looking for a clear indication of a future policy intent from the UK that is independent of the EU relationship (as well as non-membership of the wine body, OIV).

The US raised the status of listed terms under Article 7. The US is waiting on a number of recognitions submitted to the EU over the past seven years, and are curious as to whether we will automatically update. This may be problematic, so we are awaiting the US list in order to compare.

The UK accepted deletion of Article 13 (Implementation) as it is surplus to requirements on both sides.



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The most challenging element was the discussion on traditional terms. The US do not want to accept our continuity approach, even for a no deal text. They described the position, whilst referring to the issues with the EU, as “the disease spreading”. This may require political escalation. The UK will send over the latest Wine Agreement text following this call. We are about 90% agreed.

### **3. Spirits**

The UK (this morning) received the Entry into Force wording. We walked the US through this and will send over ahead of the closing plenary. USTR will still need to review. We technically agreed the text in July. Very likely to be completed by ahead of the end of November.

### **4. Organics**

The US noted that the UK had comfortably passed the inspection in September. The UK will send over a timetable to keep the process fast-paced, outlining how to achieve our next steps. The UK also committed to sharing responses to draft letters as soon as possible. The US is due to send their draft report by the end of November, with a 30-day response time for the UK. Defra will aim for a much faster time than that.

### **Policy discussion**

We had given the US notification (in continuity calls) of our intention to ask about USMCA negotiations. However, the session was not as in-depth as others across the TIWG. We discussed timelines, stakeholder reception and the key updates and US perceived ‘wins’. However, the USTR General Counsel was in the room to ensure substantive discussion was not possible. A follow up will be arranged after the 90-day period. The US responded to a number of questions with probes on a future UK-EU Sanitary and Phytosanitary (SPS) relationship.

### **Presentation**

The UK walked through the latest on the 25 Year Plan, the Agriculture Bill, and the Fisheries Bill. The US used it as an opportunity to ask some technical follow up (on subsidy operations to replace Common Agriculture Policy), as well as to ask about a future EU relationship.

### **Key Actions and Next Steps**

- Individual actions and next steps are largely covered in the respective Continuity Agreements outlines.

### **FOR INTERNAL DISTRIBUTION ONLY**

#### **Session Lead Analysis/Comments**

It’s possible we’ve reached as far as the UK is prepared to go on the wine agreement. We will assess early next week and decide whether to recommend political intervention.

That agreement has thankfully not affected progress in other areas, such as Spirits or MRA.

The significant progress concluding on Spirits and Organics is most important to UK stakeholders. It is therefore a good outcome for the UK.



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On VEA, a mutually beneficial outcome has been reached that demonstrates the UK's intent not to continue with the same levels of bureaucracy when we leave EU, which has in the past effectively translated to barriers to trade.

ON USMCA, whilst disappointing that USTR did not go in to full detail, whilst being guarded by their General Counsel, the high-level summary is probably enough at this stage, given there was no innovation in SPS, other than updating to reflect Uruguay round, and the only substantive market access outcome was covered in discussion – the Canadian dairy break though, which may have wider ramifications for the UK. A further more in depth discussion will be needed on the GI changes, but this should happen as part of a wider GI discussion next year.

USTR continued to probe on UK plans for agricultural subsidy, but this is probably more for WTO leverage.



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## LEGAL SERVICES ROUNDTABLE

Date: **November 6, 2018**

Time: **09:00 – 13:00**

### Participants

| Name                  | Department/Directorate             |
|-----------------------|------------------------------------|
| Oliver Griffiths      | DIT                                |
| Rebecca Fisher-Lamb   | DIT                                |
| Johanna Michael       | DIT                                |
| John Carroll          | DIT                                |
| Jenny Pickrell        | Ministry of Justice,               |
| Jasmin Chohan         | Ministry of Justice,               |
| Gavin Baylis          | BEIS                               |
| Jonathan Goldsmith    | Law Society of England and Wales   |
| Ben Stevenson         | Law Society of England and Wales   |
| Richard Collis        | Solicitors Regulation Authority    |
| Christian Wisskirchen | Bar Council of England and Wales   |
| Michael Clancy        | Law Society of Scotland            |
| Gordon Jackson QC     | Dean of the Faculty of Advocates   |
| Eileen Ewing          | Law Society of Northern Ireland    |
| Sarah Ramsey          | Bar of Northern Ireland            |
| Dan Mullaney          | USTR                               |
| Tom Fine              | USTR                               |
| Laurel Terry          | Penn State Dickinson law School    |
| Jenny Mittelman       | State Bar of Georgia               |
| Carole Silver         | Northwestern University Law School |
| Kristi Gains          | American Bar Association           |
| Pat McGlone           | Washington D.C. Bar Association    |
| Darrin Sobin          | Washington D.C. Bar Association    |

### Key Points to Note

- The UK-US attendees agreed on the need for a structure to continue the UK-US legal services dialogue, noting the success of the roundtable meeting.
- To be successful, these discussions must be led and administered by industry and regulators, using the momentum of the bilateral discussions between central governments.
- The attendees discussed convening in early 2019 (possibly April around an existing legal meeting), following interim work on goals and objectives.
- The attendees agreed on the importance of focusing on narrower, short term goals, while also keeping in mind longer term objectives.



## **Report of Discussions and Outcome**

### **Opening remarks**

DM (US) set out a brief context to the roundtable and highlighted the opportunities in light of Brexit to lay the ground work for a potential UK-US FTA (Free Trade Agreement). A critical component of this exercise involves consulting with stakeholders to see what can be achieved, and participants were encouraged to identify short term opportunities that may not necessarily fit within the formal framework of an FTA.

OG (UK) set out that both legal services markets were starting from a position of strength, with shared common law values, world class legal providers, and significant existing trade flows. Regulator dialogue is not a new conversation, but one that is being renewed in light of new opportunities, with a chance to bring fresh perspectives and energy. There are lots of interdependencies between our UK-US relationship and the EU exit dynamic.

### **Legal Services in the US; Presentation by Laurel Terry (US)**

The roundtable began substantively with a presentation by LT (US). This centred on legal services regulation in the US, and the opportunities for future UK-US trade in legal services.

Regulation of legal services in the US is a state rather than federal matter. Rules for admission and foreign-lawyer qualification vary across the jurisdictions, with regulatory powers vested in the judiciary. The primary regulator in each state is the State Supreme Court, although powers will often be delegated to the 'frontline' regulator, which is usually a Court agency, or a bar association.

There are in addition a number of representative bodies which take an interest in US legal services regulation. This includes the Conference of Chief Justices (CCJ), which is an overarching body that has significant influence over the State Supreme Courts (although it does not have binding authority on regulatory matters). The CCJ adopts resolutions; for example, in 2015, the CCJ adopted a resolution supporting the American Bar Association's recommendations for regulations permitting limited practise by foreign lawyers in the US to address issues arising from legal market globalisation and cross-border legal practise. The National Centre for State Courts (NCSC) is also important. This organisation functions as a think-tank and non-profit consulting firm for the courts, and advocates for judicial and legislative reform. Finally, the American Bar Association (ABA) is the national representative body for lawyers and creates 'model rules' for legal services regulation for state bars to adopt, although these are not mandatory.

LT gave an opinion on future opportunities for UK-US legal services trade, with an initial remark that both jurisdictions already had open systems, and there should be caution in trying to fix elements that were already functioning well. It was suggested that any further regulatory dialogue should be held under a formal structure, with regular meetings, identifiable work streams, and standing agenda items such as data sharing.

The delegation was asked to ensure the ABA were kept involved because although the CCJ had the power to amend regulations, the ABA would do the "leg work in delivering this". To achieve progress the UK should specify particular states of interest. Furthermore, given regulation of US legal services lies with the states, the UK should focus discussions on trade in services with the regulators in the relevant state, rather than through federal government, which cannot bind states to any federal-level agreement.



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LT referenced the UK-Australia FTA and the annex on professional business services and suggested this could serve as a model for legal services in a future UK-US FTA. LT concluded by suggesting that in parallel to any regulatory dialogues, it was important to develop a narrative that focussed on the fact that any changes would be for the benefit of citizens, and that there would not be a lowering of standards.

**Legal Services in the UK; Presentation by Jonathan Goldsmith (UK)**

JG introduced the UK delegation presentation on legal services regulation in the UK. This firstly set out the distinction between the three legal jurisdictions of England and Wales, Scotland, and Northern Ireland, and the differing roles of solicitors compared to barristers, and how we arrived at this distinction.

In the UK, the 'title' of solicitor and barrister (or advocate in Scotland) is regulated. These titles are defined by the right to practice reserved activities, such as the right of audience, the conduct of litigation, and administration of oaths. The UK does not regulate outside of these activities, save for a few limited exceptions such as the provision of immigration advice. This therefore means that anyone can come to the UK and provide 'legal advice' on any matter of law outside of these reserved activities, without the need to be regulated as a solicitor or barrister/advocate.

There was then discussion of the rights of foreign lawyers to practice in the UK, and the routes to requalification into host title. A comparison was made to the US foreign lawyer regime, which JG suggested was far more restrictive in nature.

For example, 17 US states do not have Foreign Legal Consultant status, so no lawyer can practice in those states under their home title under any conditions. This was said to have caused problems when industry and business required foreign legal advice in these states but there was no means for that to occur. Similarly, 39 states do not have rules permitting 'fly-in, fly-out' provision of legal services, which again can have similar negative consequences for business where legal advisers are needed to fly in to meet client demands, or legal advisers face reprimand for providing services illegally (or 'under the radar').

JG then set out the UK regulator and professional body asks of their US counterparts. This comprised: explicit rules in all US states to allow all UK lawyers to be able to provide advice on UK law, international law and any third country law in which they are qualified (licensed) as foreign legal consultants; recognition of UK qualifications regardless of route to qualification; no minimum post qualification requirement for eligibility to be a foreign legal consultant; temporary practice permitted in all US jurisdictions; and establishment in all US jurisdictions.

On the point around recognition of UK title regardless of route to qualification, LT (US) suggested the US preferred to look at the duration and substance of someone's education, rather than simply accepting the 'title' as sufficient. This was an 'activity' based approach, which considers what subjects someone has studied, and then deciding whether that is adequate to meet State regulations. LT argued that this was to ensure high standards. JM (US) commented that she had seen the 'bottom of the barrel' when it came to foreign lawyer practice in the US, and there was a fear that if you opened up the admissions regulation to only look at 'title', rather than route to qualification, then this could pose a risk to the quality of service being provided.

JG (UK) responded by pointing out that across the EU, recognition of lawyers is title based, and does not involve a process of looking 'behind the title' to education. This was said to work well even though there were obvious differences across the EU jurisdictions.



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TF (US) suggested there could be work done to look at ‘recognition of experience’ for foreign lawyers wishing to qualify in a US state. However, TF suggested there was no empirical evidence which indicated that those with more experience are less likely to cause issues. RC (UK) suggested that most disciplinary action in reality is from more experienced lawyers.

### **Washington D.C. Bar case study on foreign lawyer regulation**

TF (US) introduced PM (US) and DS (US) from the Washington D.C Bar, who gave a short introduction and overview of their work which has looked at liberalising state admission and regulation of legal services in DC.

The Bar had established a taskforce on global legal services trade, which examined rules of admission for lawyers who wanted to qualify in DC but had not obtained a law degree from an ABA accredited law school. A brief outline was given of the policy recommendations from that work. This comprised of lowering the credit hour requirement so foreign lawyers had to study for less time at an accredited law school in order to take the Bar exam, and recommending that certain credit hours could be achieved by distance learning. These proposals are now sitting with the judiciary for a final decision on whether to adopt them.

### **Future opportunities for regulatory dialogue**

TF (US) thanked the delegation for their presentations and moved the conversation on to agreeing key actions and next steps. JM (UK) asked the group to think about how to constitute structures for dialogue, and how this would be led if it were to be a long-term, sustainable work programme. The UK Government is very happy to facilitate conversations where appropriate.

The group agreed to initially focus regulatory dialogue on the professions with the greatest interest; i.e. solicitors and barristers/advocates in the UK, and lawyers in the US. This would keep discussions streamlined in the initial stages but there could be scope to broaden out to other professions such as notaries and licenced conveyancers.

The Law Society of England and Wales offered their support in continuing the dialogue but stressed the need to ensure key players were involved, such as the Conference of Chief Justices. It was suggested that existing forums could be used to take these discussions forward; for example, there had been previous meetings between the CCJ and The Council of Bars and Law Societies of Europe, with a standing secretariat, and this could provide a useful model to follow. The Law Society also raised that they attended a number of calendar events hosted by the ABA, and that meetings could take place in the fringes of these events. The group responded positively to this idea.

CG (US) stressed the importance of establishing a secretariat, producing terms of reference for the group, scheduling regular calls, and agreeing goals/objectives. There should be a focus on narrower, more targeted goals initially, and a discrete goal could form part of a ‘pilot’ project, with longer term ambitions mapped out to steer the direction of dialogue. CG (US) reiterated the Law Society’s suggestion that occur in the fringes of the next big ABA conferences.

The Law Society of Scotland thanked government for their support and highlighted the unique time the sector found itself in, which in itself provided an opportunity to make real progress at a pace not seen before.

TF (US) reminded the group that incrementalism is the way in which progress will occur. Policy recommendations are useful as they tend to be adopted if the right relationships are in place. JM





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(UK) stressed that we would need to manage expectations across the sector, and that this would need to be a two-way conversation. The UK and the US governments would continue to feed in on FTA negotiation progress.

RFL (UK) highlighted there was a strong political push to come back out to DC in April, and that notwithstanding the previous suggestions this might be a good time to reconvene.

**Key Actions and Next Steps**

**UK/US Regulators and Professional Bodies**

- Agreed that establishing a formal structure would benefit progress, and delegates would think about existing mechanisms with might provide a platform in which to do that. The secretariat would be provided by industry, not the UK or US government.
- Agreed that focus would initially be on shorter term, more narrowly defined goals.

**UK/US Government (to note, actions were not assigned to particular individuals during the meeting, but will be in due course)**

- Agreed that both UK and US government were keen to support and help facilitate continued dialogue.
- Action – to explore agenda items for the next meeting. There was suggestion that Government could continue to bring an item looking at what might be aimed for in a UK-US FTA.
- Action – DIT to examine US-Australia FTA PBS annex as a model for a UK-US FTA.
- Action – DIT and USTR to follow up with delegates on readouts and planning for next steps.
- Action – DIT to examine consultation results and feed back to UK delegation.

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**Session Lead Analysis/Comments**

- Overall, very positive discussion that showed a genuine willingness from the U.S government and industry to address state barriers and drive domestic reform programmes.
- We welcome the suggestion of a possible formalisation of regulatory dialogue structures within an UK-US FTA. Historically, regulatory dialogue and the authority of state-level regulators have been a sensitive area for the U.S. We are conducting further analysis on the language in U.S.-Australia, CPTPP and KORUS to identify how these structures have been used in the past.
- Extensive presentations for a large part of the event covering the detail of legal services regulation. This was necessary for the first convening of the delegation and useful for promoting transparency between the jurisdictions, but it was a resource-heavy and time-consuming part of the agenda.
- The US are eager to follow up on the agreed actions points and the UK-side will need to consider carefully how best to manage resource given ongoing EU exit work for the industry.
- We need to consider who is best placed to lead from the UK industry and to provide secretariat support for future dialogues.



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- Clear that there was less interest on this from certain organisations, such as the Solicitors Regulation Authority, and Faculty of Advocates. We should be aiming to engage in more in-depth discussion with those who are best placed to drive this work forward, whilst keeping others updated on progress.
- This session was a positive start and we should aim to make further progress on this in the lead up to the next WG.
- Noted in follow up conversation that Dan Mullaney sought to manage expectations on the likelihood of progress in this area of work. This contrasted with Tom Fine's sentiment earlier in the session, who expressed more optimism. In any event it will be for the industry to deliver on any regulator dialogue and work towards mutual recognition, so Government should not on the face of it be a blocker to progress.



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## INDUSTRIAL SUBSIDIES

Date: **November 6, 2018**

Time: **09:30**

### Participants

| Name  | Department/Directorate       |
|---|------------------------------|
| Andrew Pickering  | DIT Trade Policy Directorate |
| George Radice   | DIT                          |
| Ian Bhullar   | BEIS                         |
| Jennifer Groover  | British Embassy Washington   |
| Roy Malmrose (RM)   | USTR                         |
| Robert Gerber   | USTR                         |
| Tim Hruby   | Department of Commerce       |
| Neil Beck   | USTR                         |
| Various other US attendees from USTR, State, Commerce, Treasury |                              |

### Key Points to Note:

- The UK and US exchanged views on our domestic approaches to subsidies and how this translates into both bilateral and multilateral contexts, and how the programmes of other countries are monitored
- Due to the early stage of both parties' policy development process, we did not obtain clarity on the desirability or potential scope of future FTA provisions on industrial subsidies as a separate matter to subsidies via SOEs. A future discussion should go into more detail about our respective bilateral ambitions on this topic.
- The US outlined its views on substantive subsidy disciplines in the WTO and how these might be reformed (eg through the US-EU-JP trilateral)
- The discussion also covered the application of subsidy rules to state-owned enterprises, both in the WTO and in CPTPP and USMCA.

### Report of Discussions and Outcome:

#### **Overview of domestic arrangements**

The UK outlined plans for the state aid regime as set out on the FEP White Paper. RM implied that he have liked the US to have internal controls of its own, and noted the propensity in the US for state- and local-level subsidy races to arise.

UK asked how the US ensured that states complied with WTO commitments; RM said this was challenging, they would like to do more monitoring especially of legislative initiatives. Notification is an involved process and is always maturing. That process can be a tool to educate the states about subsidy rules. If a case arises, states do tend to cooperate with the Federal govt (almost apologetically). Being able to identify relevant draft legislation is the key thing. Canada had been the one pushing more for sub-central application of the SOEs rules in CETA.



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## Industrial subsidies in a bilateral context

RM thought that the UK and US were probably more like minded than the US and EU.

The US had historically considered subsidies a multilateral issue, noting also that some had feared agricultural subsidies could spill in if subsidies were considered in an FTA context. RM also noted the 'unilateral disarmament' logic (ie if you disarm vis a vis one country, you're doing it multilaterally by default). But the US is wondering if FTAs can be used as a testing ground, perhaps for issues it would like to see addressed multilaterally. For SOEs, it's just that. A separate track to the Appellate Body ruling on public bodies in the WTO.

The UK asked how the US approach had changed. RM explained that in the TTIP context, the US was interested in SOE coverage and the EU was interested in subsidies coverage. The US could see the value of subsidies coverage - it was a 'holdover', historically.

The EU had concerns, though, about subsidy rules directed solely at SOEs, due to Art 345 TFEU, which mandates that public bodies and private must be treated equally. RM said there was a spill over to the work of the trilateral group now. On reform, the EU was having difficulties with the imputability doctrine in the EU, which says that an SOE couldn't be assumed to be acting on government's behalf, there would have to be evidence. RM said the US focus on SOEs grew two or three years ago, focusing particularly on China, at least in part due to stakeholder pressure. RM felt that the US has more flex on SOEs than the EU, simply because it has fewer.

On subsidies, the US finds it slightly harder to be aggressive though it has been a leader in the WTO.

The UK sought to press the US on what it might want to see in a bilateral context on industrial subsidies separate to the SOEs angle, but was not able to get a clear answer. RM answered most questions by referring back to SOEs. RM saw the subsidies issue more as a wedge to set standards for the multilateral space, rather than a bilateral focus.

## WTO reform

On WTO reform, RM explained that for ASCM-prohibited subsidies, there is no need to show adverse effects. For dark amber subsidies, there was a reversed burden of proof, that the defending party would have to show there were no adverse effects. The dark amber category and non-actionable category fell out of the rules at the same time. Developing countries had concerns about the overall direction of travel and felt the green box didn't help them. The US would like to add some subsidies to the prohibited category. This first appeared in its 2007 paper, covering equity to non-investment worth firms, unconditional aid, subsidies to insolvent firms without a restructuring plan. The US was being more aggressive than the EU or Japan. Putting something into the prohibited category is difficult. Showing what uncreditworthy means is hard (though RM noted that banks do this every day). USMCA also prohibited debt to equity transfers in some circumstances; they have seen this as an issue in China.

UK asked how much these issues were about China versus other countries. RM said almost all China. Tim Hruby added that similar issues are seen in the Gulf.

The UK asked about the public bodies ruling - how did the US think this could be addressed technically? RM agreed it was challenging. It had not yet been decided that re-opening the ASCM is the right way forward - the US is more sceptical of EU proposals in that direction. In the Doha



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negotiations, the US fought to prevent this. There is a risk of linkage to the anti-dumping agreement and others.

RM said that the endgame is still undecided. Maybe a plurilateral. It would have to include China. Maybe commitments could be made in Members' schedules. It would need time. The EU is asking the same questions. On monitoring other countries' subsidies, RM said that for China (across multiple issues), there is a team of 30-40 people ('ICTIME'?). The US suspects that China is deliberately situating its 'questionable practices' at sub-central level.

For the US, both a change to the rules and an improvement in transparency are both needed. There is a group who have agreed to make notifications amongst themselves (?) on semiconductors. RM said that the OECD has a study coming out which says aluminium overcapacity is due to state-owned bank loans and subsidised input pricing. Confirms the US analysis in its WTO case.

On the trilateral, the US, EU and JP were generally on the same page. There were some divergences coming up on language and the US was more aggressive. For the EU, the imputability issue is the big problem on SOEs. The US would prefer to do away with the public body concept and just say SOE, but the EU is nervous.

The UK told the US assuming a domestic regime was put in place, it might be able to be quite offensive in this space. As for what the UK might look to on US intentions, RM suggested checking the Doha papers where it was more aggressive. RM noted that while it notifies 700 subsidies, it still has defensives.

**Key Actions and Next Steps**

- No agreed actions but see below for areas for the UK to work on.
- A future discussion should go into more detail about our respective ambitions on this topic bilaterally.

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**Session Lead Analysis/Comments**

Atmosphere – Personal atmosphere was fine. RM is the US representative at the WTO SCM Committee, so there will be the possibility to catch up in Geneva as well. It appears that subsidies has been a long-term professional focus for him and he may have sympathies for going further than the US has done in the past. The US did not exhibit any concerns about the UK adopting the EU state aid regime. No questions on UK subsidy programmes or our intended approach in the WTO. The US was surprisingly open about domestic subsidy races and challenges in applying WTO disciplines to sub-central levels in the US.

Key Achievements of session - First discussion on this topic. Disappointingly, we did not manage to get clarity on the mooted change in approach from the US on subsidies chapters in FTAs. Unclear whether the fact that RM kept pushing the discussion onto SOEs means that the US has not considered stand-alone subsidies provisions, or whether this was because it was the only angle he had clearance to discuss. We will have to press them further next time, once their thinking has advanced any their domestic processes have moved on.

Areas to work on for UK ahead of next meeting



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- We should check if Art 345 TFEU is being brought over via EUWA, and if our lawyers think this is something for us to be concerned about. At the time, the US took the view that Art 345 shouldn't be a problem insofar as it would only require justification for treating SOEs differently.
- We should also get a legal view on the EU's imputability doctrine, its applicability in the UK post-Exit and what this means for our position on WTO reform.



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## STATE OWNED ENTERPRISES (SOEs)

Date: **November 6, 2018**

Time: **15:30 -17:00**

### Participants

| Name  | Department/Directorate    |
|---|---------------------------|
| Andrew Pickering (AJP)  | DIT                       |
| Matt Ashworth   | DIT                       |
| George Radice   | DIT                       |
| Ian Bhullar   | BEIS                      |
| Neil DeSouza  | BEW                       |
| James Manning (VTC London) (JM)                                 | DIT                       |
| Emma Stubbs (VTC, London)                                       | DIT                       |
| Dorottya Szeles (VTC, London)                                   | DIT                       |
| Edwin Mangheni (VTC, London)                                    | DIT                       |
| Roy Malmrose (RM)   | USTR                      |
| Robert Gerber   | USTR                      |
| Tim Hruby   | US Department of Commerce |
| Various other US attendees from USTR, State, Commerce, Treasury |                           |

### Key Points to Note:

- The US provided valuable insight into USMCA provisions (listing, de minimis, subsidies provisions, definitions), including what the US might be looking for from the UK in agreeing a chapter.
- Both parties agreed that there are commonalities between our domestic arrangements, trade policy attitudes and the role of Government in the economy.
- Both parties agreed to continue discussions to develop a ‘gold standard’ template together and keep progress moving forward. Both parties have much to gain in the future by setting out a precedent of having strong SOE chapters, with particular reference to the issues posed by countries with a larger SOE profile, including China.

### Report of Discussions and Outcome:

AJP outlined the agreed session objectives

- To further understand the US historic approach and aims for SOE chapters, building on our previous conversation in April 2018.
- To discuss particular language and concepts used in SOE chapters, including the newer elements in USMCA.

AJP noted that the preceding working group session on industrial subsidies had touched on SOEs, as the two areas are closely linked.



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**US concerns regarding SOEs and what forms of harm are the US' primary focus.**

RM outlined that in the past two or three years US stakeholders have increasingly raised concerns in particular in relation to Chinese SOEs and have pressed the US to develop rules to address these concerns. The primary sectors concerned are steel, aluminium and semiconductors, and also the fishing industry – for example in the WTO you can see some SOE impact in China's fishing industry.

The main concerns in China are subsidies provided to SOEs, regulatory action to promote SOEs and the creation of 'national champions'. In China SOEs are used to develop the economy, partly through subsidies, so the US looking to discipline the provision of subsidies and strive to have SOEs subject to commercial considerations and non-discriminatory treatment to ensure US business is treated fairly.

RM also set out the US' concerns related to the WTO – the US have had a number of adverse appellate body decisions regarding SOEs in China, which were related to the 'public bodies' concept. The US in their FTAs are starting to create an 'alternative track' to address SOE problems.

**TPP**

RM stated that TPP was the first US FTA to have separate chapter on SOEs. Many TPP rules are similar to WTO, such as SOEs being subject to commercial considerations, non-discriminatory treatment and subsidies rules. There is also a section dealing with subsidised investment under the heading 'injury'. This is aimed at targeting subsidised investment coming into a market that is causing injury – TPP and USMCA create a dispute mechanism to remedy that.

**USMCA discussion**

USMCA tries to go further than TPP, in particular creating additional subsidy rules, with 3 subsidy types prohibited – loans or loan guarantees provided to uncreditworthy SOEs, debt equity conversion, subsidies to SOEs that are insolvent or on the brink of insolvency without a credible restructuring plan. USMCA also includes an expanded definition of an SOE, including a 'control' limb not present in CPTPP, though which appears in a number of recent EU SOE chapters, as well as additional provisions on transparency.

AJP asked about the US's views on a possible OECD global reporting standard for SOEs. RM said this is the State department's domain and there is a need for the US government to collaborate more in this regard. RM added SOEs can also be approached from an APEC context, which China is also a member of.

RM stated that USMCA is absolutely more about setting a gold standard than addressing specific concerns with Mexican or Canadian SOEs. Mexico and Canada are likeminded, particularly in relation to their steel industries (they meet every year). USMCA in RM's opinion takes another step or two forward towards the US' 'ideal' SOE chapter. Nonetheless, Canada and Mexico did still have some reservations. As mentioned previously, moving a subsidy into the prohibited category is hard and needs to be defined clearly to help governments find the right line.

**Commercial considerations**





AJP asked what exact kind of practices are specifically covered by USMCA's commercial considerations provisions. RM stated that there is very little change from TPP in this regard. CPTPP Article 17.4 – here the US wanted to make a true commercial considerations standard and thus make the actions of a private enterprise the benchmark for SOEs. RM noted that although there are concerns about some SOEs being exempted from competition law or specific regulations, these provisions don't specifically try and address that issue. RM raised USMCA Article 22.5<sup>1</sup> in relation to this concern but admitted that he was not sure if it's 'all that powerful'.

### **Definitions of a state-owned enterprise in USMCA**

Attendees discussed that the definition has been broadened from TPP. TPP focused on majority ownership only, and the US received a lot of criticism for that definition (for example, that it didn't capture situations in which the Government has control without ownership). This criticism came from US businesses, who were concerned that there could be circumvention (mainly in relation to Chinese SOEs).

Attendees discussed the difference between state-owned enterprises and state enterprises. RM stated that state enterprise is a broader term, referring to entities controlled or owned by government. State enterprise is defined in the general definitions section of USMCA.

USMCA's new language says that if Government can control the entity through ownership interests, it's an SOE.<sup>2</sup> RM asserted that the US has always been cautious to link control to ownership – there must be control exercised via ownership interests, contrary to the EU's approach.

AJP queried whether the US had an idea of how to measure the control ownership limb in 'real life' situations. An example could be that of companies such as Facebook or Amazon, whose owners own 10% of shares but retain stronger control over decisions of the companies, therefore retaining in effect much stronger control than their shareholdings would imply. RM stated that each case needs to be examined individually on a case by case basis, which is very fact intensive, but that footnote 8 lists some examples. He added that there are infinite ways to demonstrate control. The US preference was initially not to have any examples of control and that footnote 8 was a 'negotiated outcome'.

AJP queried cases in which Government might exercise control without any ownership. RM was sceptical of this and said it had to be balanced with the risk of regulatory activities being construed as government control.

### **Non-commercial assistance – to and by SOEs**

RM confirmed that the non-commercial assistance provisions cover instances where SOEs provide government subsidies to other SOEs. AJP asked about subsidies from SOEs to private companies. RM stated that this is not covered because the chapter is 'about SOEs not subsidies to private entities.' The USMCA subsidies provisions are the US' alternative to the WTO's 'public body' case law. RM added that he sees this as one of the key advancements in USMCA.

### **Transparency**

In USMCA, the Q&A mechanism goes further than TPP, notably in the area of equity infusion (USMCA Article 22.10.4) - regardless of whether this equity infusion is deemed non-commercial assistance or not, Parties still must give information when requested. Once again, this



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provision is aimed at China – domestically, China has a new mechanism which establishes equity investment funds - 'private entities' where government has no control. An example is the IC fund<sup>3</sup> – the Ministry of Finance owns 1/3 and several SOEs own the rest of it.

The US would consider this an SOE. The US has asked China to notify this programme but in China's WTO trade policy review, they stated that this is a private enterprise. The USMCA provisions aim to pre-empt that kind of a response. The US believes that where there is government ownership, there must be a 'higher standard'. RM pointed out USMCA's transparency paragraph on equity capital (22.10.9) which sets out when information about government equity investment should be confidential.

While the US recognises that some programmes might be confidential, this is an area that the US would like to further develop. For example, perhaps the terms of a loan could be argued as confidential (though even this was not the US's preference), but the quantity of subsidies or equity capital should not. This is because if Government is providing taxpayer funds to another entity, that should be transparent.

### **Listing**

The US sees the listing provisions in USMCA as applying to all SOEs above the de minimis threshold<sup>4</sup>.

AJP queried what this list might look like in practice – would there be specifics about which activities were in scope of the chapter, for example. RM was clear that this was 'just a list'!

RM stated that he had not thought about whether US companies might want access to the list, but he had assumed that this list would be 'transparent in the wider sense'. RM stated that USMCA's listing provision 'does say publicly available' so he assumes that this would be on a website and therefore available to all. RM said he will have to check whether the list would be shared with firms. [USMCA provisions actually state that parties shall 'provide to other parties OR make publicly available on an official website a list'].

### **'Principally' engaged in commercial activities**

AJP queried how the US would determine the concept of 'principally' engaged in commercial activities. RM recognised that this might become an issue - SOEs often have public functions as well as commercial so the question is how best to target the commercial activities that are likely to be trade-distorting.

RM noted that the EU words this slightly differently – stating that if an SOE has both public and commercial functions, only the commercial activities would be in scope. But even so, in case of a dispute, parties would still have to divide commercial and non-commercial. RM's interpretation is that 'principally' is strong wording, that often results in an SOE not being in scope of the chapter. This is because what parties care about are commercial operations causing trade distortions not public policy functions.

JM queried borderline situations. RM asserted that transparency provisions could partly answer that – parties could question the list given on that basis. JM also queried the risk of letting some SOEs 'off' as they're not principally engaged in commercial activities, even in situations where their commercial revenue is over de minimis? This was not something RM has thought about before, but he drew attendees' attention to the 'two-pronged' test – firstly is it principally engaged in commercial activities, and then are these commercial activities over the de minimis threshold. With



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listing, you'd again need to self-determine whether an SOE was principally engaged in commercial activities. Q&A on this is permitted, so you could use that to query a list.

### **De Minimis**

RM confirmed that the USMCA de minimis is lower than TPP, but that the US' starting point had been 25 million SDRs. RM also said that they had not found a principles-based method for devising a de minimis starting point, and simply stated that the US 'prefers' a lower de minimis than 200M.

### **Sub central application of provisions**

RM stated that in USMCA negotiations, Canada was the demandeur on sub central application, as well as the US. In CETA, the EU 'forced' Canada to apply some rules sub centrally so they now had an offensive interest here as well.

In addition, many SOEs in China are sub central so this application is also offensive towards China. RM asserted that if you want a 'gold standard' chapter, you really should apply provisions sub centrally.

AJP queried how this would work in given the US' state system. RM stated that more 'sophisticated' state entities recognise this issue with China, so they'd be happy with this application. However, he noted that US states are apprehensive about this – asking about rules, identifying SOEs etc. The US doesn't have a great idea about what's owned at sub central level but stated that this was likely to be airports, hospitals, etc. The US have done some scoping work and are not terribly concerned, stating that there is probably only one SOE that produces goods at sub central level.

The US (Hruby) queried what the UK's 'sub central' level would be. AJP said that to some extent those details were still to be worked out. Trade policy is reserved to Westminster, but we work closely with the Devolved Administrations (DAs) on trade policy and are speaking to them to gain awareness of what entities they own. Similarly to the US, ports and airports have come up in these discussions.

AJP added that the DAs are broadly aligned with Westminster and were not generally in the business of using SOEs to distort trade. 'Sub central' is not clearly defined in the UK, but AJP noted that we have not identified anything to cause concern so far as to non-compliance – the UK's SOEs are run in accordance with international best practice at all levels. George Radice noted that this could be a discussion in future working groups and noted that this has been discussed in other sessions.

### **Designated monopolies**

AJP queried the US' understanding of the term to 'designate' in the context of designated monopoly provisions. Roy stressed not to read too much into it, but that the US understands this to capture 'overt action by the Government'. Legislation would be an obvious example of this – if Government legislates to ensure that only one firm is granted a monopoly. Roy agreed that in some instances licensing could be construed to mean designating but attendees discussed that if this does not overtly block other firms entering a market then this would not mean it was designated in practice.

### **Courts and Administrative Bodies**



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AJP asked about what Art 22.5(1) USMCA aims to do. RM explained that there are SE Asian countries where their own SOEs are simply not subject to local court jurisdiction at all, so US firms cannot challenge anything they do.

### **SOEs in the WTO**

AJP asked about the US position on WTO reform related to SOEs. The US stated they had made a proposal<sup>5</sup> in the context of the Doha Round suggesting that the prohibited category of subsidies should be expanded, together with increased transparency of any financial contributions to majority owned SOEs. Again, this was making a point about subsidies. The US noted that this was an aggressive proposal, but that they are continuing to push for further transparency on SOEs in the WTO, with support from Japan. There is no current reform discussion that reflects USCMA style transparency provisions on SOEs in the WTO.

### **State trading enterprises in the WTO**

AJP asked about the distinction between SOEs and STEs. RM doesn't work specifically on STEs and believes that the two concepts are separate. For the US, STE provisions are largely about non-discriminatory treatment, with links to the GATT article on commercial considerations.

### **Links with previous EU discussions (TTIP subsidies and SOEs chapter)**

The US asked the UK in the context of the subsidies session and raised again in the SOEs session, whether we, like the EU, had concerns about having both a subsidies and a SOEs chapter (related to Art345 TFEU<sup>6</sup>). AJP said that the UK was aware that there had been an issue but thanked the US for explaining it in more detail. The UK would take that issue away and think about it.

### **Key Actions and Next Steps**

- No key actions

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#### **Session Lead Analysis/Comments**

Atmosphere - Atmosphere was friendly, with the US responsive and open to questions on their USMCA approach and understanding of key terms.

Session was dominated by UK questions about USMCA. Surprisingly few hard questions back from the US – they did not seem inclined to ask about our own domestic arrangements in any detail.

Key Achievements of session - We have more clarity on US thinking on SOEs with both commercial and non-commercial functions (seemed favourable). We have learned about prior EU reticence in this area and we can take some legal queries home to make sure we won't have similar difficulties. We have a clearer understanding of the non-commercial assistance provisions and the use of 'control' in the definition of SOE.

Areas to work on for UK ahead of next meeting - The UK still has more work to do to understand our own ownership profile, and should come to the next meeting prepared to discuss the UK position in more detail – in particular the US probed on the definition of 'sub central' for the UK



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given the role of the DAs. We will also need to explore any defensives around transparency of government loans terms.



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**SERVICES**

(Readout delayed)



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**COORDINATION TEAM PLANNING**

(Sophie to insert)



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## MRAs

Date: November 7, 2018

Time: 14:00 – 17:00

### Participants:

| UK Name          | Department/Directorate    |
|------------------|---------------------------|
| Julian Farrel    | DIT                       |
| Henry Alexander  | DIT                       |
| Verity Threlfell | DIT                       |
| Sumeet Virdee    | DIT                       |
| Cynthia Morgan   | DIT                       |
| Anton Routledge  | DIT                       |
| Richard Thompson | DFT                       |
| Jon Elliot       | BEIS                      |
| Rhidian Roberts  | BEIS                      |
| Robert Morris    | BEIS                      |
| Phillip Highe    | BEIS                      |
| Andrew Preston   | BEIS                      |
| Ian Rees         | MHRA                      |
| Daisy Ellis      | MHRA                      |
| Lea Reynolds     | DEFRA                     |
| Meg Trainor      | DExEU                     |
| US- Name         | Department/Directorate    |
| Jim Sanford      | USTR                      |
| Ashley Miller    | USTR                      |
| Christine Brown  | USTR                      |
| Bryant Trick     | USTR                      |
| Matt Jaffe       | USTR Legal                |
| Rachel Shub      | USTR                      |
| William Hurst    | FCC                       |
| Mark Abdo        | FDA                       |
| Anne Kirchner    | FDA                       |
| Ramona Saar      | NIST                      |
| Eric Puskar      | NIST                      |
| Brandi Baldwin   | US Coast Guard            |
| Brian Woodward   | US Department of Commerce |
| Cara Lofaro      | US Department of Commerce |





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### Key Take-Away Points

- The US are resistant to the UK proposal of the Short Form Agreement approach to the Mutual Recognition Agreement (MRA) that was shared in September 2018 and want to take the Long Form Agreement approach. The UK highlighted that the timeline is becoming pressing in the event of a No-Deal scenario as the agreed, initialled and signed text would need to be in Parliament by mid-December in order to follow UK processes. Therefore, if the US would like to take the Long Form approach, there may not be enough time to go through and agree it. The UK asked how long it would take the US to prepare the equivalent 1998 EC-US agreement for the UK, the US responded by informing the UK that they would have it prepared within two weeks (by 21/11/18).
- The UK explained that if we are seeking to replicate the existing 1998 EC-US MRA, we will also need to incorporate the inactive annexes (Electrical safety, recreational craft and medical devices), and asked what the implications would be for the UK if one or more of the non-operative annexes was to become operational. The US stated that they have no intention to extend the annexes that are non-operative to us as they could never become operational under the EC-US 1998 agreement. Due to this, the US do not believe it would not make any sense to transition the annexes that are non-operative.
- The UK will be sending a paper answering the questions raised by the US Coast Guard on the latest version of the UK-US Marine Equipment MRA text.
- The UK will be sending a paper in response to questions posed by NIST in the July 2018 Trade and Investment Working Group.

### Record of Discussion

#### Item 1: Updates from Regulator-to-Regulator discussions

1. The US asked the of the extent and mechanism by which the UK will adopt the Marine Equipment MRA and how the UK will notify Conformity Assessment Bodies (CABs) on these three issues. The UK (DfT) explained that they have prepared a paper to answer the question and would be sharing it within the week however they have some issues on how market surveillance will operate.
2. The US explained that they would like to hear the answers to the questions NIST had asked in July. Particularly the two priority areas which were discussed briefly during the session:
  - a. **US Question 1:** ISO / IEC 17065 or ISO/IEC 17020 can be used; How will regulations be listed on the Scope of Accreditation for the UK?  
**UK Answer:** UK based CABs must gain accreditation and designation to test against the relevant MRA legislation. There will be no changes to UKAS' accreditation process. UKAS will continue to use the international accreditation standards, ISO / IEC 17065 or ISO/IEC 17020.
  - b. **US Question 2:** NIST provides RED and EMCD Technical Assessment Checklist to ABs for mandatory use for EC – OK to use for UK? Are there additional UK specific requirements at this time?



**UK Answer:** We do not foresee additional requirements. The European Union (Withdrawal) Act 2018 has passed all its Parliamentary stages, received Royal Assent, and become law. It will keep most existing EU law as UK domestic law after Brexit in order to ensure the continuity and completeness of the UK's legal system. This means that requirements will remain the same on our day of exit in March 2019.

3. The UK offered to send the answers to all NIST's questions over in text form and the US agreed that this would work for them.
4. FCC confirmed that they would be having a conference call on e-labelling with BEIS the following week and would update the UK on the outcome. BEIS noted that they have provided information on the research the UK are doing on e-labelling regarding the future of regulatory delivery and to learn how we might shape the future of e-labelling.

## **Item 2: Discussion of Draft MRA texts**

### 1998 EC-US MRA

5. The UK explained our reasoning for exploring a short form approach of *mutatis mutandis* as this approach would save both the US and UK a lot of work and not at the expense of legal certainty. It would also ensure continuity for economic operators on both sides who are currently operating under the EC-US MRA, and would avoid a cliff -edge. The UK explained that the exchange of letters would form the new agreement and would enter into force when the current agreement ceases to apply to the UK. If there was a decision that changed the EC-US MRA later, it would not be incorporated under the UK *mutatis mutandis* approach.
6. The UK talked through the articles of the Short-Form Agreement and explained that the UK wanted the current designation of CABs to continue. The UK explained that as the intent of the UK-US MRA is to replicate the existing EC-US MRA, we would need to incorporate the inactive annexes and asked what the implications would be for the UK if the EU and US made one of the non-operative annexes operational. The US informed the UK that they have no intention of transitioning the inactive annexes as they could never become operational.
7. The US (Jaffe) informed the UK that the short form approach is something that they could not agree to as they do not believe that it is transparent and find it confusing. The US proposed using the long form approach which would include Pharmaceuticals, EMC and Telecommunications. The UK emphasised the point of importance of ensuring that the entry into force language is consistent with wider EU-US agreements - notably the updated GMP annex, given that the US intended to base their draft on the US-EFTA agreement in which the GMP annex has not yet been updated.
8. The UK explained that timelines were becoming pressing in the event of a no-deal as the agreed and signed text would need to be laid in the UK Parliament by mid-December. The US agreed to prepare a long form text equivalent to the 1998 EC-US MRA (but based on US-EFTA) and to send it to the UK in two weeks (21 Nov).

### Marine Equipment MRA



9. The US explained their draft of a US-UK Marine Equipment MRA (received 15 minutes before the meeting), and that it differs from the EEA EFTA agreement as it only involves two parties whereas EFTA involves four parties. The operative provisions are replicated for the most part within the new text however they believe that legal references will need to be considered. The legal references depend on the EU withdrawal agreement and this occurs in several places where the agreement references the Marine Equipment directive.
10. The UK will review the amended text sent by the US and come back with questions during regulator-to-regulator discussions.

**Item 3: USMCA Sectoral Annexes**

11. The US explained the outcomes of the United States Mexico Canada Agreement (USMCA). The goal of the sectoral annexes in USMCA was to reduce or eliminate unnecessary regulatory differences in key sectors of commercial interest with the objective of cost saving and regulatory efficiencies.
12. There is an annex for each sector, as well as a bilateral US-Mexico side letter on automotive safety standards. The letter is limited to US-Mexico because there is already extensive cooperation with Canada as their automotive standards mirror those of the US.
13. The sector annexes in USMCA are: Chemical substances; Pharmaceuticals; Medical Devices; Cosmetics; Information and Communication Technologies; Automotive Safety Standards; and Energy Performance Standards.
14. Each annex applies to technical regulation, standards and conformity assessment procedures and depending on the size of the sector, could apply more broadly to notifications, marketing authorisations, hazard communications and import/export permits. Commitments by competent authorities to make publicly available the description of each authority and the point of contact within each authority. Each party must notify other parties if this information changes. There is also a commitment for competent authorities to avoid imposing and/or maintaining duplicative regulatory requirements.
15. There were no queries from the UK regulators at this time.

**Item 4: Update on US-EU Economic Working Group (following Trump-Juncker bilateral)**

16. The UK asked for more information on what happened in the US-EU Economic Working Group. The US said that there had been some specific discussions in relation to medical devices (alignment of Unique Device Identifier under MDSAP), and pharmaceuticals (discussion on including veterinary medicines in the GMP Annex foreseen by next year). The US said an announcement would be made in the next week or two as part of the Malmstrom visit to Washington.
17. The UK expressed the view that if it was possible for the US and EU to make progress in these areas, it should be possible for the UK and US to make similar progress also.

**Item 5: Next Steps**



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- The UK reiterated that we were keen to progress the MRA as quickly as possible and the US agreed to send over their proposed Long Form Text on the 1998 EU-US agreement in two weeks' time.
- OPSS are to provide the US with answers to NIST questions.
- The UK are to provide the US Coast Guard with a review of their latest text and answers to their questions.
- The US is to provide an update on the outcome of the FCC conference call on e-labelling.



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## TEXTILES

Date: **7th November 2018**

Time: **14:00 – 14:50 (GMT)**

Signed off by Session Lead: **YES**

### Participants

| Name             | Directorate/Department               |
|------------------|--------------------------------------|
| Neil Feinson     | DIT – Trade in Goods                 |
| Adam Fenn        | DIT – Trade in Goods                 |
| Tim Ward         | DIT – Trade in Goods                 |
| Rhys Davies      | DIT – Trade in Goods                 |
| Emily Ellis      | DIT – Trade in Goods                 |
| Edwin Mangheni   | DIT – UK-US Trade Policy             |
| Charlotte Martin | DIT – UK-US Trade Policy             |
| Janet Heinzen    | Deputy Assistant for USTR – Textiles |
| Linda            | USDC                                 |
| Elizabeth        | US State Department                  |
| Sam Oakley       | DIT – UK-US Trade Policy             |

### Key Points to Note:

- The US interventions were entirely led by the US Chair (Janet Heinzen, Dep Asst USTR Textiles).
- The session ran along the lines of the agreed agenda, with the US side providing a (scripted) overview of the US approach to textiles in FTAs, followed by questions from the UK team. It lasted just under an hour.
- The US presentation was a high level of detail, covering both existing trade flows and key areas of focus for the US (RoO, safeguards and enhanced customs procedures). The US team also provided detailed answers to UK questions.
- Some interesting stats from the US presentation included: 41% of tariff collected by US customs relates to textiles. 25% of total US textiles exports to EU go to the UK. 7% of EU exports to US come from UK. \$336 million exports to US from UK vs c\$600m imports from US to UK.
- The US team said they would be interested to understand more about the position of the UK sector and the UK position on how regulatory issues in textiles might be covered in a future agreement.
- The UK stated it would be able to share links to existing, published, stakeholder positions (such as those displayed on trade association websites), and would take away the question on handling regulatory issues.
- Loose commitments made to stay in contact. No follow-up session was requested or agreed.

### Report of Discussions and Outcome:

#### US Presentation on Textiles and Apparel

The US gave a scripted presentation on their approach to textiles in Free Trade Agreements (FTAs). Below are the key areas they covered throughout the presentation.

#### Importance of the textiles sector to the US

- The textiles and apparel sector is a very important manufacturing sector in the US.
- The US is the 4th largest exporter of textiles and apparel in the world
- The domestic textile industry is very strong in the US and as such is heavily supported by Congress.
- 41% of tariffs collected by US customs relate to textiles

#### US approach to textiles and apparel in an FTA

- The approach the US takes in having a textiles chapter as a part of their FTAs reflects the importance of the industry to the country and the US' aim in creating new markets for their textile products to be exported into.



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- Textiles have historically been a separate negotiating area for the US. US stakeholders and Congress have come to expect this from their negotiations.
- In their existing FTAs, the US has ensured a level of protection for their domestic textile industry.
- If there is a chance in a new FTA that US supply chains will need to adapt to be able to meet the product specific rule (PSR) requirements, they would want time for that to occur. This has happened in the recent US-Mexico-Canada Agreement (USMCA).

### US-UK negotiation position

- The US is in the process of obtaining guidance from Congress regarding what their objectives will be in negotiations with the UK.

### UK-US trade statistics

- UK is among largest EU member states for imports and exports of textiles from the US. 25% of total US exports to EU go to the UK. 7% of EU exports to US come from UK.
- The UK exports textiles to the US worth \$336 million. In comparison the US' textile exports to the UK are valued at \$600 million.

### EU-US Trade Negotiations

- In the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the US and the EU the two parties had reached an agreement to remove tariffs on 97% of all textile products with a view to also removing tariffs on the remaining 3%.
- Market access was not seen as a difficult issue to address between the two parties.
- The EU opposed the requested US customs visits and direct contact with textile manufacturers. This was an issue because there is a requirement from Congress that Customs Officials will have the power to do this when an agreement is signed.
- EU had similar approach to rules of origin on yarn but differences when it came to apparel.
- The US saw the EU's approach for textile rules of origin as being essentially a very permissive version of fabric fraud.
- The US does not recognise the EU approach as conferring origin. Believe that minimal value has been added in the free trade area under the EU's approach.

### Customs

- The US experiences a high degree of customs fraud in textiles/apparel and thus expects effective enforcement mechanisms in the agreements they sign
- They also require a clear process to follow when a fraudulent/false origin claim has been filled and discovered.
- There is a requirement from Congress in trade agreements the US signs that customs officials will be able to conduct visits to the contracting party to inspect their textile production facilities.

### Rules of Origin

- The US believes that rules of origin should promote regional production.
- The US approach to rules of origin is based on the idea that a significant level of production should occur in the region/contracting party of the agreement.
- The US has consistently adopted a "yarn-forward" approach to textile rules of origin.
  - In this approach the processing that occurs after the creation of yarn should occur in one of the signatory parties.
- This approach to rules of origin assures that the benefits of the agreement go to the partners of a trade agreement and not to other countries.
- The US is not a fan of origin quotas. They prefer to address specific concerns with a particular product in the product specific rules.

### **UK questions on US presentation**

Following the presentation, the discussion was then opened for questions.

Request from the UK for expanded explanation on customs fraud.

- US Customs Service has textiles and apparel marked as a priority trade issue.



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- Congress has recently passed legislation to ensure resources are targeted and focused on tackling undervaluation of goods, intellectual property rights and mis-classification of products on import.
- This is predominately a textiles and apparel issue, but it is not exclusive to these sectors.
- 41% of all tariffs collected in the US is from textiles/apparel and so this is a sector which is rich for abuse.

Question from the UK for clarification on where the differences were between the EU and the US for their negotiation stance on textiles and apparel.

- The biggest difference was likely their differing approach to rules of origin for textiles and apparel. While the US favoured their yarn-forward approach the EU favoured one that allowed minor processing to confer origin.
- They did try at times to narrow the differences down to specific products and address the issues with those specific products but that is as far as the negotiations got before they stopped.
- Hadn't got to the point where they had the specific products pin-pointed as it was still very high level by the time the negotiations ended.
- There was concern from the EU regarding their Generalised Scheme of Preferences (GSP) development commitments and the US did understand that the EU had a special relationship with developing countries outside of the EU.

Question from the UK on how UK stakeholders question why there is a need for such rigorous customs checks for goods entering the US from the UK.

- It is very important for US Customs to have specific provisions for textiles and apparel as it allows them to track and monitor the production of a good to try and prevent fraud.
- Customs visits to factories helps to assure the customs officials that the production is occurring in the "correct" country.
- Unable to pre-judge the impact this will have on the UK.

Question from the UK on whether the US has had to use their enhanced customs provisions to ensure the integrity of production coming from developed countries.

- US customs agents will do annual conduct customs textile verification visits to various countries.
- How the countries which are visited are determined depends on risk assessments done internally. It will depend on various issues such as import levels.

Question from the UK regarding the short supply provision.

- The US employs a number of different approaches to the short supply provision
  1. Negotiating an amendment to change a particular product specific rule for a particular input. This has been used previously but it is a very long method.
  2. Creating a short supply list and having a streamlined process to be able to add products to that list. This is currently used in the Central American Free Trade Agreement (CAFTA) and the US runs this list. It takes between 30-45 days to process a request with over 90% of requests being processed and added to the list within 30 days. They have had very few objections on this system thus far.
  3. Under TPP as a part of the negotiations they negotiated a list of products that would be on the short supply list.
- The US is seeing a lot of new investment in their textile industry and as such which products will and will not be available in the future is a conversation we will have to have.
- There is no prescribed level of detail required for entry onto the short supply list. It is entirely due to what the individual stakeholder needs and the level of detail they provide in their application.
- The creation of a short supply list is done on a case by case basis with each individual trading partner.

Question from the UK on the Article 6-A, Special Provisions, in USMCA.

- The special provisions annex did exist under North American Free Trade Agreement (NAFTA).
- 980200.90 is the code for textile and apparel goods, assembled in Mexico in which all fabric components were wholly formed and cut in the United States, etc.



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- The special provisions contained under this tariff code are available for any good the requirements specified.

Question from the UK regarding the opinions of US textile stakeholders raised at the Industry Trade Advisory Committee on Textiles and Clothing (ITAC 11) with regards to the rules that will be applied under USMCA.

- Under USMCA the goal was to increase North American content in textile and apparel trade without unduly effecting existing supply chains.
- The question remained on how best to increase North American content.
- They decided to establish new chapter rules for sourcing various materials. Importers and retailers were made aware of these changes and the US found that a lot of what is already sourced by the textile industry is done so throughout North America.
- In order to address the concerns of industry there is a transition period until these rules become effective to give industry time to alter supply chains as necessary.

Question from the UK on which model of textile chapter the US is most likely to want to adopt in our negotiations.

- They would not pick one particular model as the best one.
- They will wait for guidance from Congress and their stakeholders as to which approach to take with the UK
- If the UK looked at all American FTAs they should be able to get a sense of what is a common approach across the textile chapters.
- Must remember that each FTA has its own unique provisions which are specific to that trading partner so advice is to look at all of them to determine what options are available to people.

Question from the UK on the timeline for the work Stakeholders and Congress are doing considering the US-UK FTA approach.

- Currently about 30 days into a 90-day process.
- Believe in about a month or some there should be some publicly available guidance on the situation.

US stated that they are very interested in learning more about the UK textile and apparel industry and any special interests they might have. Any information the UK can provide on that will be gratefully received.

- The UK offered to send the US information regarding the UK's textile and apparel sectors.
- In response the US also offered to send the UK links to useful customs webpages.

US is also interested in regulations, standards and regulatory issues that could impact trade with the UK.

- The UK took this question away.

### **Key Actions and Next Steps**

- UK to send to the US any information they have found useful regarding the UK's textile and apparel sectors. This could potentially include consultation responses once they have been made public.
- US to send the UK links to US customs enforcement efforts and a link to the webpage to the Office of Textiles and Apparel.
- UK to provide an answer to the US question on regulations, standards and regulatory issues.

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### **Session Lead Analysis/Comments**

Suggested issues for Session Lead to add:

- Atmosphere of the meeting
- Areas to push in future working groups
- Pushback from counterparts, as well as the potential implications
- Initial thoughts on the success of the meeting/the extent to which objectives were achieved





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## FINANCIAL SERVICES

Date: November 7, 2018

Time: 0930 – 1230

### Participants

| Name               | Department/Directorate     |
|--------------------|----------------------------|
| Jaya Choraria      | HMT                        |
| Matt Mueller       | HMT                        |
| James Flannery     | HMT                        |
| Shirley Rhone      | HMT – Legal                |
| Johanna Michael    | DIT – Services             |
| John Carroll       | DIT – Services             |
| Matt Ashworth      | DIT – Investment           |
| Victoria Donaldson | DIT – Legal                |
| Sophie Brice       | DIT – US Team              |
| Claire Furbush     | British Embassy Washington |
| Philip Kenworthy   | British Embassy Washington |
| Matt Sullivan      | UST                        |
| Matt Swinehart     | UST                        |
| Lailee Moghtader   | UST                        |
| Mirea Lynton Grotz | UST                        |
| Tom Fine           | USTR                       |

**Also, in attendance at margins:** US officials from US Treasury, State Department, Dept. of Commerce, Small Business Administration.

### Key Points to Note

- The session focussed on a detailed, technical discussion of the financial services provisions in the USMCA – including areas of innovation such as additional cross-border commitments and advanced provisions on financial services digital and data.
- The UK provided an update on ongoing UK-EU negotiations on financial services and responded to questions from the US.
- The UK and the US agreed to continue discussions on financial services at future Working Groups.

### Report of Discussions and Outcome

#### Opening Remarks

Matt Sullivan (UST) opened the discussion, noting the positive conversation that took place in London in July 2018. MS also noted that the US agencies would not be in a position to discuss objectives for a future UK-US FTA at this meeting.



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Responding for the UK, Jaya Choraria (HMT) acknowledged the UK was also not yet in a position to discuss specific policy positions for a future UK-US FTA, but noted it would be useful to continue the discussion started in London. In particular, given the recent successful conclusion of negotiations on USMCA, the UK is interested in understanding the financial services content of the agreement.

MS (UST) agreed, noting that HMT had already identified certain areas of interest in USMCA to be discussed in this meeting.

### **USMCA Discussion**

#### ***Definitions***

JC (HMT) noted that the definitions in USCMA employ several new terms compared to previous US FTAs. The UK is keen to check our understanding of which activities fall within scope of the financial services chapter versus other chapters such as investment or digital – for instance, we understand payment activities carried out by companies like Visa or Mastercard fall within the scope of the data localisation provisions in the digital rather than financial services chapter? Similarly, do financial services provided by non-financial institutions – such as a supermarket chain providing credit card services – fall out of the scope of the financial services chapter?

Matt Swinehart (UST) responded that the scope of the chapter is defined in several ways in relation to financial institutions. The definition of “financial service supplier” under the agreement is based either on whether an entity is supervised by a financial regulator; another is if it is subject to regulatory rules applicable only to financial institutions – e.g. capital requirements. The scope is defined in part by domestic law and will vary by jurisdiction.

MSw explained the cross-border element of the definition of “covered person”. Where the “covered person” definition relates to data transfer and location of computing facilities article, it was essential to ensure that there were built-in protections to enable regulatory and supervisory access to data stored. These protections relate to the “acute need” for regulators to have access to data. Only those cross-border service providers that meet that acute need are scoped in. If a firm is not supervised by a financial regulator, it is indicative that the “acute need” does not need to be met.

On the specific text, MSw (UST) noted that the particulars of the language related to working with Canada and Mexico and the idiosyncratic Canadian regime. The language is somewhat unique, given Canadian domestic “title-based” approach to financial regulation. For instance, in the US, if you’re taking deposits and making commercial loans from those deposits, you must have a bank licence. However, in Canada, although you can’t call yourself a bank without a banking licence, firms are otherwise free to perform “banking” activities.

US proposal had been a definition that fits the US regulatory system, such that if a cross-border supplier was required to register as financial institution in their home territory to provide their services, then they’d qualify under the cross-border definition. Clearly this approach would not be compatible with the Canadian system, hence the need for the alternative “acute need” approach – the USMCA text involves “threading the needle” between the two regulatory systems through the use of appropriate proxies that bring the right set of FS firms into scope.

The USMCA approach hinges on the domestic requirement to register as a financial institution conditioning coverage by the cross-border “covered person” definition. This domestic requirement operates within three parameters:



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- A cross-border service supplier must be regulated by a domestic financial regulatory authority.
- A cross-border service supplier must be supervised by that financial regulatory authority, ensuring ongoing monitoring and compliance with above financial regulation.
- A cross-border service supplier must have completed some form of authorisation or registration with its domestic authorities.

Msw (UST) clarified that if there's no regulatory interest in simple registration, then it's hard to justify the argument that there's an "acute need" for information. Similarly, if there is no domestic requirement to register, it is indicative that there is fundamentally no "acute need". Msw (UST) also noted that, from the US perspective there is a difference between regulation (i.e. developing a basic set of rules) and supervision (i.e. the ongoing monitoring of compliance with that rule set).

Matt Mueller (HMT) queried whether it wouldn't have just been enough to say regulation and supervision. Responding, Msw clarified that the intention was also to make clear that this was a "trigger" for the cross-border "covered person" definition – if a firm is supervised domestically as a financial institution, then it is also likely to be a requirement them to have some sort of licence or authorisation.

Responding to JC's question about particular entities, Msw (UST) noted that it depends on the jurisdiction. In the US system, supermarkets providing cheque cashing services may or may not need licences, depending on the state. For the purposes of USMCA, the key is whether or not an entity is subject to additional regulatory requirements, such as capital requirements. By way of additional example, Msw noted that payment providers – such as Visa and Mastercard – are not typically subject to financial regulation and therefore not a financial institution for the purpose of the financial services chapter, but are considered to be banks in some jurisdictions where they are located because they choose to be – e.g. PayPal is a bank in some jurisdictions.

MM (HMT) queried whether that means that the scope of the chapter would vary. Msw confirmed that this is an intentional part of the chapter – the chapter can be applied flexibly depending on the domestic rule-making of the parties and adapts to changes in domestic rule-making in a way that keeps the chapter "fresh".

On specific definitions, JC (HMT) noted the change from "financial services provider" – as under NAFTA 1.0 – to "financial services supplier" in USMCA in line with the GATS – asking whether this is indicative of any substantive change. Msw responded that the US never used the word "provider" in financial services except in NAFTA 1.0 which was written at the same time as the GATS, so there were various places where there were inconsistencies with WTO definitions.

MM (HMT) queried whether the USMCA "investor of a party" definition could be construed as conferring pre-establishment rights.

Msw responded that the definition applies to all elements of a financial services investment. At its heart, the definition of an "investor of a party" is based on capital rules. There is a commonly-accepted definition of what constitutes regulatory capital, and loans and other debt instruments can be considered investment if they meet the other requirements to be considered an investment under the investment chapter. In practice, parties would look at other loan terms to see if they meet definitions. The policy reason behind the particular nuance is that, instead of leaving the definition open-ended, it allows you to know that this is a more serious, long-term kind of investment rather than a short-term inventory loan – regulatory capital is what counts as capital under a financial institution's rules and is one way of providing clarity about what is investment and what is not.



### ***Market Access and Cross-Border Annex***

JC (HMT) noted expansion of market access obligation to cross-border supply of services and related re-jigging of some of the titles and structures in USMCA and asked whether this is now what the US considers to be “best practice”.

MS (UST) responded that the US is constantly reevaluating the annex and cross-border list to assess what services should be added. Key to this is monitoring developments in financial services sector and talking to stakeholders – particularly in areas of growth and disruptive change such as Fintech.

However, MS also noted that the US approach to the cross-border annex is “technology neutral” – i.e. it is not the modality of service that matters but the nature of the service itself. This means that fintechs are in scope of the commitments if they are just delivering the same activity in a different way.

MSw (UST) noted that the reason the reason for a short list of cross-border services is that balance sheet risks management and cross-border regulatory issues are often not amenable to cross-border supply. The three principal additions to GATS found in US financial services chapters were because industry – and other stakeholders – had identified them as major areas that would add value by being delivered on a cross-border basis. Importantly, they are also areas where UST and regulators could sign up to additional commitments, because the regulatory framework allowed the activities to take place cross-border. These areas include the additional commitments on portfolio management and electronic payment services.

On the extension of cross-border commitments to portfolio management services, MSw noted that the provision does not cover custodial and execution services unrelated to collective investment schemes (but does cover if related to collective investment schemes). However, the value of the provisions lies in permitting portfolio managers ability to buy and sell securities on behalf of clients, essential for collective investment schemes with global reach using portfolio management delegation between entities.

MSw noted that the commitments on electronic payment services draw directly on the definitions provided in the UN-CPC.

MSw observed that payment services are “a backwater of FS regulation” and it is not clear what is covered by EPS given how large the payment ecosystem is. However, his upcoming article in the Kansas Law Review should provide some additional clarity.

MSw observed that describing the provision as covering “electronic payment services” is a misnomer – as drafted, the commitment covers only messaging services – i.e. when a consumer and a merchant are trying to send funds back and forth they may not have a relationship with the same bank and require a way of matching the consumer bank with the merchant bank.

Many banks and messaging services provide this matchmaking services – sending messages from merchant bank to consumer bank and carrying out the actions listed in 17-A US para 2.e.i (e.g. verification of financial balances, authorization of transactions, notification of banks (or credit card issuer) of individual transactions and provision of daily summaries and instructions regarding the net financial position of the relevant institutions for authorized transactions).



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Then a card payment service provider will send messages to the Federal Reserve, as settlement provider, so payment can be made between the customer and merchant. This message to the settlement system is not covered by the EPS definition.

MSw added that messaging and EPS services provide a certain amount of value-add, leveraging complex systems in order to determine whether transaction is valid or fraudulent and sending notification to the consumer of unnatural spending behaviour.

MSw clarified that the payment systems covered in the financial services chapter use only proprietary networks and that the customers of payment providers are banks (rather than consumers). Bitcoin – and other alternative currency or payment systems – are not proprietary networks and therefore not covered by this umbrella. Bitcoin also does not provide messaging services.

MSw clarified that the payment services covered by the agreement does not involves the transfer of funds to and from transactors' accounts. The three main areas of coverage are credit, debit, and pre-paid cards (e.g. the Starbucks app). This also includes any digital form of those cards, so while products like Apple Pay are not covered, any underlying messaging services are covered.

MM (HMT) queried whether this provision applied to messaging services for wholesale transactions, such as SWIFT.

MSw clarified that wholesale transaction services are not covered by this, adding that this is a particularly good question. There are a very limited number of such cross-border companies, but in US there is one clearing house-operated system – CHIPS – and one operated by the Federal Reserve that also covers cross-border transactions. SWIFT is operated by a consortium of banks, so there is little commercial value in creating something uniquely for it in an FTA. By contrast, much of messaging services conducted by central banks *is* considered worth covering for the same reason.

Ultimately, this may be academic because SWIFT doesn't send messages between US and the EU – there is an EU SWIFT system and a US SWIFT system and the two don't talk.

JC (HMT) asked about the structure and language of the electronic payment card services commitments, querying if there was any substantive liberalising effect in USMCA above equivalent TPP language which seemed to be of a more best endeavours nature.

MSw (UST) noted that the original US TPP proposal on EPCS looked similar to USMCA text.

The new language provides additional clarity to firms and regulators – particularly on the questions of permission and imposition of quantitative limitation. If the text simply “permits” the service – as in TPP – then there remains the possibility for fees and transaction costs attached to the service such that the service can become so onerously expensive it is effectively barred. Preventing this is the source of most of the new – more concise – language

Likewise, the USMCA parties are bound not to impose quantitative limitations on the supply of a service, but of course can impose regulations – consistent with national treatment – on that service. Additional conditions – such as licensing – are also permitted. MSw also explained that US was not required to list any limitation-based reservations against EPCS commitments, as those conditions are not inconsistent with underlying obligation.



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James Flannery (HMT) queried whether the parties had considered taking on any additional cross-border commitments. NAFTA 1404.4 had required the parties to consult on additional commitments on insurance, any consultation outcomes are not reflected in the USMCA text.

MSw (UST) responded that all original NAFTA obligations are carried forward in USMCA 17.6. No specific cross-border commitments were negotiated in NAFTA.

However, if USMCA parties permitted the service in 1994, they are not now allowed to restrict it. The language in 17.6 is included purely to guarantee there are no gaps between NAFTA and USMCA. Additional thinking on additional cross-border commitments took place between 1994 and 1998 that is reflected both in the USMCA and text – and more significantly – in the GATS Financial Services Understanding.

Tom Fine (USTR) noted that USMCA 17.6 is very specific to the NAFTA context.

JF (HMT) noted that Mexico appear to have taken on additional cross-border commitments on insurance in 17-A Mexico para 1.a.i and 17-A Mexico para 1.b. and questioned the value of these commitments in the US view.

MSw noted that the UK had clearly been through the USMCA text in detail. In the US view, Mexico has taken on all of the same affirmative obligations as the US and Canada, but wanted to match some nuance in their laws, hence the inclusion of this specific language.

On the additional Mexican insurance commitment (17-A Mexico para 1.b), MSw observed that the specific language had been translated directly from Spanish into English.

The Mexican obligations which go above and beyond US and Canadian commitments mean that, if a firm is seeking primary insurance in Mexico, it must first undertake a process (reasonable effort) to see whether a Mexican supplier is willing and able to supply this service. If no Mexican supplier is capable of providing the service, then a cross-border supplier can be used. The customer would know this in the case of repeat insurance. The US perception was that it was not particularly valuable for consumer lines, but more so for commercial risks. Insurance of global risks was particular to those trading partners.

MM (HMT) asked whether it is a question not just of whether that provider exists, but whether the provider has an incentive to provide services cross-border. Also queried whether this provision allows Mexican entities to come to the US market and whether there was any discussion of the US making similar commitments. The commitment seems imbalanced.

MSw observed that the US finds it fascinating as well. Suggested that the differences are derived from specific negotiations with individual markets leading to minor variations. It is all part of a negotiated outcome. MX asking for reciprocity for this commitment would have come at a price – given the value would have been unclear, ended up with the asymmetry.

TF (USTR) asked whether the UK has any specific views on expansion of the cross-border list.

JC (HMT) responded that this is under consideration and that HMT is going through a process with our regulators.

TF queried whether UK industry had any specific view on additional cross-border. JC responded that there are a variety of views.



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### ***National Treatment***

JC (HMT) questioned whether the US sees a difference between language on “like circumstances” and “like situations” for the purposes of interpreting national treatment articles.

MSw (UST) responded that the US considers them to be the same for interpretative purposes.

### ***Transparency & Administration of Certain Measures***

JC asked UST to explain the additions to transparency provisions in USMCA. MS (UST) noted that the first 6 paragraphs reflect existing US best practice, but that Para. 7 – on authorisations – reflects US proposals in TiSA which attempt to incorporate elements to ensure parties are faithful to their mandate while allowing for flexibility.

The US view has been that, while some markets have a veneer of market access – e.g. inviting applications for licenses in a particular sector – there can be limited practical follow-up. This provision is an effort to include more specificity to ensure that commitments made are actually kept, that applications are followed up on and that any reasons for denial are conveyed to the applicant.

MSw (UST) asked if the UK had any questions on the notice and comment provisions.

MM (HMT) asked whether, from a regulators’ perspective, the additional prescriptiveness of these commitments has presented any additional burden.

MSw responded that the obligations under the commitment are consistent with standard US regulatory practice.

UST Lawyer noted that the US has a rule-making law called the Administrative Procedures Act that sets out the framework and timelines for agencies to propose regulations pursuant to an act of legislation. An agency must provide notice of a proposed piece of regulation – typically 30-60 days (but can be up to 180) – Art. 17 Paras.1-3 spell that out. In relation to Para. 3, 3.a provides for advanced publication of regulation, 3B about comment period being required. The comment period allows interested parties – and other parties – to comment on the proposed rule, and timelines are prescribed again for that (also typically 30-60 days). There are also timelines for the regulation taking effect (30-60 days also), spelled out in Para. 5. Regulators must then respond to comments in writing, if they do not incorporate them.

UST Lawyer also noted that Paras. 3-5 apply solely to regulations, not the underlying legislative rules. A measure refers to both legislation and regulations.

UST further noted that “to the extent practicable” language is included so as to not bind regulators too tightly.

JC (HMT) queried the removal of the 120-day limit for regulatory decisions on licensing applications found in TPP.

MSw (UST) responded that the 120-day deadline came from the requirements for *some* FS regulation in the US (market regulation in SEC space), but USMCA moved to “a more reasonable period of time” as this more general, GATS-based approach better reflects heterogeneity and doesn’t specify a particular time frame.





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UST clarified that the provision in TPP is binding even though this is “to the extent practicable”. “To the extent practicable”, allows parties and regulators to take into account the exigencies of specific special circumstance.

TF (USTR) ask how the USMCA text requirements would marry up with UK financial regulation. MM (UST) responded that HMT is still talking to regulators. We expect that UK approach would largely be reflected in the TPP approach. The UK considers its regulatory transparency practice to be best practice.

MSw (UST) added that the US is happy to take licensing applications digitally. The text of Para. 7.e reflects the need in Mexico to present applications in hard copy in person. This was a red line for MX.

***Digital & Data Localisation***

MS (UST) noted that the UK and US had discussed data and digital in July, but that additional language has been included in USMCA that might provoke questions. JC (HMT) queried the application of 19.16 (Source Code) in the digital chapter to financial institutions in comparison to specific financial services provisions for data transfer and localisation.

MS (UST) explained that the exception to general application of the digital chapter is by virtue of the definition of “covered person” for data localization chapter/transfer of info.

MSw clarified that, while the core source code obligation is found in Chapter 19 Article 19.16 Para. 1, Para. 2 is threading a needle because financial and other regulators – e.g. law enforcement – may have a need to see source code.

For instance, if a firm is engaged in manipulative algorithmic trading, the SEC is highly likely to ask the firm to see the underlying source code, especially in the case of suspicious market behaviour, and the SEC will be looking into the suspicious behaviour of a specific actor. However, this is not a blanket source code disclosure requirement — source code may only be disclosed when there’s a discrete investigation going on under mandate of regulatory or enforcement authority. Additional safeguarding against unauthorized disclosure means that regulatory or enforcement authorities are not allowed to pass the source code to any third party.

The genesis of the Para 2 was financial market regulators’ concern (especially SEC) about their ability to access source code in the case of suspicious trading patterns or activity. TF (USTR) noted that the language in Para. 2 is probably already covered by the general exception anyway, but the additional language is to ensure that regulators and enforcement authorities are guaranteed access.

MSw (UST) added that the provision is written broadly because there may be cases outside financial services where a regulatory investigation requires source code disclosure. MM (HMT) asked if UST could clarify the definition of “covered persons” and any differences from TPP.

MSw clarified that in TPP there was a wholesale exclusion of financial services from the covered person element and none of this language was included at all. As described in July, the fact that this was a sticking point for some stakeholders was the genesis of this new approach.

MM (HMT) asked, in relation to personal information, how the US developed its data protection rules.



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MSw explained that part of the answer lies in trade history. The first financial services data commitment was in GATS, when negotiators were trying to confront the nascent digital economy, but understanding of cross-border flows of data was less well-developed.

At the time, the basic understanding was that parties had to permit the cross-border transfer of information when required in the ordinary course of business.

However, this raised a lot of questions, including when data is explicitly required. Consequently, the US has removed that language, as well as the “ordinary course of business” language because it was too general.

Some countries – that will remain nameless (i.e. USMCA parties) – say they don’t need to allow the cross-border transfer of information because unless the data isn’t directly related to the small, on-the-ground transactions, then it is not necessary to permit its transferral cross-border. Instead, the language is tied to the license/registration and “covered persons” definition, tightening the drafting. The license/regulation itself is proof of the acute need for information. If a firm is authorised to carry out an activity, then it is also permitted to transfer information related to that activity. Regulators and market participants like this because it makes the requirement much clearer. The link to authorisation/ regulation also ensures the application of the provision is future-proof. The second sentence is exactly the same as in GATS and in other FTAs, and is included here for clarity. Nothing in the provision is intended to impose additional privacy or confidentiality requirements on accounts storing private information

JC (HMT) queried how the USMCA carve-out of the definition of computing facilities e.g. for financial market infrastructures and exchanges was defined and asked whether the carve outs had enabled the provision to be agreed in the context of USMCA.

MSw (UST) explained that the FMI language was taken directly from IOSCO and CPMI and collectively agreed standards for FMI data handling. An example of this is the Chicago Mercantile Exchange (CME – as well as LCH, LME, Fedwire), a collectively agreed system where institutions get together and agree rules for clearing and settlements.

In US, authorities take an approach based on the concept of financial market utility, where the FSOC can designate certain systemically important FMUs as FMIs – this includes NYSE, CME and other types of exchanges and clearing houses

However, it is important to note that computer systems accessing these networks are not covered. On computers accessing the network, there is often a requirement to have a connection within the same territory. Given the sensitivity of the infrastructure there’s often some data localization requirements, but this is very targeted to direct connections to these particular infrastructures.

MM (HMT) questioned the difference between FMUs and FMIs.

MSw responded – by way of example – that the price-setting function of the NYSE is not considered to be a part of market-setting infrastructure. Additionally, many smaller exchanges that don’t allow for the larger clearing functions may be considered financial exchanges or markets but not FMIs

MM pressed UST on this point, asking how this relates to proprietary or bilateral exchanges, such as market-based pools. MSw responded that market-based pools – such as dark pools – are not covered as these would not be considered to be an exchange or market. Although there is a price-discovery tool, but they are opaque by design and are not fulfilling the central function



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of a marketplace. Similarly, a bilateral securities transaction – such as the purchase and sale of privately-held securities – would also not be covered.

Additionally, MSw noted that SEC Schedule 13D sets out requirement for securities that are listed on exchanges and markets – securities and security-based derivatives that are covered in the US are listed in 13D and E.

MSw noted that entities like FINRA, NYSE, etc. are covered for sure. However, FINRA's computer systems not covered – the US does not currently require that FINRA have its computers domestically located, but if it did, that requirement would be covered by the exclusion.

MM (HMT) queried the motivation for excluding exchanges, due to the systemic sensitivities of those kind of infrastructures.

MSw responded that all of these exceptions are covered by the prudential exception but because systemically important or providing a regulatory function (like an SRO) it's better to have complete clarity on scope upfront.

JC (HMT) asked whether the exceptions related to actual practice.

MSw responded that he was only aware of one instance – in the US, if a firm wants to send money over Fedwire, it needs to have a computer in the US to settle in the US. The firm needs a branch or subsidiary to use settlement finality, therefore needs to have a computer, but not a data centre, and transactions of this type do not require sufficient computing power to necessitate a data centre.

JC (HMT) noted that there had been a discussion of US data language and access to data at TIWG4 and asked if the US could provide any further detail on interpretation of the specific terms.

MSw (UST) noted that all global financial regulatory authorities around the should have the tools at their disposal to do their job – including access to data on an “in real time” or “on request” basis. This wording is not pulled from specific legislation. The objective is to ensure that regulatory authorities have the access they need in order to fulfil their mandate. There is an expectation that there would be bank supervisors in big banks doing real-time analysis, but in the case of a medium-sized registered investment advisor, US authorities don't want them sending bulk data to the SEC on an ongoing basis—only as requested. The approach varies between regulators.

MSw noted that the FFIEC IT Examination Handbook will be substantially revised in the coming months and the preamble makes clear what is being expected of firms in terms of data regulation. The guidance will be performance-based (i.e. principle based). Under US rules, firms must demonstrate that they have a business continuity plan so that, in the event of disruptions, they can be back online and providing financial services within 2-3 hours. The regulations do not prescribe how and is system neutral, it just requires that they be able to meet these performance-based requirements. This is the type of approach that runs throughout trade agreement language.

The provision may be worded in an overly protective way, but this is just to ensure that all types of regulator access are definitely covered.

MM (HMT) questioned the US approach to cloud computing in relation to FTAs.



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MSw responded that this is an area of emerging trade policy and it is probably premature to get into a discussion of cloud computing. MSw distinguished between a private and a public cloud. Firms like JP Morgan had a private cloud. Smaller firms used a public cloud provided by a third-party service provider. The US regulators had no comprehensive policy, so it is premature to incorporate a specific commitment lock-in permissions for the use of cloud computing. The UST report acknowledged that this was in flux. The obligation doesn't speak to third party services providers. This was an interesting issue. However, the US is aware that it can lower cost and increase security, especially for smaller banks. These smaller banks can leverage these tools, but they are unlikely to become a major global lender, so there is no imminent prospect of any stability or data security risks. Nonetheless, it is important to some regulators that this provision doesn't speak to core versus non-core functions – e.g. what can and cannot be outsourced.

MM responded that the FCA has published its own guidance on cloud computing this summer.

MSw acknowledged this, noting that he had found it an enjoyable read.

**Investment**

JF (HMT) noted the revised USMCA approach to ISDS, noting the inclusion of breaches of National Treatment and MFN within the scope financial services ISDS, and the novelty of this approach for US FTAs.

Mirea Lynton Grotz (UST) replied that this approach is function of negotiating circumstances. On NT and MFN, the US approach has varied over the years. MSw added that the US typically negotiates something in each agreement that takes into account each trading partner.

JF (HMT) asked about reasoning behind the 18-month recourse to domestic courts in the financial services chapter compared to 30 months in the investment chapter. MLG noted that this was in recognition that for financial services it was likely that there was also a prudential filter process. The whole package was specific to that negotiation and would need to be revisited in future negotiations.

MLG (UST) talked through the procedures laid out in 17-C, Para 5 – i.e. the Prudential Filter. The tweaks to the prudential filter were also a negotiated outcome. There was more focus on how a joint determination would be arrived at.

5.a.i This was an addition and stipulates that the respondent will set out in the request the text of a proposed joint determination on the validity of the prudential exception as a defence.

5.b allows the timeline for the procedures to be extended an additional 60 days beyond the original 120- in extraordinary circumstances.

5.c permits additional changes to reflect discussion on a joint determination between the parties.

5.d. and 5.e cover how any joint determination would be handled

If there's no response by the respondent, then it is assumed that the respondent is not disagreeing with the joint draft determination. The joint draft determination is then deemed to be the joint determination and is binding through the ISDS process.

There is an additional second presumption that, if a case proceeds before an ISDS tribunal, then there is an opportunity for a non-disputing party to weigh in and submit a non-



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disputing party submission. If there is silence (i.e. no submission) from a non-disputing party, then the second presumption is that the non-disputing party view is not inconsistent with the respondent.

MSw (UST) noted that the other nuance here that is largely consistent with general financial services ISDS provisions is the requirement for an arbitration panel to have financial services expertise. Para. 3.a covers this for the presiding arbitrator.

MSw also indicated the provisions in Para. 3.b. and the requirement that a domestic regulator responsible for the relevant regulation will be consulted in the course of the dispute settlement. JF (HMT) responded that this seems like a *sine qua non*. MSw described this as a hortatory promise.

JF (HMT) queried the purpose of Para. 6, asking if it operates as a kind of filter mechanism for NCMs.

MSw confirmed this, noting that the US had always intended for this to be the case but didn't explicitly say that. This paragraph sets out the process for interpretation of NCMs and how they should be applied to financial institutions. The investment chapter also has a procedure for NCMs.

### **Senior Management & Boards of Directors**

JF (HMT) queried the approach to senior management and boards of directors, noting that the equivalent TPP language was for no more than a minority on boards, but USMCA now specifies a simple *majority*. MSw noted that the US prefers *minority* and complies with this apart from the OCC. USMCA negotiating partners in this instance insisted on taking NCMs that would have effectively lowered commitments to this level. Therefore, instead of allowing them to take out NCMs, USMCA lowers the overall baseline.

JF (HMT) noted the difference in language between the financial services and investment chapters, observing the lack of language on board sub-committee in the financial services chapter. MSw responded that the US would interpret the financial services language as applying to any sub-committees – any difference in language is unintentional.

### **Financial Services Committee**

JC (HMT) asked about the regulatory dialogue between the USMCA parties that had been proposed alongside the FTA as this didn't appear in the chapter text but we understood from discussion at TIWG4 that something had been agreed.

JC (HMT) noted the additional language in the FSC provision regarding the attendance of regulators as appropriate and asked whether regulators would be involved in discussion on the implementation of the FTA chapter. MSw (UST) noted that inclusion of regulators would depend on the specific measure being implemented or discussed. The Fed is almost always invited. He noted that the NAFTA committee had historically developed into more of a free flow discussion.

MS (UST) added that the US has a number of financial regulatory dialogues, including with the UK, EU, India, Japan, and North American countries. The US does not keep documents that memorialize the contents of those dialogues with Japan and India, but there is one non-public document with the EU. The US understands the desire for dialogues. MS noted that there will be a document outside USMCA setting out the parameters for the dialogue with CA and MX.



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MSw noted that the discussion between the UK and US is on a par with the US-EU discussions. Continuing, MSw admitted that the UK-US discussion is actually more substantial, but noted that he would deny saying that if asked by the EU. There wasn't a sense that the US/Mexico/Canada dialogue would meet every six months.

**Brexit update**

JC (HMT) recapped on the update in the plenary about the Withdrawal Agreement where the pending issues concerned the Northern Ireland border. On the future relationship, the position on financial services had been set out in the White Paper in July. HMG had also provided a presentation on the financial services proposition to the Task Force 50 later in July. This presentation was public.

The Commission had responded constructively to the shift in the UK position with the move away from previous language about mutual recognition and towards an emphasis on recognition of autonomous decision making. HMG continued to aim to preserve the economic benefits of financial services trade (although this wouldn't be through passporting). The proposal involved enhancing equivalence and also having a bilateral agreement for regulatory dialogue and supervisory cooperation (as set out on slide 8). It was positive that there was common ground with the Commission on ambitions for the future relationship on financial services. There had not been further detailed discussions with the Commission as the current focus was on finalising the Withdrawal Agreement and the declaration on the future framework.

JC noted that principles for the future relationship had been discussed and there were a variety of existing precedents and concepts (as set out on slide 14). Given the unique UK/EU starting point and ambitions for the future UK/EU relationship, we would need to go beyond these precedents. JC noted that the UK/US starting point was different but, nevertheless, encouraged consideration of these concepts including for example in the EU-Japan agreement.

MS asked for clarification of the UK proposal that equivalence decisions were autonomous and therefore not subject to dispute settlement but that the bilateral process was subject to dispute settlement. JC confirmed that this was the case. MSw asked about the boundaries between the autonomous decision making and elements subject to dispute settlement. JC noted that there would need to be further discussions on this as part of the negotiations. MSw asked whether being subject to dispute settlement on the process could affect the incentives for regulators to grant market access in the first instance. JC acknowledged that the scenario UST was describing was counter-productive and noted that this wasn't the intention. There would need to be detailed discussions on this issue. MM reiterated that there was a unique UK/EU starting point of identical rules.

US asked what the reference to global norms on slide 8 referred to. JC explained that this referred to international standards but there wasn't an exhaustive list. MM referred to examples on slide 14.

MS thanked HMG for the update and noted that the US shared HMG's ambitions to preserve UK/EU market access.

**Closing**

JC noted that it had been very useful to get UST's detailed insights and technical explanation on the history and background of the USMCA text. We looked forward to the next discussion in



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February by which time HMG expected to be in a position to start discussing its thinking on a UK-US FTA. US noted that it would also expected to have UK-US negotiating objectives by then.

### **Session Lead Comments**

UST recognised that the UK team had studied the USMCA financial services chapter closely. The detailed discussion gives us a good understanding of likely direction of US positions in most but not all areas e.g. it is unclear what US position on ISDS for financial services will be in a UK-US FTA. The US has not yet indicated specific objectives for a UK-US FTA or where it thinks a UK-US FTA could potentially go beyond existing on the shelf precedents. We may need to do the heavy-lifting in getting discussion started on this. US sensitivities continue to be clear on linkages of financial services regulatory cooperation to trade talks.

In the margins, USTR pressed us on whether the UK was going to table its own "model". It would be helpful to have a discussion on negotiating strategy across the agreement within the UK team before the next TIWG.



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## ECONOMICS

Date: **November 7, 2018**

Time: **10:45 – 14:30**

### Participants

| Name                   | Department/Directorate            |
|------------------------|-----------------------------------|
| Richard Price          | DIT                               |
| Catherine Barber       | DIT                               |
| Gavin Jaunky           | DIT                               |
| Anthony Christodoulou  | DIT                               |
| Tom Knight             | DIT                               |
| Jonathan Bateman       | DIT                               |
| Paul Roe               | DIT                               |
| Peter Antoniadis       | DIT                               |
| Nikos Tsotros          | DIT                               |
| Jade Golding           | DIT                               |
| Katie Waring           | DIT                               |
| Igor Zurimendi         | HMT                               |
| Enrik Noka             | BEIS                              |
| Meghan Ormerod         | BEW                               |
| Alice Campbell         | BEW                               |
| Philip Kenworthy       | BEW                               |
| William (Bill) Shpiece | USTR                              |
| Fay Johnson            | USTR                              |
| Kari Heerman           | USTR                              |
| Praveen Dixit          | Department of Commerce            |
| Jean Janicke           | Department of Commerce            |
| Kristy Howell          | Department of Commerce            |
| James Fetzer           | Department of Commerce            |
| Jessica Hanson         | Department of Commerce            |
| Sharon Sydow           | Department of Agriculture         |
| Shawn Arita            | Department of Agriculture         |
| William (Bill) Powers  | US International Trade Commission |
| David Riker            | US International Trade Commission |
| Saad Ahmad             | US International Trade Commission |
| Sarah Scott            | US International Trade Commission |
| Lin Jones              | US International Trade Commission |
| Tim Fitzgerald         | Council of Economic Advisors      |
| Andre Barbe            | Council of Economic Advisors      |





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|                  |                        |
|------------------|------------------------|
| Won Chang        | Department of Treasury |
| Ken Swinnerton   | Department of Labor    |
| Rebecca Kirchmer | Department of Labor    |

### **Key Points to Note**

- DIT provided an update on our Consultation and the general contents and scope of the Scoping Assessment. We highlighted the large interest in a UK-US FTA from the public as demonstrated through the large number of responses to the Consultation.
- Bill Shpiece (BS) mentioned that US could begin negotiations until 90 days have passed since the USTR sent the letter of intent to Congress in mid-October. The US would carry out consultations, with responses published as standard procedure. US negotiations objectives for a UK/US FTA would be published 30 days prior to the start of negotiations.
- US presented preliminary economic modelling results analysing the impact of a UK/US FTA, under 'hard' and 'soft' Brexit scenarios, on the UK/US economies and on bilateral trade. The analysis looked only at tariff and TRQ elimination and did not model NTBs or services trade. The main macroeconomic outputs suggested that UK welfare and GDP gains from elimination of UK and US tariffs and TRQs on goods would be smaller under the 'hard Brexit' scenario, whereas for the US, the reverse held. USTR were keen to have an update on our CGE modelling, suggesting a future video call between UK and US modellers.
- US Commerce gave a presentation on how they communicate the gains from an FTA to the public, emphasising the importance of tailoring the message to the audience in question.
- DIT provided an update on the NTB study, highlighting that around 180 interviews so far had been conducted with exporting firms in both the UK and the US. USTR expressed interest in seeing the results.
- USITC gave a presentation on their fact-finding investigation into barriers faced by US SMEs exporting into the UK. The study would be conducted through telephone interviews, group meetings, public hearings and written submissions. The study would be finalised by July 2019. The study would identify and quantify barriers facing SMEs exporting into the UK, it would not provide an assessment of the actionability to tackle the barriers, which will be carried out by the USTR.
- USITC provided a presentation on GVCs and UK/US integration. The presentation provided a description of official trade data and TiVA data, examining its uses and limitations. They provided some alternative approaches to measuring GVCs, including survey and modelling approaches.
- UK and US statisticians discussed issues around bilateral trade asymmetries. Collaborative work between ONS and BEA had led to some progress on the causes of bilateral asymmetries. More work was needed.
- DIT agreed to share statistics, as previously outlined in our written offer to the USTR, with the US reciprocating. It was agreed that we would share an initial package of statistics as soon as they could collated, with the UK's FDI statistics to be sent once the ONS publish the 2017 figures in December. US also asked for our post-Brexit tariff schedules but DIT noted that these were currently undergoing scrutiny at the WTO.
- USTR noted the analytical reports they were required to send to Congress assessing the impact of an FTA on a number of categories, such as the labour market. These reports were usually sent to Congress as a package late in the FTA process.



- The atmosphere was positive and collaborative.

## **Report of Discussions and Outcome**

### **Opening remarks**

Bill Shpiece (US) opened the session by welcoming everyone and hoping to build upon the successful first economic session at the 4<sup>th</sup> TIWG. The wide participation showed that the US Administration regarded a UK/US FTA as important. Richard Price (UK) emphasised that analysis was vital in the process of an FTA. He was pleased with progress since the last session and looked forward further progress. He was confident that the UK would secure a good deal with the EU soon.

### **Upcoming DIT/USTR publications on UK-US FTA**

Catherine Barber (UK) highlighted the Secretary of State's (SoS) commitments to securing an FTA with the US and his commitments to the UK Parliament in July to undertake consultations for all future FTAs. The UK would publish a Scoping Assessment and an Outline Approach on the UK's FTAs with the US, Australia, New Zealand and CPTPP before entering negotiations. CB (UK) laid out the general contents of a Scoping Assessment, explaining it would assess the potential economic impact of an FTA based on assumed scenarios. She highlighted the large public interest in a UK/US FTA as represented by the many responses received in the public consultations.

BS (US) explained that the Trade Promotion Authority (TPA) required the USTR to pursue certain objectives which are expected to be met in an FTA. USTR had sent a letter to Congress in mid-October outlining the intent to begin negotiations with the UK. The US could not begin negotiations until 90 days after this. The US also holds a consultation process for all FTAs, with the responses published as standard procedure. USTR will use the responses of the consultations to inform their objectives for an FTA with the UK, with a requirement for the USTR to publish their negotiating objectives for a UK FTA at least 30 days prior to the commencement of negotiations.

BS (US) stated that he had sent a letter to the USITC requesting a report on the impact of an FTA with the UK. This "Probable Economic Effect of an FTA with the UK" (similar to DIT's Scoping Assessment) would not be published. The US published impact assessments on conclusion of an agreement – for example, on November 15/16 the USITC was expected to publish an impact assessment of the USMCA.

BS (US) asked if UK consultation responses were made public, as in the US. CB (UK) explained they would not be made public, but individuals could publish their own responses if they wished.

### **Preliminary economic modelling**

USTR and USITC presented their initial work on modelling the impact of a UK/US FTA on the UK/US economies and on bilateral trade.

This modelled two base scenarios, a 'hard Brexit' where the UK and EU traded on EU MFN terms, and a 'soft Brexit' where the status-quo was maintained and no tariffs were imposed on UK/EU trade. The model analysed the effect of tariff and TRQ elimination but did not model NTBs or services liberalisation. The US explained that it was a static model, using a simple 'before and after' analysis and the latest GTAP (version 10) data.



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The main macroeconomic results were small. UK welfare and GDP increased less under the hard Brexit scenario. For the US, the reverse held, with the soft Brexit scenario offering smaller gains. The model estimated similar relative increases in trade across the GTAP sectors under both a soft and hard Brexit. Differences between a sector's soft / hard Brexit ranking, by change in value, tended to be minor or involve very small changes in trade flows (less than \$1 million and less than 1%) relative to the counterfactual. A notable exception was a relatively larger expansion under the hard Brexit setting in US exports in two agricultural sectors: dairy and meat products. Exports contracted in a few sectors when tariffs and TRQs on goods were removed, but almost all the contractions were very small (less than \$1 million and less than 1% change). Almost all contracting sectors were agricultural products, natural resources or services.

Gavin Jaunky (UK) provided an overview of DIT's approach to modelling the impact of a UK/US FTA and how this would feed into future work, primarily through the Scoping Assessment. Answering questions from Paul Roe (UK), USITC confirmed their results showed a negative return to land (factor of production); that the model assumed perfect competition across all sectors and used standard CGE modelling assumptions, such as mobile capital and full-employment.

BS (US) said it would be useful for the UK to identify the important sectors it wished to model and expressed his interest to have an update on the progress we have made on CGE modelling, suggesting a future video call between UK and US modellers to discuss technicalities. CB (UK) clarified that the UK would be able to share more information on modelling and sectors of interest once HMG had published material relating to our modelling for EU Exit analysis.

BS (US) emphasised the importance of modelling NTB liberalisation, while acknowledging the difficulties in measuring or estimating NTBs, as they usually present much higher trade costs than tariffs.

Praveen Dixit (US) expressed the importance of determining where and when CGE models are useful for influencing decisions and ensuring CGE results are understandable. He believed that CGE modelling was most useful in the early phases of policy development to identify important sectors. He agreed that closure conditions were very important and must be well documented to ensure that differing results were understood and could be communicated clearly. He emphasised the importance of distributional impacts of trade which are often ignored by economists.

BS (US) agreed on the importance of being transparent with policy makers on results and analysing distributional impacts of trade. CB (UK) explained that the UK was also thinking about distributional impacts and how CGE modelling relates to this, mentioning discussions with the Devolved Administrations on trade policy.

PD (US) spoke about the importance of employment and multipliers to be incorporated into the modelling.

Igor Zurimendi (UK) asked for advice on pitfalls to avoid in modelling.

BS (US) said there was sometimes too much emphasis on the quantitative estimates of small issues. Instead he stressed the importance of emphasising the comprehensive impact of an FTA.



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### Communicating the benefits of trade agreements

The US presented on the lessons they had learnt in effectively communicating the benefits of trade agreements to stakeholders, providing a useful three-point guide to effective communication:

1. Start early. What data and analysis are needed to communicate the benefits of the trade agreement effectively. For example, regional breakdowns? What sectors are of interest? What are common misinterpretations?
2. Go granular. Stakeholders want local information, relevant to their personal situation. It may be useful to supplement data with stakeholder evidence. This applies to Congress, to lobby groups, to consumers. PD (US) referred to this as a market for information (“if they don’t produce numbers then someone else will”). Transparency is key.
3. Think about the audience. Some audiences prefer numbers, some graphs, and some narratives. It’s important to tailor the presentation to the audience.

GJ (UK) asked how the US ensured an accurate and representative view of the industry when engaging with stakeholders. The US replied that they got information from a range of different sources. In manufacturing for example, there were often conflicts of interest between different sectors, however they tried to get a wide range of views and test against available data.

### Non-tariff barriers/measures (NTB)

GJ (UK) described DIT’s NTB survey, explaining that it had interviewed around 180 British and American businesses each, with majority in the goods sector so far. He laid out the future timeline, planning for 100% data collection by the end of November, and a summary report to be drafted in December/January.

BS (US) asked if the survey responses would be made public. GJ (UK) said we could share summarised tables of the findings of the survey, however there might be confidentiality issues at a more disaggregated level.

USITC presented their fact-finding investigation on barriers US SMEs face exporting to the UK. This focused on tariff and NTBs that SMEs consider to disproportionately affect their ability to export to the UK. The study would identify barriers by sector or issue, focusing on sectors with high concentrations of SMEs. It would distinguish qualitatively among the identified barriers. There would be a section including suggestions, either from SMEs or the literature, for actions to address the identified barriers and enhance the participation of US SMEs in exporting to the UK. The approach would be a combination of telephone interviews, domestic group meetings, public hearings and written submissions. The study would last for 12 months until July 2019.

CB (UK) asked whether the SMEs had detailed knowledge of their supply chains. USITC responded that they used information from SMEs alongside information from the Maritime Agency to help track supply chains backwards. GJ (UK) asked if the USITC would assess of the actionability of the barriers which they identify. BS (US) informed us that the USTR will provide an assessment on actionability on the barriers that have been identified, rather than USITC.

BS (US) discussed the work the USTR had done to gather intelligence on barriers faced by US businesses. BS (US) highlighted the USTR’s request for public comment to inform the National Trade Estimate Report on Foreign Trade Barriers. BS (US) also mentioned the China Compliance Report and Russia Compliance Report which would assess the compliance of the two countries with their commitments as WTO members.



### Trade in Value Added data / supply chains

BP (US) and his colleagues presented USITC's work on measuring Global Value Chains (GVCs). They distinguished between the two main sources they used to measure GVCs as official trade statistics and Trade in Value added (TiVA) data.

Using OECD trade data, they showed that most UK/US bilateral trade was in intermediate products. This aligned with DIT analysts' assessment of trade in the Information Notes accompanying DIT's US FTA consultation. They also highlighted the importance of Multi-National Enterprises (MNEs) in our trade, with US foreign affiliates based in the UK comprising one-quarter of US goods trade with the UK in 2012. UK/US bilateral trade was dominated by products produced in regional or global supply chains. However, official trade statistics had a number of limitations, such as the inability to inform us of the sources of value of products consumed domestically or the final destination of domestic value-added.

The TiVA database helped to overcome some of these issues by tracking value-added in GVCs from the original source country and industry to final destination. The US explained the methodology and limitations of TiVA data, focusing on the fact that inter-country input-output tables have to harmonise trade and national accounts data on a consistent industrial basis and time periods across countries. This could lead to issues such as a reliance on relatively aggregated sectors and significant time lags in the data. As a result, TiVA analysis could not show heterogeneity in firm types and differences in value-added structure for bilateral trade. The US also highlighted other potential approaches of GVC analysis beyond inter-country input-output tables, such as surveys and modelling.

Tom Knight (UK) said that the OECD was planning to update the TiVA database in December with data up to 2014/2015. It would also have additional data on employment, gender and carbon dioxide emissions. He welcomed the examination of TiVA limitations and mentioned that the OECD recognised the need for greater transparency of the TiVA methodology. Nikos Tsotros (UK) also recognised the significant limitations of the TiVA data but asked whether the TiVA data provided a more realistic estimate than the other approaches from the US. BP (US) responded that it depended on the industry in question and the level of sectoral disaggregation.

### Data asymmetries and data sharing

TK (UK) described the work undertaken by the Office for National Statistics (ONS) on data asymmetries. He explained that in the case of bilateral trade asymmetries, it was not the case that one country's data was right and the other's wrong. Instead, there were methodological and definitional differences. NT (UK) mentioned the third report from the ONS in the series on trade asymmetries. He noted the finding that there is an absolute bilateral trade asymmetry with the US of around £37 billion in 2016. The main drivers of the asymmetry were financial and business services. Much of the difference could be explained by definitional differences. For example, the ONS included Puerto Rico in US trade (but not other US territories), and the BEA included the UK Crown Dependencies in UK trade.

KH (US) said that the BEA had produced a report on data asymmetries in February 2018. They had identified the source of around one-third of differences in UK/US bilateral trade asymmetries. The BEA had tried to quantify the impact of classification differences on the trade asymmetry. On "financial intermediation services indirectly measured" (FISIM) the BEA were looking to update on their definition. The BEA were also looking to improve the source of travel services data. They would then evaluate how these improvements affected bilateral trade



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asymmetries. Relating to international efforts to reduce trade asymmetries, the US were limited in their participation due to legal constraints on sharing firm-level data.

NT (UK) said that FDI asymmetries were around 9 times bigger than trade asymmetries. Four HS codes explained around three-quarters of the trade asymmetries between the UK and the US.

On data sharing, Peter Antonaides (UK) confirmed that all the data that DIT have offered to share was publicly available. Data sharing was not an exercise in reducing trade asymmetries. The US had additional data requests from DIT, namely input-output tables, post-Brexit MFN tariff rate schedules and more detailed FDI data. PA (UK) stated that DIT do not have any more detailed data on FDI, but that the OECD publish an AMNE database and FDI Restrictiveness Index database which would provide further detail on the UK FDI regime. PA (UK) mentioned that the ONS would soon publish an update for the UK FDI data for 2017.

PA (UK) asked whether the US had trade data at a sub-regional level and whether the BEA would be able to share that. FJ (US) said that the BEA produced detailed State-level data which they would be able to share. DIT and USTR agreed to exchange a package of data before the end of 2018.

### **Other issues**

Discussion then moved onto the reports which USTR are required to produce under the Trade Promotion Authority. BS (US) said that all reports were published apart from the Probable Economic Effects report. The USTR would produce a package of reports examining the impact of an FTA on labour, the environment and SMEs.

Jonathan Bateman (UK) asked the timings of the reports in the FTA process. The US clarified that the reports would be sent as a package to Congress in the late stages of the FTA negotiation process.

CB (UK) asked whether they would look at different demographics within the labour markets report. The US replied that it was difficult to make a robust comment on the demographics of the labour market other than relating to educational level and skilled/unskilled labour. CB (UK) asked if the question were ever reversed, i.e. designing an FTA to meet the requirement of the labour market. The US said not but there were overarching objectives relating to employment and protecting jobs which the USTR was required to meet in an FTA. IZ (UK) asked if labour market impacts on other areas other than manufacturing were analysed, e.g. the impact of jobs within services industries. The US replied that the main focus was usually on manufacturing and agricultural sectors as it was difficult to measure employment connected to services trade. This stemmed from the difficulties in measuring services trade more generally.

BS (US) then asked what reports the UK was required to publish during an FTA. CB (UK) informed him that the UK was currently determining this.

BS (US) and CB (UK) thanked the delegations and closed the session.

### **Key Actions and Next Steps**

- UK and US statisticians committed to share the agreed data as soon as possible, and definitely before the end of 2018.
- DIT and USTR will arrange a discussion between UK and US modellers once the UK has published information about its CGE model.



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- DIT will share information from the NTB business survey in early 2019.
  - DIT will provide an update on progress on the Withdrawal Agreement and associated modelling at the next TIWG Economic Session.

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**Session Lead Analysis/Comments**

- Constructive discussion. Good progress on data exchange.
- Interesting that USTR shared their first modelling of a deal - but tariffs only – imagine they are trying to elicit numbers from us. They'll see more of our results in early 2019 (through the scoping assessment) than we will from them (USITC's equivalent is not published).
- USTR were very sceptical about 25/50% NTM reductions proposed by DG Trade for TTIP modelling, as they said the EU assumed the US would sign up to European standards. They will presumably disagree with our analysis for the same reason unless we indicate it's the UK signing up to US standards (unlikely). We don't expect them to publish numbers that would contradict ours publicly, but they may disagree gov-to-gov and challenge us on what NTM liberalisation we're expecting.
- The discussion was technically useful for us. It also helped clarify what analysis both sides would publish (and when) during the FTA process, to avoid surprises in either direction.



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## Technical Barriers to Trade

Date: November 7, 2018

Time: 13.00 - 15.00

### Participants

| Name               | Department/Directorate     |
|--------------------|----------------------------|
| UK                 |                            |
| Julian Farrel      | DIT                        |
| Henry Alexander    | DIT                        |
| George Radice      | DIT                        |
| Ian Bhullar        | BEIS                       |
| James Dunn         | DEFRA                      |
| Meghan Ormerod     | British Embassy Washington |
|                    |                            |
| US                 |                            |
| Christine Brown    | USTR                       |
| Rachel Shub        | USTR                       |
| Natalie Simonoff   |                            |
| Matthew Jaffe      | USTR                       |
| Silvia Savich      | USTR                       |
| Katherine Skarstem | US Embassy London          |

### Key Points to Note:

None

### Report of Discussions and Outcome:

#### USMCA TBT Chapter

Discussion started with the US offering to walk through the TBT chapter in USMCA. Christine Brown explained that USMCA contained the US' most ambitious TBT chapter and that there had been a number of improvements when compared to NAFTA or any other US FTA. She explained that the chapter builds on WTO commitments in this area and commented that US policy on international standards discussed in the last TBT session of the TIWG was fully reflected in the chapter.

USTR noted that, as in (CP)TPP, the USMCA chapter requires Parties to apply the WTO TBT Committee decision from 2000 when defining international standards. In contrast to CPTPP, USMCA makes explicit that no additional criteria should be applied in determining what an international standard is. There should not be any limit on where a body is located, whether the standards body is governmental or non-governmental. The US considers this clarification a strengthening in comparison to CPTPP.





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There are elements of the USMCA TBT chapter where the US had built upon TPP – and they commented that it had been good to give that language a legal scrub.

The US explained that the idea of this provision went back much further than TPP, to the FTA with Chile. The USMCA chapter made clear that parties should not be adding additional criteria to the TBT Committee decision.

On **conformity assessment** the US explained that the USMCA chapter is consistent with existing US FTAs, providing national treatment for accreditation of conformity assessment bodies. It also makes clear that there should be greater transparency of conformity assessment procedures and their fees.

Article 11.6.6 adds language for national treatment of accreditation bodies. A number of additions have been made here for the sake of transparency. This is particularly the case around enabling stakeholders to feed into the process of regulation making. Parties should make best endeavours to notify revisions to regulations, and where significant revisions are made notify this to the WTO.

On **technical regulations**, like CPTPP, USMCA says Parties shall normally allow 60 days for comments on draft technical regulations: where possible Parties should consider extending this to 90 days. There should normally be a minimum of 6 months for the process of implementing new regulations.

The agreement enhances commitments to make technical regulations based on impact assessment.

The US explained that it is important for them that parties acknowledge that there may be instances where more than one international standard could be used to demonstrate compliance with regulations. There should be a pathway for regulators to use other standards. Provisions regarding the review of regulations are relevant here – and this ties back in to the GRP chapter. No preference should be accorded to standards developed in a manner inconsistent with the TBT Committee Decision on international standards;

On **third party agreements and technical assistance**, there are provisions stating that parties should encourage the use of standards, guides and recommendations developed in accordance with the TBT committee decision.

On **dispute settlement, provisions** the US explained that they had made some modifications to previous agreements:

- Preventing USMCA dispute settlement in respect of provisions of the WTO TBT requirements incorporated in the USMCA agreement.
- Requiring the parties to pick one of either the USMCA dispute settlement route or the WTO and preventing parties from bringing a dispute on the same issue in both.

The UK (Henry Alexander – HA) asked if the US had a certain time period in mind in the commitment to periodically review technical regulations. The US noted that there is an overall review period for the US, but that each Administration comes in and has their own effort to review regulations – this is particularly the case with the current Administration. The US noted that the review provisions in the TBT chapter are a little stronger than you have in the GRP chapter. The point was that you should not maintain regulations beyond their shelf-life, to encourage agencies to ensure any regulations are current.



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In response to a question from the UK (Julian Farrel – JF) the US explained that they had included a right to petition in the agreement. The provision sets out that the private sector should have a right to approach the regulator to seek to have a regulation reviewed – very much like the good regulatory practices review.

JF asked if the labelling provision was intended to address a particular problem that had already arisen, or one that might arise in the future. The US said that they had not proposed this measure. It sounded good, but in fact labelling guidance tended to be more appropriately dealt with on a sector specific basis, so they were sceptical about the added value of the provisions here above what is already in the WTO agreements.

JF commented that provisions on national treatment and conformity assessment looked very similar to those in TPP. The US agreed. National treatment of accreditation of conformity assessment bodies had existed for some time. There were new commitments, but on transparency, procedures and fees, as well on sub-contracting and accreditation.

JF asked if this meant that if a CAB in Mexico or Canada wanted to be accredited the accreditation process would be the same as for a US based CAB. The US explained that if a regulator in the US recognises that private sector bodies can perform tests then it has to be open to private bodies located elsewhere in the world to apply for accreditation. Each one of the regulators sets up their own processes for how they recognise licensed bodies and there is a range. Whatever the programme of accreditation, it should apply to domestic and international bodies.

Clarifying this, the US said that between the three parties to the USMCA there are differences in how regulators recognise conformity assessment bodies and labs, but whatever those processes are it requires the regulator to look at the CAB similarly wherever it is based.

HA commented that the provisions around sub-contracting are new, and asked what problem the US was seeking to solve by including this. The US explained that sometimes the range of requirements are not available within a single body and this is used to discriminate. Explicitly outlining measures around sub-contracting is intended to help deal with this.

In response to a question on fees, the US explained that the intention of provisions is to make clear that a regulator can recoup additional costs involved in reviewing a CAB in another country (travel etc.), but that charging higher fees to CABs located elsewhere should not be seen as a revenue-raising exercise.

The US confirmed that the measures around notification of TBT (60 days notification) is a recommended figure.

On the **TBT Committee established by the agreement** the US explained that this committee is “more robust” than those established by previous FTAs and that they imagine it will undertake more work. Expect it to meet at least on a yearly basis to talk about trade concerns. The US (RS) commented that the committee under NAFTA was very active for the first 5/6 years, for example through regulatory co-operation groups. After a number of years, they tend to “run out of steam”. All parties in USMCA were agreed that it should be made clear to stakeholders that they committee is a place they could come to if they have ideas on things that could be done to facilitate trade – for example on conformity assessment. Any one of the parties could also put any issues on the agenda.



HA asked how the public would be involved in the committee. The US explained that this had evolved over the years. Often the committee met back-to-back with a meeting with the private sector. The private sector is not part of the decision-making but might receive a briefing from the committee and provide inputs to it. The US commented that they had used the committee with Australia in a very robust way in this respect. There were a couple of outcomes in APEC that were a direct result of US-AUS co-operation in the context of the FTA.

The US commented that this committee would be entirely separate to the Regulatory Co-operation Council with Canada. The RCC was recently renewed through an MOU. It looks to regulators to volunteer up things they are working on at the time to be taken forward through the RCC. There are already direct relationships between the regulators, the RCC looks to help facilitate them. The RCC has generated a variety of outcomes including joint inspections of boats on the Great Lakes.

The US commented that FTA stakeholder meetings tend to be more focused on TBT issues and sector specific issues (e.g. digital). They had previously held successful workshops in the margins on conformity assessment for example.

The US explained that the preference set out in the agreement is to avoid “government unique” standards. Governments should avoid creating a standard where industry has developed voluntary standards – standards should not be inward and government facing. The UK said that it did not think that this was an issue it came up against: standards are voluntary and created by those that use them. [There appeared to be some scepticism from the US side on this.] The US said that some governments appear to “take pride” in the “originality” of their standards and they wanted to be clear that this was not a good thing.

### Exiting the EU

The UK (JF) updated the US on negotiations. JF noted the common rulebook proposal in the Chequers White Paper, and that it remained to be seen where this would come out in negotiations with Brussels. JF commented that on DIT analysis it did not seem that there would be insuperable obstacles to the kind of TBT chapter found in TPP if the UK were in a Chequers agreement scenario. The UK had not had the chance to study USMCA to the same degree to reach a determination on this. The UK’s sense was that none of the TBT chapters in FTAs seem to be so prescriptive on product regulation that there would be a conflict with the common rulebook approach.

The US asked for more information on why the UK did not think there would be a problem. They noted that there was a lot of similarity between the TBT provisions in USMCA and those laid down by the US for TTIP. Many of the elements of TTIP had been problematic for the EU and continue to be problematic in current EU-US discussions: having more than one acceptable standard; public notification of intention to set new technical regulations; considering international standards that are not limited by the Geneva institutions. The US asked how the UK could reach the conclusion that a TBT chapter like that in TPP could be acceptable if it is adopting a common rulebook approach.

JF explained that while the UK will rollover the EU acquis for the Implementation Period what happens after that is dependent on the long-term agreement reached with the EU on the Future Economic Partnership. European standards are voluntary with very few exceptions. One way that a manufacturer can demonstrate that they have complied with the law is by meeting the European standards, but the standards themselves are not the law. The law is the safety requirement set out



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in the legislation. European standards are only ever one route to demonstrating compliance. The CE Mark demonstrates that you meet the regulation, not the standard.

The US remained sceptical about this. They outlined that their objective is a predictable system and that the EU system is not predictable, unless you are using European standards. The European standards system may be voluntary in principle, but in their view in practice, the alternative means does not work. The chapter in USMCA outlines a system that is more predictable and flexible for companies.

The US (Small Business Administration – Bryan O’Byrne BoB) commented that the US also had problems with the European standard itself. It was precisely to avoid a similar scenario that USMCA has a section on the TBT committee decision.

JF argued that the UK takes what is on the statute book seriously – the safety requirement is what is important, not the standard. The US argued that it was nonetheless a risk for importers of US products and one they were unwilling to take. Importers could not be sure that a product would get through. The US would look to UK regulators to say in a public, transparent way: “you can use X standard that is not the EU standard, and that would be acceptable”. JF repeated that the obligation in the UK is compliance with the law and that it was open to any manufacturer to demonstrate that they meet the law. RS said that this is what the US had heard from the EU and it was an impediment to progress in the TTIP negotiations.

The parties discussed whether it was possible to continue the discussion on this topic currently given the uncertainty around the UK’s position post-EU exit. The US said that their overarching point was trying to determine what space the UK would have to act after exit. RS said that she accepted that the UK might already respond slightly differently to other parts of the EU: a US manufacturer had in the past managed to get something approved by the UK body, but the UK body was then reprimanded in Brussels. Would this kind of set-up be the same in the future?

BoB noted that this issue was particularly pertinent for small businesses. SMEs in particular need greater certainty and are unlikely to pursue trade in this space where uncertainty exists.

Both parties agreed that as the situation becomes clearer with respect to the UK’s position post-exit more specific conversations will be possible.

The US commented that this issue was one reason why the petition process became so important. It provided a way to get the government to provide more certainty product by product, sector-by-sector. This is what the US had been seeking from the EU.

#### UK consultation

The UK (George Radice – GR) updated the group on the initial results of the consultation process – 6,000 substantive responses on UK-US, a team in London currently analysing the results. HMG will likely issue a response at the same time as an “outline approach” for a UK-US FTA.

JF outlined some of the initial findings on TBT. There is a cross-cutting concern that no FTA should lead to a reduction in protection in different areas covered by FTAs (e.g. food safety). Some returns raise the issue of the split between federal and state level regulation.

#### **Key Actions and Next Steps**

Further discussion once greater clarity on FEP provisions.



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**Session Lead Analysis/Comments**

Ongoing US scepticism about the compatibility of a Common Rulebook with the EU, and our ability to sign up to a TBT chapter in an FTA.



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## COMPETITION

Date: **November 7, 2018**

Time: **13:00**

### Participants

| Name                 | Department/Directorate                                      |
|----------------------|---|
| Andrew Pickering     | Head of Trade and Competition, DIT Trade Policy Directorate |
| Katie Waring         | US Team, DIT  |
| Anne Collet          | Deputy Head, Trade and Agriculture Team, BEW                |
| Mark Mowrey (MM)     | Deputy Assistant USTR for Eurasia and the Middle East       |
| Timothy Longman (TL) | US Department of Justice                                    |
| Andrew Heimert (AH)  | US Federal Trade Commission                                 |
| Debbie Holland       | US Department of State                                      |
| Ryan W               | US Department of Commerce                                   |
| Alexandra Whitaker   | Attorney, USTR  |
| Krista Barry         | USTR  |

### Key Points to Note:

- Useful discussion of USMCA which is clearly the US model in this area
- Clear US focus on procedural rights; UK sought to emphasise like-mindedness on this.
- US interested in UK's ability to deviate from substantive EU approach and case law; this was not unexpected, but we may get more pressure on this even if it's not formally covered in an FTA.
- Agreement that UK-US cooperation agreement and work on the Multilateral Framework on Procedure are separate tracks to the TIWG and discussions on a future FTA, and that an FTA would typically not need to go into detail on cooperation where the position between agencies where clear and there were no doubts about mechanisms for cooperation.

### Report of Discussions and Outcome:

#### *Overview of US approach to competition chapters*

MM explained that competition chapters are included in US FTAs as standard, with a focus on process and transparency. 'Competition authorities are in driving seats so we try and keep out of the way.'

#### *UK competition policy*

The UK outlined its proposed to the EU for the FEP, including how the EUWA will apply in this area and to what extent the UK will be bound to pre-Exit case law. Competition law covered in Brexit (FEP) White Paper. It doesn't say there will be ongoing harmonisation with the EU.



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The US asked about what would happen where it wanted to deviate, or where the EU's own position changed over time - would the UK still be bound to the status quo ante? The US also asked how whether this would cover EU case law on procedural rights. The UK said that the intention was to retain flexibility, but agreed to write with a fuller explanation, including how this would relate to the structure of the UK legal system - at what level such decisions would be made. The UK would also share the draft SI and Explanatory Memorandum.

*FTC hearings*

The UK asked the FTC about the current hearings it is holding. AH explained that it's 25 years since the last set. The FTC leadership wanted to hear various voices and has an open mind on key issues. Concentration is an issue being discussed, as is the consumer welfare standard. There would be a possibility to propose legislative changes or changes to agency working practices. There were hearings taking place now but there would be a further series into spring. No decision on next steps after hearings conclude but a report is a potential outcome.

*Consumer welfare standard and multilateral framework on procedures*

The UK asked about references in USMCA to consumer welfare [COMMENT: USTR seemed to confuse this with consumer protection]. On consumer protection, USTR said the EU had had some limitations in TTIP discussions. There were also provisions in the digital trade chapter.

On the consumer welfare standard, the DoJ noted that the relevant provisions are phrased such that consumer welfare is an indirect effect of the competitive process, not the direct objective. The DoJ mentioned its opposition to excessive pricing cases.

The UK asked if the US priority had tended to be substantive convergence, procedural convergence, or something else. The DoJ said that in its view, procedural rights were not a matter of convergence, but basic standards and fundamental rights. There was a minimum threshold that it wanted to see. Above that there might be a question of a place for divergence/convergence.

The UK asked about the kinds of concerns that it gets from stakeholders on this topic. The US mentioned concerns about China, Korea, Japan, Taiwan, but noted the EU as well in certain specific elements of its approach. The DoJ said that it was not exclusively a stakeholder-driven approach. The agencies also had an interest: the more they cooperate with other agencies, the more they are concerned to ensure those agencies meet procedural standards.

The FTC added that the legitimacy of a regime was also relevant: where procedural rights are not strong, the odds of bad decision-making are raised. The best results come from proper procedures - better evidence. The UK agreed, noting that it had used similar arguments in the past.

USTR said that for TTIP, they got a lot of input from industry, and there were a lot of things the USTR had to say no to [ie US firms are clearly offensive in this space and we should expect to be under some pressure].

The UK asked the DoJ about its Multilateral Framework on Procedures (MFP) initiative. The DoJ said that negotiations were underway on a final text and they were aiming for signatures next year. This was agency to agency not government to government and unlike an FTA, was not a legally binding text. There would be 'adherence devices': dialogue and reporting. Reporting would take the form of an authority explaining how its processed met the MFP obligations. This would be updated as required. It was still TBC how this would relate to ICN and OECD work. The US was sceptical



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on the ICN in that it would be hard to get 140 signatures by consensus. Debates with the EU were ongoing on that.

### USMCA

The UK asked the US to introduce USMCA. USTR said that the structure was usually the same in their FTAs: opening statement, procedural fairness (explicit mention of cross-examination of witnesses 'high on the list'), consumer protection, DS disappplied.

On procedural fairness, there had been certain things the EU could not do, like cross-examination of testifying witnesses. The UK asked the DoJ whether this meant that a regime must allow for testifying witnesses and that they should be cross examined, or whether it meant that *if* a regime had testifying witnesses, they should be able to be cross-examined. The DoJ said the latter.

The UK and US confirmed their shared understanding of intentions for a first (and potentially, later, a second) generation cooperation agreement. The UK said that it felt that where cooperation agreements exist, there was no obvious reason to go into detail on cooperation mechanisms in an FTA. The US said it would tend to add more where the position was unclear or where there were doubts about the mechanism. If a party did not have the legal mechanism to cooperate as desired, FTA provisions could be a means to trigger legislative change.

The US confirmed that USMCA was its most comprehensive competition chapter. The UK asked why private actions were not covered here, where they were in CPTPP. USTR was unsure but would check. But in TPP, this was included at the request of another party, not the US - it may have been to help another country get a private actions regime set up. NAFTA had been used to get a Mexican competition regime in place; similar for Vietnam/Brunei in TPP.

The UK noted the symbolic value of consumer rights provisions [nods from the US] but asked the US for views on the practical value. The US said it didn't have lots of experience but would get a view from Stacey Feuer (international consumer affairs, FTC). Again, there could be cases where another country didn't have domestic arrangements and this was used to encourage them. Cooperation could also be important.

The UK asked why the definition of fraudulent and deceptive practices appeared in TPP but not USMCA. The FTC said that it was unsure but noted that it was (likely) based on an OECD definition, so unlikely that there would have been new negotiations on the wording/differing understandings.

The UK asked about US agricultural exemptions (Capper-Volstead). The DoJ handles agri in the US system<sup>1</sup> but said that Congress sets the laws and Congress can create exemptions. The DoJ wasn't going to tell them otherwise; this won't change. The UK asked whether comp law exemptions were on a 'block' or 'individual' basis. The FTC said that they were usually industry specific, often based on litigation where a view had then been taken that the industry shouldn't have to bear the brunt of certain practices being covered by the antitrust laws. Often dating from a time when analysis was less refined and where modern antitrust enforcement would likely conclude there is no harm anyway.

The UK said that EU block exemption regulations (BERs) would be brought across into UK law via the EUWA. The UK agreed to provide a fuller explanation of how HMG/Parliament would be able to amend this in future, and how this related to adopting pre-Exit EU case law.

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<sup>1</sup> For some enforcement matters, sectors are divided between the FTC and DoJ.





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The US asked how case handling would work on Exit - who would deal with what? Would the UK take responsibility for the UK elements of the Google case, for example. The UK said some elements were still subject to negotiation, but we would update the US when we could.

The US asked about how case law would work with the DAs - would they be able to do something different and how would this work with separate court systems. The UK said all of the UK applied the same law, but it would provide a fuller explanation in writing. US asked if a trade agreement on this space would apply to all regulators across UK? UK replied that some details name all the regulators and the law. UK open to which method is best to ensure UK- wide application  
The US asked about whether pre-Exit EU case law would apply to the SFO<sup>2</sup> and FCA [and implicitly concurrent regulators.] The UK said, again, then concurrent regulators applied the same law.

*China engagement*

The UK asked the FTC about its work in China. AH said engagement is robust and ongoing. Increasingly case cooperation and decreasingly technical assistance. The UK asked if the new agency had fewer staff than the old three agency system. The FTC had heard that, but unclear if it was true on an FTE basis. The UK asked how well the FCMR is working. FTC said it was a challenging exercise and early days still. A modest success. Much advocacy is naturally behind the scenes.

*Closing*

The UK mentioned that ERRA13 provides for a review of the UK regime before April 2019. BEIS was handling this. The US asked if this would account for EU Exit considerations. The UK said it expected they would be taken into account, but that this was not the focus or what Parliament had intended when it passed ERRA13.

The US asked about CPTPP - was this an accession or a negotiation. The UK said TBC. The US said TPP and USMCA were different but not inconsistent.

The UK closed by stating that all the content of USMCA are recognisable principles. UK is looking at joining CPTPP. UK has common principles – seems very achievable without too many difficulties. US concluded by stating that today's discussion was a good start. Agreed to keep exchanging information.

**Key Actions and Next Steps**

UK to provide further information in writing as to how EU case law will apply post-Exit, including amendments made to Competition Act 1998 s60 by virtue of The Competition (Amendment etc.) (EU Exit) Regulations 2019. To share draft SI and Explanatory Memorandum, as well as an explanation where the UK would have flexibility to deviate from EU precedent and at what level of the UK legal system. NB: completed 16 Nov 2018.

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<sup>2</sup> The SFO is not a concurrent regular for competition law. The CMA and SFO can both investigate and prosecute individuals for the criminal cartel offence as set out in the Enterprise Act 2002 (and for which there is no EU law parallel). This is separate to concurrency arrangements for civil matters in the Competition Act 1998. We may need to ensure the US has understood this distinction.



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### **Session Lead Analysis/Comments**

Atmosphere – Positive atmosphere in a like-minded area, helped by prior professional engagements between Pickering, Heimert (and Coppola) and Longman. Probing and detailed questions from Alexandra Whitaker, which we should be better prepared for next time. Some hints that US would push UK quite hard on procedural rights.

Key Achievements of session – This was our first discussion, so this was mostly about making sure we had covered it and that there were no nasty surprises. Obtained clarity on certain elements of US preferences (private actions, consumer welfare standard, cross-examination of testifying witnesses).

### **Areas to work on for UK ahead of next meeting**

- Lines to take on likelihood of divergence from EU case law
- Lines to take on UK/EU case allocation during IP and immediately after Exit
- Procedural rights audit for UK CMA and concurrent regulators



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## CLOSING PLENARY SESSION

Date: **November 7, 2018**

Time: **15:00 – 16:00**

### Participants

| Name  | Department/Directorate  |
|---|---|
| <b>Chaired by</b>                                   |   |
| <b>Dan Mullaney (DM)</b>                            | <b>Assistant USTR for Europe</b>  |
| <b>Oliver Griffiths (OG)</b>                        | <b>Director, Americas Negotiations and Strategic Engagement, Department for International Trade</b> |
| <b>All members of UK and US delegations present</b> |   |

### Key Points to Note:

**Dan Mullaney (DM)** commenced by setting out the highlights from the week: over 200 officials from UK and US departments/ agencies had participated in the 5<sup>th</sup> TIWG; the 3<sup>rd</sup> UK-US SME Dialogue had focussed on digital trade and attracted over 100 SMEs; there had been good discussions at the inaugural Legal Services Roundtable - jointly hosted by UK and US regulators; and whilst we couldn't control the political circumstances, the work put in to lay the groundwork for an FTA meant that we would be totally prepared for what might eventually happen, including starting negotiations. The next TIWG – notionally in the 1<sup>st</sup> quarter of 2019 – would probably be the last in the current format. We would then move into an entirely new mode. **DM** said that leads had done a very good job of planning on-going engagement between TIWGs – this should continue. There had been good progress on Continuity Agreements, but there was still some work to do to avoid any gaps.

**Oliver Griffiths (OG)** said that there had been really strong atmospherics with strong relationships on both sides – very important as took work forward. There had been solid progress and we were now heading into acceleration mode. The extensive engagement with stake-holders at this TIWG, including the joint event at the US Chamber, felt like “coming out into the light”. With the UK consultation; USTR's notification and request for comments; and the Congress expressing more interest all meant that we were getting ready for gear shift.

**DM** thought that both sides were well on their way to potential negotiations. It would therefore be useful to use the time between now and next TIWG to ensure we were ready for a potential 1 April start date. Whilst we didn't know exactly what timeframe leaders will be on, **DM** anticipated that the President and USTR Lighthizer would want to move as quickly as possible.

**DM** continued that the recently completed US-Mexico-Canada Agreement (USMCA) was in some ways a good indication of the approach the Administration was taking to new trade agreements. There were however a number of provisions specifically tailored to US, Canada and Mexico in USMCA. USTR would also need to take on board responses to the federal register notices on a UK-US FTA and there would be aspects which would need to be tailored to the specifics of the UK and US economies. At the next TIWG (potentially February) it would be useful to have UK thoughts on USMCA, in particular: areas aligned with UK interests; and things which weren't acceptable to the UK. This would be useful to help anticipate where we were likely to be aligned and where needed to resolve differences.



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In terms of next steps, **DM** highlighted the Administration's interest in the UK's negotiations with the EU, were it was important to leave maximum space to negotiate an ambitious FTA with the US. There was strong interest from Congress and other US stakeholders on this. For the US' Trade Promotion Authority (TPA), the next step would be a Federal Register notice to elicit comments from the public including a public hearing [*Comment: issued on 16 November*]. Timing likely to be Dec/Jan timeframe with hearing likely in Jan. The final step - developed on the basis of this consultation – would be a set of detailed negotiating objectives to Congress 30 days before any negotiations commence (no later than 27 February for a 1 April start date).

**OG** summed up the three main areas covered by the TIWG:

1. **Continuity Agreements**, where there had been good progress, including at the Economic Working Group in the margins on the broader economic agenda. On Spirits, wording would be agreed in the next couple of weeks; on Organics, the UK had passed inspection and would appreciate receiving confirmation soon; on Veterinary Equivalence, both sides were aiming to have a call by the end of month to decide the format (e.g. exchange of letters); on Wine, there remained some distance, but the UK planned to send over the latest text by the end of next week; and on MRAs, the UK had received the message that the US wanted a long-form on marine equipment and the UK had requested detail on the industrial goods MRA asap.
2. **Short Term Outcomes**, it would be good to have the economic study on IP ready for the next TIWG and we were looking forward to the 4<sup>th</sup> UK-US SME dialogue. The Legal Services Roundtable had been really positive (led by regulators and industry). This should be used as a template for a broader agenda – e.g. architects and engineers
3. **Laying the groundwork for an FTA**, it had been very helpful to be walked through USMCA. Here it would be helpful to have a follow-up on agriculture. It had also been useful to have an initial discussion on industrial subsidies and competition (where there was a UK action point to find out how far the UK would be bound by EU case law); there had also been a really valuable customs session - here there was more the UK and US could do and it would be good to expedite work before next TIWG. Economists had also agreed to exchange trade data before Xmas. On TBTs, the UK did not see the common rulebook posing an obstacle to a TBT chapter in a future FTA. At the next TIWG, it would be useful to cover off procurement and remedies.

**OG** then set out next steps on the UK side: we now had consultation responses in, which were being digested; we would look to do public response in the first quarter next year, accompanied by an outline approach (objectives) for a UK-US FTA. Whilst we were keen to signal green or amber, red lights regarding USMCA, we may be constrained in some areas between now and the next TIWG. There would hopefully be more clarity on the UK's future relationship with the EU before the next TIWG (although this would be a broad outline approach).

**End of report**

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For any queries about the contents of this dossier or the Trade Working Group meetings, please contact:

**Sophie Brice**  
Acting Deputy Director, UK-US Trade Policy Group  
Department for International Trade