Department for
International Trade

UK-US Trade & Investment Working Group

24-25 July 2017

Full Readout

Department for
International Trade

Agenda and Table of Contents

Original scheduled time/date*	Meeting title and objectives	Page Number
Day 1 - Monday 24th July		
9:30-10:15	**Coordination Team meeting (USTR/UK coordination)**	3
10:15-10:45	**Trade Strategy/WTO**	5
10:45-11:15	**Goods/Textiles & Apparel**	7
11:15-12:30	**Informal discussion on Regulatory Issues (USTR/DIT/BEIS)**	10
12:30-14:00 - Lunch		
14:00-15:15	**Lighthizer-Fox meetings** ***Suggested running order was:*** **14:00 - 14:15: Fox/Lighthizer bilateral** **14:15 - 15:15: Main plenary session**	13
15:30-17:00	**SMEs**	15
Day 2 - Tuesday 25th July		
9:00-11:30	**Services, Data, FS** ***Running order:*** **9:00 - 10:15: Services, including Financial Services** **10:15 - 11:30: Data, digital and e-commerce issues**	18
11:30-15:00	**Goods (Part 1 and Part 2)**	28
15:00-16:00	**IPR & Gis**	40
16:00-17:00	**Coordination Team meeting (USTR/UK coordination)**	44

*Session times may have varied from the schedule for actual meetings

Department for
International Trade

Title of Meeting: ***Opening Coordination Meeting***

Date: ***24 July***

Time: ***09.30***

Participants

Name	Department/Directorate
Dan Mullaney	USTR
Tim Wedding	USTR
David Weiner	USTR
Ram Rizzo	USTR
Alexandra Whittaker	Assistant General Counsel USTR
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Mark Kent	British Embassy Washington

Key Points to Note

- UK explained seven short term outcomes. US supports concept of STOs but reserves its position pending inter-agency review.
- US question whether Trade Working Group is the right forum for consideration of some of these STOs. UK notes that Economic Working Group only focused on continuity.
- US requests STO proposals remain internal to US and UK Government at this stage.

Report of Discussions and Outcome

1. USTR (Wedding) set out their expectations for the agenda of the 2-day meetings running through the individual sessions and representatives on the side. UK (Griffiths) agreed. The UK asked about the treatment of procurement continuity issues, given US sensitivities prevented its addition to the agenda. The US (Wedding) offered to introduce Scott Pietan, USTR lead on procurement who would be able to discuss. But he cautioned that US policy was in flux given the 'Buy America, Hire America' report which was under discussion. The US would not have a policy position at this stage, but this was likely a "temporal issue".

2. The UK introduced discussion of the 7 short term outcomes (STOs) which did not fit within the separate sessions:

    a. Defence Technology Transfer. The UK (Gadd) presented. Significant existing dialogue at working level with Dept of Defence and State Dept. There is an opportunity to overcome hurdles on both sides given largely homogenous defence industry. Improving the ability to

move technology back and forth would reduce cost and increase capability of both our militaries. The Defence and Foreign Secretaries had already raised with their US counterparts.

b. Defence Market Access and Governance. The UK (Gadd) presented. This proposal would build on the Reciprocal Defence Procurement MoU which provides relief from Buy America provisions. The goal would be to expand the scope of coverage.

c. Science and Technology Agreement. The UK (Colley) presented. Negotiations to secure this agreement are ongoing between BEIS and the State Dept. This would provide a straightforward deliverable.

d. Offshore Wind Collaboration. The UK (Colley) presented. The UK is a world leader in offshore wind. The US is taking increasing interest, including at the sub-Federal level. Our goal would be enhanced policy dialogue and provide Govt blessing to primarily private sector engagement.

e. PPP Expertise Sharing. The UK (Colley) presented. In the context of President Trump's infrastructure initiative, the proposal represents a UK offer to share expertise and best practice in PPP. A joint conference could be a useful mechanism to bring together public and private sectors.

f. Mobile Roaming. The UK (Connolly) presented. The EU agreement to eliminate roaming charges has gone down well with the public. This proposal could do so between the UK and US. This could increase digital trade and generate long-term net benefits. UK telcos already have agreements with US providers, some of which already eliminate roaming charges. There may be mechanisms to do this jointly.

g. Sports collaboration. The UK (Connolly) presented. There is a significant UK appetite for US sports franchises. American Football has begun exhibition matches and a formal franchise is under consideration. Additional US sports would be welcome.

3. The US (Wedding) welcomed the explanations and endorsed the concept of seeking short term outcomes. Given the outlines had only been received just prior to the Working Group, the US would reserve its position on the specific proposals. The US would need to do some thinking on an inter-agency basis to consider the proposals and may revert with questions. US leads would share their own proposals during the specific sessions. Wedding noted the potential trade policy angle was obvious in some proposals, providing a clear USTR locus, whereas in others the lead would be clearly with other agencies. The US questioned whether the trade working group was the best forum for discussion and recommended an additional discussion with Clete Willems (NSC, Chair of Economic Working Group) regarding the proposals. The UK (Phillipson) noted the Economic Working Group was only mandated at present to look at continuity issues, not the future relationship. The US (Mullaney) recommended experts digging into the detail (e.g. Rob Tanner on roaming). Wedding raised comms around the STOs, noting press reporting of "24" proposals but no specifics, and requested that they remain internal at this stage.

Department for International Trade

Title of Meeting: ***Trade Strategy / WTO***

Date: ***24 July***

Time: ***10.15***

Participants

Name	Department/Directorate
Dawn Shackleford	Assistant USTR for the WTO and Multilateral Affairs
Mary Thornton	Counsellor, US Mission to the WTO, Geneva
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Antony Phillipson	DExEU
Anne Collett	British Embassy Washington

Key Points to Note

- US sceptical about chance of substantive deliverables at WTO Ministerial
- US remains concerned about operation of WTO Dispute Settlement Body (DSB), but no substantive discussion.
- US seeking improved compliance with existing notification obligations from WTO membership, important in the context of overcapacity.
- US keen to see conversation about special and differential treatment for developing countries that recognises difference between advanced developing and low income countries.

Report of Discussions and Outcome

1. Shackleford set out three current US issues: preparations for the WTO Ministerial; the WTO Dispute Settlement Body; and, the approach to developing countries in the WTO.

    a. *WTO Ministerial*. The US was approaching this in a different way to the EU. The US is sceptical that concrete outcomes would coalesce in time for the Ministerial. At this stage ahead of Bali, the process was further ahead. Lighthizer dislikes the 'housekeeping' characterisation of the Ministerial, seeing instead an opportunity to reinvigorate the WTO.

    b. *Dispute Settlement Body*. There is an important issue around the operation of the DSB, but this is managed by the Monitoring and Enforcement Office of USTR.

    c. *Development in the WTO*. A significant issue is emerging with Developing countries regarding transparency and notifications, which is emblematic of a wider problem regarding the

Department for
International Trade

treatment of development at the WTO. This is especially relevant to China and overcapacity issues, where a lack of information is a fundamental problem, but is true for other countries too. Indonesia is woefully behind in notifications. This is not an issue of new rules, but of how to get the existing rules followed. Unfortunately, at present India, Cameroon and Uganda in particular were causing chaos, arguing that there is no mandate to discuss transparency. This is especially challenging, given Argentina and Brazil were both supportive. Navigating this desire for more advanced developing countries to discuss new issues, whilst the backmarkers did not, would be important. The US was looking for ways to begin talking about development differently, particularly for countries like Korea and Mexico still asserting their 'developing' status, whilst not "freaking out" genuinely developing countries.

2. Shackleford noted the importance the US attaches to the OECD as a forum for discussion and caucusing amongst likeminded WTO members on trade issues. She typically engages DG Trade but would welcome more discussion with UK counterparts.

3. The UK (Griffiths) responded. The WTO exists to do deals. Working out how to encourage this is in everyone's interests. The UK would be interested in a conversation about special and differentiated treatment whilst remaining committed to the role that trade plays in development. The UK views dispute settlement as a component of the WTO that currently works well, but we are open to ideas for ways to improve it. Transparency is an important theme which overcapacity is bringing into sharp focus. Ensuring proper notification in accordance with WTO rules is an important issue.

4. The UK (Philippson) highlighted the UK's goals regarding transition of existing and potential future plurilateral agreements negotiated with the EU. It was important in the context of exiting the EU that the UK and US are active in building global rules which can guide our trade.

Action Items

N/A

Department for International Trade

Title of Meeting: ***Textiles***

Date: ***24 July 2017***

Time: ***10.45***

Participants

Name	Department/Directorate
Elizabeth Branson	Deputy Assistant USTR for Textiles
Janet Heinzen	Director Office of Textiles, International Trade Administration, Dept of Commerce
Representatives from State Department EU and Multilateral divisions	
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Neil Feinson	DIT, Trade in Goods, Trade Policy Group
Tim Colley	BEIS, International Trade
Mark Kent	British Embassy Washington

Key Points to Note

- Textiles is a sensitive and important issue for the US, typically handled separately from other goods sectors with its own FTA chapter.

- The US approach to rules of origin for textiles supports production in, and economic integration between, the signatories to an FTA but tightly limits third country supply chains and inputs. They were critical of more liberal EU rules which allowed simple finishing processes such as dyeing and printing to confer origin for apparel.

- Given the complexity of the rules of origin and relatively high MFN tariff rates, there is significant customs fraud in the sector. The US emphasised the need for enhanced customs collaboration in the sector, including inspections of producers in the country of export, the latter of which proved particularly problematic in the TTIP negotiations.

Report of Discussions and Outcome

1. The US (Branson) used the session to set out the typical US approach to textiles in trade agreements. UK-US trade in textiles and apparel is notable. The US imports $432m and exports $659m. 25% of US exports to the UK are fabric. Imports are 1/3 apparel and 1/3 fabric. The US typically structures dialogue on textiles as a separate negotiating area, which dates back to quota arrangements. It is a key issue for stakeholders. The US definition of textiles encompasses Chapter 50-63 of the HS, along with elements of Chapters 42, 66, 70, 94 and 96. That means the inclusion of some travel goods, umbrellas, comforters etc.

Department for
International Trade

2. The key elements of US textiles FTA chapter include: trade rules and market access; rules of origin; customs cooperation and enforcement; and safeguards.

    a. Trade rules and market access. In TTIP, the US sought fully reciprocal tariff liberalisation. Average EU tariffs are 6.5% for textiles and 11.4% for apparel, whereas in the US they are 7.9% for textiles and 11.6% for apparel. This creates scope to reduce cost. TTIP had reached 97% tariff elimination and both sides were on a path to eliminate the remaining 3%. The US typically includes safeguard measures in case of trade surges, but these are rarely used (once in CAFTA) and are unlikely in a UK-US context given mature industries and similar competition.

    b. Rules of origin. This was more difficult in TTIP. The US wants to see producers in the region of an FTA benefit based on a principle that significant production and economic integration occurs within a free trade region. This is through the "Yarn-Forward Rule", meaning everything from the yarn spinning forward needs to take place within an FTA region. The US seeks to deliver this through tariff shift rules which traders prefer as more predictable and transparent, not subject to shifting cost calculations and complexity. With the EU there was similarity of approach with respect to yarn and fabric but apparel was more problematic as the EU recognised fabric dyeing, printing and finishing as transformation. The US doesn't recognise this as it provides "minimal value to the region". The EU also has a framework tariff preference levels for areas where there is no domestic supply. Neither Congress nor US industry likes this approach. The US used this approach temporarily in the past but found it didn't support domestic production. So the US seeks to address through short supply lists.

    c. Customs cooperation. No surprise, given complex ROO and high tariffs, that considerable fraud exists. The US goal is for FTA countries to benefit which creates the need for enforcement and clear penalties for fraud. An issue in TTIP had been the US desire to inspect exporters in the country of export to prevent fraud. This involves US Customs and Border Protection inspectors visiting. It is a key enforcement tool which industry and Congress have grown to expect. CBP typically visits 10 countries per year.

3. The UK (Feinson) asked where to find additional information on the US policy approach, where US industry was based and how textiles are treated in the US preferential trade arrangements. The US (Branson) highlighted the Commerce Department's Office of Textiles and Apparel (OTEXA) website (www.otexa.trade.gov). TPP includes a relevant chapter on textiles which includes much of these provisions. The US domestic textiles industry is concentrated in an arc from Virginia to Alabama with substantial pockets of production in New York and California. Textiles are excluded by US statute from the Generalised System of Preferences, but USTR recently added some specific travel goods.

Action Items

N/A

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

The meeting was a US ask and it was business-like with the US setting out their well-rehearsed positions on textiles, the political significance of the sector to the US and some of the issues that arose during TTIP.

Considerable further sectoral analysis is necessary by the UK to understand whether we can accommodate the US positions or will need to push back.

A potential area of difficulty for the UK could be UK exporters with third country (esp GSP) inputs. The extent and reality of this issue needs further investigation before any FTA discussions.

Department for
International Trade

Title of Meeting: ***Informal discussion on Regulatory Issues (USTR/UK Team only)***

Date: ***Monday 24th July***

Time: ***10.30***

Participants

Name	**Department/Directorate**
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Julian Farrel	DIT, Policy Directorate
Re Hobley	DIT, Policy Directorate
Antony Phillipson	DExEU, Trade and Partnerships
Tim Colley	BEIS, International Trade
Mark Kent	British Embassy
Jim Sanford	USTR, Assistant USTR for Market Access and Industrial Competitiveness
Rachel Shub	USTR, Senior Director for European Regulatory Affairs
Kent Shigetomi	USTR, Director for Multilateral Non-Tariff Barriers
Ashley Miller	USTR, Director for Industrial Goods Market Access

Key Points to Note

- Significant US interest in the degree of regulatory flexibility the UK currently has, and will be seeking in future, from our relationship with the EU.
- US has significant objectives for a future FTA around national treatment for standards development and conformity assessment.
- The US also has important objectives around good regulatory practice, including transparency and stakeholder input, in all trade discussions.

Report of Discussions and Outcome

1. The US (Sanford) set out current US thinking on regulatory issues in a US-UK context. The key question for the US is to better understand the policy space available to choose regulatory approaches and outcomes. Primarily that creates an interest in UK-EU discussions. The US also has a range of stakeholder engagement frameworks which Sanford's team works closely in and the US is interested in how the UK plans to engage its business community.
2. The UK (Griffiths) highlighted that how we engage stakeholders is a live policy discussion in the UK. We are thinking hard about Parliamentary as well as other stakeholder input in the process in

Department for International Trade

the context of preparations for a Trade Bill. The UK's internal government structures are a matter for us. The UK (Phillipson) responded on the EU negotiation. UK objectives remain as articulated in the Prime Minster's January speech at Lancaster House and in the Article 50 letter. We will be seeking as seamless and frictionless trade as possible with the EU. But we also want an independent international trade policy that allows divergence from the EU. We are beginning from a point of harmonisation. In future we will need to manage both convergence with the EU in some areas and divergence in others. The EU currently lacks a mandate to discuss the future relationship with the UK, but we hope they develop one in November. Phillipson noted the live discussion of an implementation period following our exit. The Secretary of State for Exiting the EU accepts the logic of the need for an implementation period and to send an early signal to business regarding it to help planning.

3. The US (Sanford) noted the need for continuity of existing agreements and characterised the transition of the MRAs as a relatively easy "drafting exercise". He returned to the issue of policy space, highlighting an example from medical devices regulation. In this case, the UK and Ireland attend IMDRF (International Medical Devices Regulators Forum) meetings. This is relevant because this is where the single audit standard has been developed, an important issue for US stakeholders. Does this mean the UK has some policy flexibility here? If so, are there other similar examples which might allow policy change consistent with EU obligations? The US would not be seeking to lower standards. Shub noted the frequent comment from the Commission in TTIP that some areas were Member State competence. Miller raised the issue of e-labelling. There has been global uptake and piloting in much of the world except Europe. Is there policy space for the UK to do something on e-labelling on a pilot basis?

4. The US (Shigetomi) highlighted typical issues in Technical Barriers to Trade (TBT) discussions. The US typically has a TBT chapter (with one exception). But the EU doesn't always (e.g. EU-Mexico). Typically, US text reaffirms WTO TBT commitments whereas the EU incorporates those commitments. The difference amounts to a legal question about whether dispute settlement mechanism applies (it does not in US TBT chapters). The US tends to build on the WTO TBT text, TBT+. It has the following features (summarised in a 2014 USTR Report: https://ustr.gov/sites/default/files/2014%20TBT%20Report.pdf) :

   i. It allows persons of other countries to participate in the standards setting process through national treatment.

   ii. It requires national treatment of conformity assessment bodies. It requires non-discrimination on where you are based or whether operating for profit or not for profit basis.

   iii. It requires transparency in the rulemaking process. This means transparent timelines for publication and before finalisation and entry into force, including comment mechanisms and a requirement to respond substantively to comments.

5. The US (Shigetomi) set out US concerns highlighted in a TTIP context. The US feels it faces discrimination in the EU. The US view is that the EU does not use international standards, but rather regional standards developed in the EU through a process closed to outsiders. By contrast, the EU

Department for
International Trade

does not face discrimination in the US system. US law requires the use of international standards wherever developed. Nor does the EU face discrimination of conformity assessment bodies in the US, whereas in the EU only EU based bodies can test in the EU market. In TTIP, the US had sought for an EU body to recognise US conformity assessment bodies. The US had understood that this authority was there, and that precedent exists, but that the political will was lacking. In response to a question, the US promised to circulate the referenced paper and US text.

6. The US (Shub) set out typical objectives around good regulatory practice (GRP). This exists to identify domestic administrative requirements in a more seamless way. It is easier to change a regulation before it is finalised. There is a preference for performance-based (e.g. mph) rather than design based objectives. The UK puts out regulatory proposals for comment and supports evidence-based decision-making through the better regulation programme. The US asked about current UK process for scrutinising directives emanating from Brussels. The UK (Farrel) summarised briefly that the same process applies to domestic and EU regulation, especially given typical implementation flexibility in directives.

7. The UK (Salt) summarised the rich seam of issues which merit greater discussion and the importance of building a shared understanding of our respective regulatory approaches.

Action Items
N/A

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments
N/A

OFFICIAL – SENSITIVE (UK eyes only)

Department for International Trade

Title of Meeting: ***Lighthizer-Fox bi-lateral meeting and Plenary Session***

Date: ***24 July***

Time: ***14.00***

Participants

Name	Department/Directorate
Amb. Robert Lighthizer	USTR
Dr Liam Fox	Secretary of State, DIT
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
David Gloss	DIT, Ministerial
George Thompson	DIT, Ministerial
Niken Wresniwiro	DIT, Ministerial
Antony Phillipson	DExEU
Emma Coppack	DExEU
Freya Jackson	British Embassy Washington
Meghan Ormerod	British Embassy Washington

Report of Discussions and Outcome from Bi-Lat

1. SoS noted the importance of services to the UK and US economies, and emphasised the importance of TiSA which he said could be an important route for the UK to lock in EU services commitments. Lighthizer noted that the US was looking at 'all these agreements' and would decide which to prioritise.

2. Lighthizer noted his interest in working together with the UK on the Trade Secrets case. He made it clear that the US was planning to press ahead fairly soon.

3. On the WTO, Lighthizer set out his belief that the system cannot deal with a large economic player which is not structured as an open economy. He cited a Chinese ambition to build up capacity sector by sector to wipe out established industries in liberal economies. SoS reported on his positive conversations with Azevedo, where SoS had floated the idea of a small number of leading countries moving ahead on a plurilateral basis on issues such as data. Lighthizer was interested but wondered how the proposal would deter MFN free-riding.

4. SoS set out his ambitions for the Working Group: a technical exercise on continuity agreements; to move forward on a list of short term outcomes; to prepare for a future FTA; to co-ordinate on WTO. Lighthizer underlined his personal support – and that of the President – "Trade is not always a happy area; this is."

Department for
International Trade

5. SoS concluded by pressing Lighthizer on three points: (i) support for technical rectification in Geneva (ii) support for the UK re-joining GPA and (iii) the importance the UK places on the s232 report, noting the defence interface. Lighthizer noted all three points, including saying that GPA was another of the agreements that the US Administration was looking at.

Report of Discussions from Plenary

1. In the Plenary session with USTR Amb Lighthizer, SoS Fox discussed broader trade issues including WTO, Services, steel and IP.
2. On WTO, Lighthizer looked forward to the time when the UK would be able to operate "in a more innovative capacity" in the WTO. There was much the US and UK could do together.
3. SoS Fox agreed on the need for a rules-based system that was effectively enforced: "free trade did not mean free-for-all trade."
4. Lighthizer said the US were putting recommendations to the President on aspects of TISA. The difficulty was that the President did not accept we were in a post-industrial period. So the main focus would be on bringing back some manufacturing jobs.
5. The US were also drawing up options for tackling barriers in countries that were preventing efficient markets.
6. On steel, Lighthizer asked for alternatives to their S232 idea on how to tackle over-capacity. He also looked forward to working with the UK to tackle IP theft, which SoS Fox highlighted as a serious issue between China and the UK.

Action Items

N/A

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

N/A

Department for
International Trade

Title of Meeting: ***SME Working Group***

Date: ***24 July***

Time: ***15.30***

Participants

Name	Department/Directorate
Christina Sevilla	USTR
Tim Wedding	USTR
Peter Cazamias	Small Business Administration (SBA)
Bryan O'Byrne	Small Business Administration (SBA)
Charles Maresca	SBA Office of Advocacy
Rosalyn Steward	SBA Office of Advocacy
Patrick Kirwan	Commerce
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Julian Farrel	DIT, Policy Directorate
Tim Colley	BEIS, International Trade

Key Points to Note

- US (Sevilla) set out extent of US and UK SME bilateral trade. US (Sevilla and O'Byrne) and UK (Colley and Farrel) explained their respective governments' approaches to supporting small and medium sized business. The UK noted that it didn't have an exact counterpart to the SBA.

- US suggested examining EU-US experience (e.g. EU-US SME Best Practices Workshop) as possible way to move forward on SME work stream before launch of formal talks.

- Follow-up: each side to identify areas of immediate engagement/commonality, including an inventory of agencies who do SME work, and to follow-up with a VTC at a date tbd.

Report of Discussions and Outcome

1. USTR (Sevilla) said that UK is the third top destination for US SME exports, totalling $19 billion. It was her understanding that 44% of UK SME exports go to the US. The US explained that the bulk of the SME work was handled by the Small Business Administration with some work by the Commerce Department and USTR. The SBA supports SMEs by providing capital, grants, counselling, and match-making opportunities. SBA Advocacy (a division within the SBA) advocates for SME interests in the US inter-agency process to minimize the impact of regulations on these companies. DOC manages trade zones, provides counselling to SMEs subject to a/d cases, helps identify global markets for US SMEs (e.g., the Foreign and Commercial Service hosts joint DOC and SBA offices in 26 locations to support SMEs), and

Department for
International Trade

also provides analytical services. USTR's role in SMEs was mandated by the Trade Promotion Act to ensure that the interests of small business are considered in all trade talks.

2. The UK (Colley and Farrel) said that SMEs were an exciting part of the agenda and linked to the UK's industrial strategy. In the UK, SME issues were covered by numerous government agencies as they didn't have a dedicated SBA-like entity. Issues addressed included access to finance, support to SMEs to navigate regulation, and access to skills and technology. The UK Better Regulation Executive oversees the operation of the 'SAMBA' (small and micro business assessment) in UK impact assessments to help address SME needs in new regulation. The UK was keenly interested in helping SMEs via an SME chapter in a future FTA.

3. The US (Sevilla) thanked the UK for their explanation and said that USTR's role in supporting SMEs was focused on chapters in FTAs that, for example, lowered tariffs, reduced NTBs (e.g. inspection requirements and making it easier for SMEs to comment on proposed regulations), as well as addressing de minimis requirements (eg the $800 de minimis threshold for customs). The SBA (O'Byrne) explained that 22 out of the 24 Korea-US FTA chapters addressed NTBs.

4. USTR (Sevilla) outlined the Best Practice Workshops that were held under the auspices of the Transatlantic Economic Council (TEC). The US and EU had hosted 7 sessions thus far with attendees including Member States, business, and trade associations. Topics included finance, start-ups and training. DOC noted that the EU had also signed a Cooperation Agreement with the US to share information on SMEs, provide for SME networking opportunities and promote international trade and business cooperation between US and EU SMEs. SBA suggested that an MOU might also be an option. The US (Sevilla) noted that an MOU with the UK at this time could run the risk of treading into FTA competence but could be an option for later. The UK (Griffiths) said that they needed to bring UK SMEs into this conversation and suggested that DIT (trade promotion arm) should participate in future discussions, particularly in light of the mention of match-making and trade fairs.

5. The UK (Colley) noted that IPR could also be a focus of cooperation. The US (Sevilla) agreed and said that the Trade Policy Staff Committee typically identified areas of cooperation that could potentially be included in an FTA chapter. Typically the US sought to include three kinds of provisions for SMEs in FTAs: generic provisions which were helpful to SMEs (eg testing and certification); an SME Chapter; and SME-specific provisions in individual chapters. The SBA (O'Byrne) said that they could also bring in the countries' respective patent offices to identify common approaches.

6. The UK (Farrel) asked about how the US sold FTAs to SMEs. The US (Sevilla) said that they mainly worked with trade associations but also did outreach in the US (e.g. USTR visited Peoria, Illinois) to educate SMEs about the benefits of free trade.

<u>Action Items</u>

1. The US (Wedding) said that next steps could include having each side identify areas of immediate engagement/commonality and to follow-up with a VTC at a date tbd. The US (Sevilla) said some initial thoughts could include scoping out which agencies on both sides do what and then to identify sectors/priorities for future cooperation (e.g. the workshops).

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

N/A

Department for
International Trade

Title of Meeting: ***Services/Data/FS***

Date: ***25 July***

Time: ***9.00***

Participants

Name	**Department/Directorate**
Re Hobley	DIT, International Trade in Services Policy
Sarah Connolly	DCMS
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Rob Ward	HMT
Tim Colley	BEIS, International Trade
Benedict Wagner-Rundell	British Embassy Washington
Meghan Ormerod	British Embassy Washington
Maryam Teschke-Panah	DIT, Trade Policy Group
Adam Williams	IPO
Tom Fine	USTR
Rob Tanner	USTR
Dan Mullaney	USTR
Tim Wedding	USTR
Jeff Segal	US Treasury
David Weiner	USTR
Michael Corbin	Commerce
Mary Thornton	Counsellor, US Mission to the WTO, Geneva
Alexandra Whittaker	Assistant General Counsel, USTR
Sarah Sybilla	Commerce
Jackie Vergis	USTR
Blake Murray	Commerce
Rebecca Nolins	

Key Points to Note

- The previous Administration had been surprised by how difficult the services discussions in TTIP had been. The US has a clear template for dealing with services in the context of a Free Trade Agreement.
- There is a high degree of appetite to work with the UK on services in the context of the trade dialogue and in the future.

Department for International Trade

- There are two questions that the US is particularly interested in with respect to the UK's future relationship with the EU and the impact of this on the future UK/US relationship. Will the UK adopt a negative list approach to services (like the US) or a positive list approach (like the EU)? Will the UK adopt current EU wide reservations on services – if so how many will the UK adopt?

- The US understands the UK's technical rectification approach to tariffs at the WTO. However, it considers a similar approach to services schedules a mistake as the EU has a 'least common denominator' approach and this is what the UK will adopt. It would be a negative signal for another entity in the WTO to do this.

- It is early in this Administration's thinking on TISA. They suggested the UK should look at the agreement in further detail to inform its position on the agreement.

- On e-commerce there are good existing relationships between regulators. There is interest from the US in discussing data flows, data privacy and data localisation issues further with the UK.

- On short term outcomes:

    - There is willingness to take forward work on a financial dialogue HM Treasury to US Treasury, further work will be needed to decide on a format that works for this. There was an express ask that this work be Treasury to Treasury led.

    - There is potential for the UK and US to work together on mutual recognition of auditor professional qualifications, the US outlined appetite from other professions (legal, nursing and architects) the UK will take away to consider.

    - There was no substantive discussion on Earth observation regulations. The US will put the UK in contact with the relevant people in the US Government.

<u>Report of Discussions and Outcome</u>

1. USTR (Fine) explained that the US would set out their historic approach to services in trade agreements to help set UK expectations about where the conversation would be going. He set out five points to shape the discussion on services.

    a) The US is used to looking at the UK through the TTIP lens. As the UK would be having conversations with the Commission about services the US could offer some lessons from TTIP.

    b) The US wanted to relay concerns the US has about the WTO and services, touching on TISA. The US noted that the Administration had not made up its mind on what is going on with TISA yet. They were aware there was UK interest in continuing the TISA talks and it would be good to explore UK expectations.

    c) Short term wins. There was a lot of interest in doing something ahead of Brexit. US (Fine) noted the UK proposals; the US would have ideas too.

    d) On continuity agreements there were some conversations underway already and not so many continuity agreements in the services space.

Department for
International Trade

2. The UK (Griffiths) set out that there were three short term outcomes in the services space:

    a) Financial Services Dialogue

    b) MRPQ issue/audit

    c) Earth Observation Regulation

3. On continuity agreements the UK (Griffiths) noted that the division of responsibility tended to sit with the Economics Working Group. He asked the US to let the UK know if any of the Short Term Outcomes were of interest.

4. The US (Fine) then set out the US approach to services in an FTA. He noted, for the avoidance of doubt that the group was not meeting in the context of negotiating an FTA. He set out that not all countries do FTAs in the same way as the US. He asked the UK what it meant when it said that it was not prepared to discuss a trade agreement yet. The US did not want to cross any lines.

5. The US (Fine) explained that the US divides up services into five chapters: Cross Border Services, Investment, Financial Services, Telecoms and E-Commerce. This format had been born out of NAFTA. Internally the USTR was organised along this model. It may be revised in the future, but this was the model for now. The chapters on Telecoms and E-commerce could evolve into a chapter on digital trade.

6. For the purposes of the conversation here the US would set aside the investment point as the UK did not have the experts in the room. The US noted the investment component of the Financial Services Chapter.

7. The US explained that their key approach to services was that of a negative list. The Commission's approach was different. It appeared that there might be a movement towards the US approach – for example in CETA and TISA. But for now the two were different. In TTIP this had been a challenge. There was a basic distinction between positive and negative. The US approach was that everything in services should be open unless there was a very good reason not to. The positive list approach was different. It tried to be more strategic. Where should be open and where should not be? The US argued that economies were much better open than closed.

8. The US (Fine) noted that the Obama administration had been quite surprised by how difficult the services discussion in TTIP had been. They had predicted that Agriculture would be difficult but late in the TTIP process it became clear that services would be. Much of the problem flowed from the positive, negative approach. The US had done a lot of work with Member States including the UK to understand individual positions. There had been US frustration. The EU had reserved the right to introduce new discriminatory measures after the FTA was in place. They found this "horrifying". It was not something they had encountered with other trading partners. There was sympathy for the Commission's position, particularly as they had worked through and better understood the political sensitivities of different Member States but the US had to think about whether they could sell a deal to Congress.

9. The US (Fine) said that the Commission had a good services regime in place on the ground. They knew there was no difficulty in doing business. But this is why they had been surprised by how difficult it was.

The political problems were with the Member States. The UK was not the problem during these negotiations, but other Member States had been pressuring the Commission for reservations in the services schedules. The US knew where their allies were and they had been trying to help negotiate a deal that was better and stronger.

10. The US explained that they had told Lighthizer that services was an area the UK and US could work together on when it was having an FTA style conversation. The US (Fine) explained that they had a lot of respect for the Commission and the way the EU had liberalised services on the ground, but they bore the scars from the experience of TTIP. They appreciated that the Commission had political challenges to face. The US explained that the conversation on services could be positive and the success of a UK-US conversation on services could be an example to other Member States and other non-EU countries. They could fly the good flag of services liberalisation.

11. The US (Tanner) explained that the negative list approach was very important to the US. There could not be carve outs for future innovation. He asked what the UK's current thinking was on approach.

12. The UK (Griffiths) explained that it was too early for that specific conversation. He set out that the UK saw the services elements of a future relationship as very important. The UK had a very open system already and the US should expect the UK to be a liberalising influence. The UK (Hobley) thanked the US for their helpful explanation of the US approach. She agreed with Griffiths comments on timing and the importance of services elements and was interested in the US approach to listing. The UK wanted to focus on outcomes rather than the list structure and asked the US to expand on how the negative list system fitted in with its regulatory system. What were stakeholder views on it? She was keen for the UK to learn from US experiences. The UK (Hobley) suggested an offline conversation and that the group continue to talk about outcomes. On the US assessment of the TTIP negotiations it was good to hear the UK approach then had not been too problematic.

13. The US (Fine) raised that there were EU wide future reservations in TTIP. There had also been 6 UK specific future reservations. The US said that they understood that those 6 UK specific reservations were politically sensitive. Setting aside those 6 they asked which of the EU wide reservations the UK anticipated keeping. Would the UK keep audio visual for example? The US assumption was that for many of the EU wide reservations the EU would want the UK to keep them. The EU had tried to get other countries to adopt them, in order to demonstrate that it was normal to do so. Which would the UK keep? The US also asked what the UK would do in the WTO. Would the UK be trying to simply do something quickly? Would the UK just pick up the EU approach? The US appreciated that it made sense to do so on tariffs, but less so on services. Were there EU reservations the UK did not care about?

14. The UK (Hobley) explained that the UK was starting to look at technical rectification of all EU-3rd country FTAs. This was primarily about ensuring continuity on Day 1 of EU exit. On GATS the UK would propose to the WTO that they transfer over all of the existing arrangements. The UK explained that they realised this was not what the US would want to hear, but that to do otherwise would take too long and we would not wish to enter into a full blown negotiation with other countries. Our primary objective was to ensure our businesses did not fall off a cliff edge on day 1 of exit.

Department for
International Trade

15. The UK (Griffiths) explained that there were 40 existing FTAs to transition and a trade remedy regime to create. The UK wanted to make sure that the UK and its trading partners were not in a worse position on leaving. To ensure this the UK needed to transition to a baseline.

16. The US (Fine) understood this "baseline" position on tariffs. Continuity was important and it could be based on the premise that the EU had a good tariff schedule. He said that the assumption did not apply on services. The EU services schedule was the lowest common denominator and the worst of what every Member State wanted put together. The US had a sense of how the UK would function on services in practice and asked why the UK would take all the dirty laundry from the EU. They understood the workload issue and that this meant that the UK could not rework all schedules. But it would be a negative signal to have another party in addition to the EU that wouldn't take competition for audio visual and that took a future reservation in this area. The US asked how they could accept the UK not taking a single step forward, under Article 21 at the WTO.

17. The UK (Hobley) explained that the UK wanted to avoid the transposition exercise at the WTO becoming a negotiation under WTO rules. The US (Fine) understood, but said that no Article 21 process has ever concluded. The US asked again if the UK had to take on all the EU's "dirty laundry" in services reservations? Could there be any middle ground? The UK (Hobley) said that the UK had to stick within WTO rules. Griffiths said that the point had been noted.

18. The US (Fine) said that the bigger issue was how far the UK wanted to be like the EU in the long run and how far it wanted to be something different. He explained that the US sees some small countries – for example Switzerland – as "satellites of the EU". They did not want the UK to be that. The US wanted to know what kind of TISA member the UK would be. Ligthhizer hadn't settled the US approach yet. But want to know more on the UK attitude.

19. The UK (Griffiths) said that in principle, the UK was enormously supportive. Ministers were not looking at it in detail though as TISA talks were currently suspended. The UK (Hobley) explained that they were interested in where the US was going. She emphasised that the UK had a very liberal services market and wanted TISA negotiations to continue. The UK had offered a lot on services in TISA and wanted to know how this had landed with the US. What did US stakeholders think and want?

20. The US (Fine) explained that there was a distinction between TTIP and TISA. The US had placed a very different emphasis on each. TTIP was about Market Access. TISA was about the rules. In some cases the reverse was true, but the emphasis had been entirely different in each agreement. TISA had been about granular rules. The detailed conversation on content was in TTIP.

21. The US (Fine) asked if the UK had seen the full text of TISA. The UK (Hobley) explained that the UK saw less now from the EU than it once did. Stakeholders had been enthusiastic about TISA. The US (Fine) said, that the UK said they were interested in TISA but if the UK had not seen the text there might be things in the agreement that the UK did not like. The UK (Hobley) clarified that as it had been many months since TISA was last discussed there had not been text since then. The UK (Griffiths) said that the UK would need to find the right legal vehicle for TISA if it was agreed. The US (Fine) noted that the UK would need to negotiate with the EU, US and others on this.

Department for
International Trade

Short Term Outcomes – Financial Services

22. The US (Fine) noted that the US had seen the UK list of proposed short term outcomes. He noted that US Treasury (Segal) would lead on the Financial Services Dialogue discussion and that a lot of this would take place US Treasury (UST) to HM Treasury (HMT).

23. The UK (Ward) noted that the covered agreement on insurance was among the continuity agreements that mattered from a financial services perspective. There were a number of other issues dealt with under the equivalence regime including the central counter-parts agreements and EMIR legislation. Noted that these would be dealt with in the Economic Working Group.

24. The UK noted that they were keen to address a dialogue on a UST/HMT and regulator to regulator basis. The UK said that the principles they were guided by were stability in financial services, the scope for alignment on regulation, support for market efficiency and ways the UK and US could co-operate to make these happen. There were several dimensions to why this would be useful. Firstly, continuity and rectification issues. The UK was conscious that as EU negotiations developed there may be issues to consider regulator to regulator. The UK was also interested in US future financial services regulation. How would the US approach international fora and seek to avoid market fragmentation? Were there areas of common interest before the UK left the EU? Beyond Brexit what would the relationship look like?

25. The UK (Ward) was keen to involve regulators in any discussion. The UK took the same position as the US regarding independence of regulators. They thought a financial dialogue would report into the Trade Working Group, the Economic Working Group and to the Chancellor and Secretary Mnuchin.

26. The US (Fine) thought that the UK was talking to the right people about the dialogue, with the majority of the conversation occurring UST-HMT. They said there was a complex relationship between what went into the regulatory box and what went into the trade box. On trade issues USTR shared the chair with UST; the covered agreement on insurance was an example of an issue that fell within this space. Issues that fell squarely within the regulatory box fell outside of the trade purview (and out of USTR's area). The US explained that the line between them was not always clear and that it was important to approach issues through both avenues.

27. The US (Segal) passed on his thanks to HMT for their visit to UST and discussions with Susan Baker's team. The US (Segal) said that every time they discussed the UK-US relationship with the Fed and other regulators the relationship with the UK was held up as the gold standard. They considered the UK a bedrock of the international system on financial regulation. The US set out that they were in a period of political transition too and they wanted to approach this in a thoughtful way. They wanted to figure out a way and format for the dialogue that would work and fit alongside the EU negotiations. They looked forward to working with the UK on this, but needed to do so in the right way. The US emphasised that it was important to keep conversations UST to HMT.

Department for
International Trade

Short Term Outcomes - Audit

28. The UK (Colley) set out BEIS' role in managing HMG's relationship with industry, including on professional services. The UK would be looking to maintain its relationship with the EU and the Brexit negotiations were very important. But mutual recognition of audit seemed like an area in which the UK and US could move forward. The UK was conscious there would be challenges for the US – in particular where professional qualifications and licensing were done at the State rather than federal level. The UK was interested in whether we could give political impetus to this area, perhaps encouraging regulators to speak to one another. The UK understood that the US had made progress on this area with Mexico and Canada and wanted to explore this further.

29. The US (Fine) explained that there had been discussion on this issue in the context of TTIP. The US had been ready to talk about the <u>who</u> but not the <u>what.</u> Each country should be allowed to adopt their own standards, (the what) but if someone was qualified in a profession, travelled to the other country and gained qualification in the other country they should be able to practice (the who). The UK agreed that both were talking about the <u>who</u>. The US (Fine) thought that the UK and US could move forward on this topic. They wondered why we should be constrained to auditing but noted that it was where the US had been particularly successful in the past.

30. The US had previously played a co-ordination role between the 50 states on this issue. In some professions the states were more united (e.g. had similar standards) and Auditing was the "pinnacle" of this. It was particularly easy for an auditor in one state to move and practice in another. The US noted that they had a lot of international agreements on this, for example with Australia, New Zealand, Hong Kong, Canada and Mexico. This enabled people to take a simplified exam when they moved to the US. There was enthusiasm from firms. It was a profession dominated by a few firms and they were invariably keen to move their people around.

31. The US noted that they had had problems with the Commission approach. There was an 'all for one and one for all' approach adopted by the EU and the Commission had insisted that all Member States were the same. The US commented that they were not. US regulators might know a lot about standards in the UK, but very little about those in Cyprus for example. TTIP had stumbled in this area as a result. The US also noted that there were other professions who were also interested in progressing work in this area. Architects had expressed an interest – there were agreements with Australia and New Zealand. Under those agreements a new board had been established. Architects from Australia and NZ could approach the board, take a simplified exam and practice in most states.

32. Nursing was the other profession that the US was interested in. Nursing in the US was very closely co-ordinated with Canada and Ireland. The relationship with Canada was particularly close and Canada had adopted the US exam. A compact between 25-30 states meant that nurses were able to move between those states. The US were interested to know if it would be really problematic for the UK to act in this area – they were sensitive to the particular sensitivities with the health sector in the UK.

33. The US also noted potential in Legal services. The profession was keen to "work together" on what might be possible. The US thought that the UK and US could establish a group to talk about this further,

determine which professions to cover and begin to look at the state level regulators that would be involved.

34. The UK (Salt) noted that there was a big sensitivity for the UK around areas that were currently EU competence. Audit was very nice because there was a specific carve out for mutually recognised qualifications in this field. There was an established track record on this. The UK would need to look at the situation for any other professions. The US (Fine) said that they were highly sceptical about the EU's position on EU competencies. Surely, he asked each member state still retained the competence to decide who would be qualified in a particular profession. The US said they understood that part of the conversation was about the political relationship with the Commission.

35. The UK (Griffiths) said that they needed to make sure they were confident in questions around EU competence. The UK (Salt) were interested to hear there was a relationship with Ireland on nursing. The US (Fine) explained that Ireland had adopted the US exam. Each state had their own approach to how they treated foreign lawyers. Mullaney noted that there was a more liberal approach in some EU Member States than others in the way foreign lawyers were treated. The UK (Hobley) liked the idea of a group to consider this issue further and asked if we could consider this an outcome of the discussion. The US (Fine) agreed that it could be. The US was ready to bring regulators in to have this discussion and could do so relatively quickly. If there was greater ease for the UK in just looking at auditors then they could do this.

E-Commerce/Telecoms

36. The US (Tapper) set out that after NAFTA mutual recognition had incrementally improved upon the GATS approach. The US had a package of disciplines that they sought in telecoms. TPP was the most recent example of this in an FTA. The US regulator had no formal MOU with OFCOM but did have lots of conversations with them – the relationship was quite good already. They considered the UK and US to be very much aligned. While regulators may sometimes have taken different decisions they generally had a similar approach. For example, on transparency and impartiality of the regulator. The US always asked that there were no restriction of foreign investment in telecoms. They noted that a number of countries had restrictions on this.

37. The US said that the EU approach was much more concerned with setting laws on telecoms/e-commerce whereas the US approach was to take a path to agree an outcome. The EU had a strong preference for regulation to solve problems whereas the US did not endorse this as the only solution and were outcomes focused. The US preferred to set obligations around outcomes and for each party to work out how to reach those outcomes. The UK (Hobley) asked how this type of approach could be enforced. The US (Tapper) explained that if a party felt that the outcomes had not been observed then in practice the first step would be discussion between the parties about this and then an assessment based on the facts of the case.

Department for
International Trade

E-Commerce

38. The US (Tapper) explained that electronic commerce was a buzz word currently, but that it had meant transformation across the economy with the movement of data and digitisation transforming the way we trade. It was important to build out disciplines to deal with actual problems and look ahead to potential problems. The US chapter on e-commerce was not limited to services, but it did not apply to government procurement. There were a lot of disciplines in an e-commerce trade discussion or agreement, for example around source codes. It also touched on things on the customs side, for example de minimis – all were connected to e-commerce. The UK (Connolly) asked if the US could share a list of everything the US thought was involved in an e-commerce chapter. The US (Tapper) said that they did not have a list but could talk to the UK about this to give the UK some sense of what would be involved.

39. The US (Tapper) set out that the latest example of an e-commerce chapter that the UK could look at was TPP. On moving data and cloud services the US had tried to craft rules and put discipline around something. It raised big issues, for example on privacy. A model had developed in TPP designed to allow exceptions for privacy and some guidelines around it. The US (Tapper) said they would be interested in discussing developing (UK) thinking on EU data flows. The UK (Connolly) explained that the UK were strong supporters of the free flow of data and data protection. The UK was bound to bring in the GDPR and would be bringing forward legislation. There were a different set of interdependencies around data. Data protection was right in the right set of circumstances. The US (Tapper) said that knowing the UK would have the GDPR but would not be in the EU meant it was unclear what that would look like in practice. The US (Segal) explained they were committed to preventing data localisation issues. They looked forward to talking about this with the UK. TTIP had worked on a different approach for FS than on other areas for this. The UK (Connolly) explained that they were very aware of this issue.

40. The US (Tapper) explained that the FTC had an MOU with the UK on consumer protection. Beyond cloud services there were also rules on data services. Most countries had been supportive of GATS. The US was interested in talking to the UK about this when we were ready. In TPP the US had agreed to a number of provisions that were slightly less relevant to trade, but were instead about providing a good environment for trade. For example consumer protection, rules around spam emails, online protection, privacy. The US set out that they remained open to discussing these issues in the context of trade discussions. They had begun to see some problems in this area, for example on divulging sharing source codes. There could be some future work to look at how to address this.

41. The UK (Williams) explained that there were quite a lot of Intellectual Property connections with source code elements. The UK (Hobley) commented on consumer policy - the UK had a high appetite for ensuring that any agreements benefit consumers and not just businesses. The US (Tapper) wondered if the group should discuss sporting events. The UK (Connolly) suggested not.

Department for
International Trade

Observation regulation

42. The UK (Colley) introduced the short term outcome on Eartch observation regulation. He explained that the UK was in the process of building significant capacity on satellite/space. It was a challenging area due to the use of observation data. They did not want to end up in a situation where problems were caused for businesses. The US (Fine) indicated that the right people were not in the room, but that USTR would find the right people for the UK to talk to about this.

Action Items

1. To continue to keep in touch with a possibility of a phone call in mid-September once both US and UK have revisited their TiSA offers.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- The atmosphere of the meeting was jovial and relaxed, however it was obvious that the US really did not like the EU Commission and their approach to Services negotiations. There was much talk which painted the EU Commission as the bad guys.

- The UK should continue to push for an understanding of how any outcomes would work in practice given that different rules could apply at State level compared to Federal level.

- In future dialogue, the US will continue to ask the UK about agreeing to a negative listing structure. We will need to seek policy clearance on the approach and detailed analysis will need to be undertaken to support this, however, in terms of sequencing of discussions, it is possible to talk about various issues/chapters in Services first and then discuss structure later on during the process.

- This was a good initial meeting which reaffirmed that the US were keen to work with the UK on those short term outcomes in the services policy area which were discussed.

Department for
International Trade

Title of Meeting: ***Goods (Part 1, Part 2)***

Date: ***25 July***

Time: ***11.30; 13.00***

Participants

Name	**Department/Directorate**
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Neil Feinson	DIT, Trade in Goods, Trade Policy Group
Julian Farrel	DIT, Policy Directorate
Tim Colley	BEIS, International Trade
Ceri Morgan	DEFRA
Tom Surrey	DEFRA
Adam Williams	IPO
Antony Phillipson	DExEU
Emma Coppack	DExEU
Meghan Ormerod	British Embassy Washington
Sushan Demirjian,	Deputy Assistant USTR for Market Access and Industrial Competitiveness
Roger Wentzel	Deputy Assistant USTR for Agricultural Affairs
Jim Sandford	Assistant USTR for Market Access and Industrial Competitiveness
Ashley Miller	Director for Industrial Goods Market Access
Rachel Shub	Senior Director for European Regulatory Affairs
Alexandra Whittaker	Assistant General Counsel, USTR
Julie Callahan	Senior Director for Agricultural Affairs
Dan Mullaney	Assistant USTR for Europe and the Middle East
Tim Wedding	Deputy Assistant USTR for Europe
David Weiner	Deputy Assistant USTR for Europe
Alex Hunt	Office of Information and Regulatory Affairs
Richard Kaufman	Office of Information and Regulatory Affairs
Jessica Simonoff	USTR Legal
Alexander Mc...	EPA
Kristin Nadji	Commerce Department
Elizabeth Wewerka	State Department
Mary Thorne	US Delegation to the WTO, Geneva
Brian O'Byrne	Small Business Administration

Department for
International Trade

Jonathan Coleman	USITC
Emma Lawries	
Jonathan Coleman	USITC
Karen Welch	USTR
Chuck Burch	USDA
Becky Resler	

Key Points to Note

Part 1:

- US outlined their standard approach to goods in trade talks and FTAs.
- There will need to be future discussions around Rules of Origin.
- On Conformity Agreements there is a strong desire from the US to only rollover those agreements and sectors that are currently in use.
- Continuity Agreements in this space do not require legislation to be passed through Congress.
- There will be a future discussion to determine the right forum (e.g. Trade Working Group/Economic Working Group) in which to take forward work on each STO.

Part 2

- Agreements on Wine and Spirits matter to both parties. Certification and names of origin are particularly important elements of both to ensure continuity in the wine and spirits trade.
- The UK committed to look into whether transferring over the acquis through the Repeal Bill would include transferring over commitments under international (e.g. EU-US) agreements.
- The UK committed to look into how far they could take rolling over agreements ahead of Brexit. For example, could the agreement be worked up and agreed in advance and then signed and dated on the day of exit?
- There would need to be more direct lawyer/lawyer discussions as part of the continuity agreement process.
- There was agreement that rolling over commitments on organics should be relatively straightforward. In due course the UK and US should consider a future vision for post-Brexit and work out how to articulate this to interested stakeholders.
- There is strong US interest in the UK's approach to adopting EU Regulation 1107/2009.
- The US is unwilling to discuss UK exports of beef to the US separately to the question of access for US beef to the UK market.

Department for International Trade

- The way in which the UK seeks to rectify its position on TRQs is of significant interest and concern for the US.

Report of Discussions and Outcome - Part 1

1. The US (Demirjian) explained that Chapter 2 of US FTAs cover Goods. Commitments on import and export restrictions had evolved in recent years. Remanufactured goods tended to be a sensitive subject. They sought to prohibit use of domestic content to get a reduction on customs duty. Their FTAs (including TPP) incorporated WTO notification obligations for import licensing, and similar obligations for export licensing. None of the commitments the US generally included in FTAs were new or challenging for developed countries but they were fundamentally important.

2. The UK (Feinson) expressed interest in understanding the relationship vertical chapters (e.g. textiles) in FTAs and horizontal chapters (e.g. goods). The US (Demirjian) explained that everything in the "Market Access for Goods" chapter applied to all goods. The Agriculture and Textiles chapters were supplemental lists that added to the Market Access chapter in those areas.

3. The UK (Feinson) asked which parts of the "Market Access for Goods" chapter industry was most interested in. The US (Demirjian) explained that the customs community was most interested in elements around the resale of repaired/temporary conditioned goods. The US is not a signatory to the Istanbul Convention (1990). Elements of the chapter focused on remanufactured goods were the main point of interest for industry. Industry also paid a lot of attention to the annex to this chapter - the tariff schedule. The UK (Feinson) explained that engagement with UK industry was a work in progress.

4. The US explained that within some industrial sectors there was a lot of interest in the whole chapter. Sometimes different personnel within the same industry or even same company had different interests. For example, those tasked with moving goods around were particularly interested in rules around the movement of goods.

5. The UK (Feinson) asked about the interaction between FTAs and Foreign Trade Zones (FTZs). The US explained that NAFTA had influenced the way the US deals with FTZs. The administration of FTZ's is not really a part of FTAs. A regulator in an FTZ can export anything they like and then pay duty coming into the US. The US doesn't address the issue specifically in FTAs.

6. The US (Demirjian) explained that Rules of Origin (ROO) would need to be a topic for a future discussion. The UK (Colley) commented that ROO was clearly a big issue and that the sooner the UK was able to get its head around the US approach the better. The US (Wedding) explained that there had been a lot of EU-US discussion on ROO. The US proposed a VTC on the issue with experts; Kent Shigatomi (USTR) is the lead.

Continuity Agreements

1. The UK (Phillipson) opened on Continuity Agreements. The UK preference is for a technical rollover of EU-US agreements to UK-US agreements. This is preferred for reasons of efficiency and the UK's relationship with the Commission. If there is an opportunity to enhance agreements the UK is open

to this, but it cannot risk the timetable, and would need to work through whether any amendments were sensitive with the Commission.

2. On next steps and actions the UK is keen to work back from the time it needs to have the agreements in force. One option would be to bring agreements up to the point of signing by a set date, for example by March 2018, and then actually sign the agreements on the day the UK leaves the EU. This might allow the UK and third country to signal to stakeholders in advance that agreements would be operable upon the UK exiting the EU.

3. The UK (Phillipson) explained that DExEU's role is to make sure that across all agreements experts are talking to their foreign counterparts. If there are concerns about how well this is working these should surface up through the Economic working Group and Trade Working Group. Phillipson had discussed this with Clete Willems on Monday afternoon.

Mutual Recognition Agreements/Marine Equipment Agreement

4. The UK (Farrel) explained that their main interests were in the Mutual Recognition Agreements on Conformity Assessment (1998) and Marine Equipment (2004). The UK wanted to avoid a cliff edge so that UK-US trade affected by these agreements could continue. DIT wanted to start drafting amended agreements in these areas. On Conformity Assessment they were conscious that there would need to be the creation of new national mechanisms.

5. The UK (Farrel) questioned sectoral coverage in relation to the Conformity Assessment Agreement. Only two out of the six sectors in the agreement were operational, with a third due to come into force later in the year. The UK was interested in what this meant in practice for a continuity agreement. The UK asked if the US had any idea of the level of use of the Agreements. Was there pent up demand in the sectors that were not operational? Does updating the list of designated bodies currently work or is it problematic?

6. On legislative process, the UK explained that HMG needs to lay legislation 21 days before it comes into force, but the upcoming Trade bill might make an amendment to this process for the purposes of continuity agreements. The UK asked about the US legislative process. The US (Sandford) explained that the agreements were executive actions and that replicating them would not require the involvement of Congress. There was an inter-agency process and there would be consultation with cleared advisors but the US didn't expect lots of comments to be provided. It would likely be a light lift from the US side.

7. The US (Sandford) said that it would be good to understand more about the UK process. The US experience was that the EU tended to take longer to ratify this type of agreement than the US. The US often found they were often sitting around waiting for the EU – for example on the pharma agreement which Commissioner Malmstrom had signed three months after Ambassador Froman. The US didn't see delays (caused by the US) as being a major issue.

8. The US underlined that they were keen to focus on replicating existing agreements that work. If annexes were not operational they should not be replicated. The UK asked if the US was aware of a decision not to operationalise certain annexes under the 1998 MRA. The US explained that there

Department for
International Trade

had not been a decision per se. They were not sure how much the agreement was being used. Regulators were not interested in renegotiating the scope. The UK (Farrel) asked if a lawyer reading the agreement would know which parts were operational and which parts were not. Was there a legal document to this effect? The US didn't think so. The medical devices annex had never been operational. The pharma annex had been renegotiated and was in the process of being implemented – it was an ongoing process.

9. The US had gone through a similar process with the EEA/EFTA states (as it would now go through with the UK) and negotiated a similar agreement with Norway in 2005. The US asked what kind of a relationship the UK would have with the EMA and MSA (on marine equipment). Both had played an important role in implementation of the agreements. Proposals under the conformity agreements had come through the EU. The FCC signs off on UK labs. Where would proposals come from if not the EU?

10. The US reiterated that they didn't see the sense in replicating everything – it only made sense to replicate what works and then use this time to work through technical questions on implementation.

11. The UK (Phillipson) understood the interdependency between the EU negotiations and talks on trade with the US but said that the likelihood was that the UK would end up with a transitional arrangement. There was a question about what the implications of a longer transition time would be. Would it affect the timeline for all agreements? For example meaning that not all of them needed to be ready for March 2019? It was important that this remain a dynamic part of the discussion.

12. The US wanted to know to what extent the UK had discussed its plans for this type of discussion with the EU (i.e. Trade Working Group discussions). The UK explained that it had told the Commission it would be having conversations on all sectors with all trading partners. There had already been discussions on aviation. The US asked if the UK had already had discussions of this kind with other countries. The UK explained that it was further ahead with the US than most other partners with the exception of Switzerland. The assumption was that discussions of this kind were part of the rectification process. The US explained that this was their starting point too.

13. The UK (Farrel) touched upon inoperative sectors in the 1998 Mutual Recognition Agreement. The UK wondered if medical devices were different to other inoperative sectors. Was there greater potential for the UK and US to do something on this? The US said that they wouldn't want to right now. It was not currently an operational area; they had tried to make it so a few years ago and not succeeded. This could perhaps be part of a future relationship negotiation. The US turned to single audit (IMDRF). Maybe steps could be taken to get this working. Maybe this was something for constructive discussion going forward. This could go beyond continuity.

14. The US set out their key points for taking this conversation forward. The US argued that exploring these points in a discussion was the best way to proceed rather than a drafting exercise. The US would need answers to these questions in order to proceed with inter-agency and stakeholder consultation:

Department for
International Trade

a) What are the technical issues at hand for these continuity agreements, eg who would be the UK designating authorities?
b) How is the UK aligning with the EU, specifically what relationship would the UK have with relevant EU regulators?
c) To what extent would the UK seek other kinds of regulatory co-operation?
d) What were the views of regulators?

Satellites

1. The US (Wedding) raised satellites. There is a big market for small satellites in Europe. The US wanted to ensure that US technology could be used in the UK. The USTR didn't work on export control issues so would have to defer to partners elsewhere in government on this. The US (Wedding) explained that there were some issues in the STO list outside trade – would these be better situated in the Economic Working Group? There was an architecture issue that the parties would need to consider the best way to address.

2. The UK (Phillipson) had discussed these issues with Clete Willems on Monday. The guide should be substance rather than architecture. The US (Wedding) said that both parties should look at whether there was interest in any of the STOs and then work on where they should sit.

Goods Part II

Detail

1. The US (Wentzel) asked the UK for an update on Brexit, suggested that they start the discussion on continuity agreements, discuss Agricultural TRQs and SPS.

2. The UK (Phillipson) explained that formal Brexit negotiations started on the 19 June. The second round had taken place w/c 17 July. The initial focus was on withdrawal issues including EU citizens in the UK. Agriculture would be an important part of the EU-UK relationship. In the first instance the UK would be looking to replicate rather than enhance or upgrade the relationship. This was for the sake of efficiency. It was intended to send a signal to stakeholders ahead of exit – there would be replication. The UK was not against enhancement but this could not be the central goal.

3. The UK recognised that it was not operating in a normal world. The UK has told the Commission that it will be talking to other countries. There is interdependency between UK/EU and UK/3rd country relationships.

4. The UK (Morgan) opened discussion on agricultural continuity agreements. The UK's focus was to get to Day 1 but also to smooth the road beyond.

5. The US explained that the Wine and Spirits agreements would be important. The US wanted to know if the UK would continue to recognise UK names of origin in the agreement. What kind of certification requirements would there be for US wine in the UK market? What would the labelling requirements be? For example, would terms "Bream" and "Classic" still be recognised? What were

Department for
International Trade

the plans for certification of UK wine in the US market? The UK was currently exempt from some labelling and certification requirements.

6. The US (Welch) was interested in natural wine certification. It applied to all countries and there was an exemption where a country had a wine agreement with the US. The UK (Morgan) said that given that the overarching conversation was about continuity we would need to think about issues to prioritise. What were the US' key interests in the wine and spirits agreement?

7. The US set out that certification was their main interest. It worked both ways. Was there a simplification that could be achieved? The Wine agreement provided certainty around labelling. They wanted to ensure there wouldn't be uncertainty about what producers would need to do once the UK left the EU. For example on labelling relating to the appellation origin and grape variety.

8. The US (Wedding) asked if the UK was clear on the legislative route for the UK on exit. The UK (Phillipson) explained that the Withdrawal Bill would be the main legislative vehicle. It had been introduced into Parliament and was expected to complete passage by March 2018. It would repeal the EC Act and import the whole EU acquis. This would give the UK the time to work out what to keep and what to amend. This could be used as the base case assumption.

9. The US (Wentzel) asked what the relationship between adopted regulations and agreements on wine would be if the UK brought in all EU wine regulations. Currently the wine agreement makes it easier for the US to send wine to the UK. The UK (Phillipson) explained that this was exactly why it was important to have this discussion. The US (Mullaney) asked if the acquis included international agreements. The UK (Phillipson) said that the UK would need to look into this. The implications were different for EU directives/regulations and agreements made by the EU. The UK did not want to default to less good terms of trade with any of its trading partners. If the UK and third country decided to enhance any of the agreements then that should happen, but the focus had to be on replication. The UK (Morgan) explained that the range of issues here fell into a few buckets. There may be things that couldn't be improved in time for exit but that could be improved later.

Distilled Spirits

1. The US explained that the EU recognised certain labels, for example Kentucky Bourbon, and the US recognised others, for example, Scotch Whiskey. The USTR said that the US would continue to recognise Scotch. Would the UK continue to recognise Tennessee Whiskey and bourbon?

2. The US wanted assurance on the process for rolling over this agreement. Industry wanted a quick answer. They could see opportunity for changes later, but certainty on Day 1 was the priority. There were a number of multinational players in this area. The UK (Morgan) explained that it was certainly the UK's intention to have this in place by Brexit. The UK (Surrey) asked what the US legislative requirements were to reach that stage. The US (Wentzel) explained that they didn't see the need for the US to have new legislation on this.

3. The UK (Phillipson) explained that they would need to think about the UK's legal ability to bring decisions and agreements into force before exit. The UK may want to have the agreement ready to

Department for
International Trade

go ahead of Brexit, perhaps by March 2018. The UK (Griffiths) wondered if there was a cross-cutting theme here for HMG to look at – the extent to which agreements could be taken to the point of signing by a particular date ahead of Brexit – e.g. March 2018 and then simply date and sign them on the day of exit to ensure continuity. The UK (Phillipson) said that from the centre DExEU needed to think of this as a cross-cutting theme but that they would want individual policy leads to be thinking about what would work best in their individual areas.

4. The US (Mullaney) suggested that this demonstrated a need to bring in the lawyers. There would be a suite where we would need executive orders signed ready to come into force when they're notified the UK has left the EU. What would happen in a default situation if no new legislation were enacted? They would need lawyers to look at the logistics for each transition to ensure it was as seamless as possible. The US (Whittaker) said that there were a lot of legally creative ways to approach this.

5. The US (Callahan) said that the UK independently had some agreements with the FDA. The US (Wentzel) didn't see anything changing from a US perspective; the question would be the UK's approach. The UK (Surrey) suggested that the parties should agree how best to take forward, the parties should speak directly.

Organics

1. The US (Callahan) said that on organics both sides could see the value in continuing to trade as currently. There were preliminary discussions of a plurilateral agreement on organics but it seemed unlikely that this would conclude pre-Brexit. The US recalled that prior to the 2012 organics agreement between the EU and US there had already been a UK-US agreement. The US was interested in whether the UK would continue to treat organics in the same way as it does now; would anything change?

2. The US suggested that this did not feel complicated. The UK (Morgan) felt similarly, this would be quite straightforward. The UK thought that the countries should think about a shared future vision for the longer term on organics. The language that both parties shared with stakeholders would be important, both on continuity and the future vision. The UK (Morgan) noted that there were a committed group of stakeholders in this area.

3. The UK (Surrey) suggested that the parties look at the pre-2012 agreement. The US was interested in whether the UK had to change their organics programme in 2012 to fit in with the EU-US agreement. The UK (Morgan) explained that on the trade operations and systems side there was some work for the UK to dust off.

4. The UK (Morgan) noted that during an earlier discussion the US had raised a Cheese Agreement and a Tinned Fruit agreement. Had the US found out any more about these in the interim? The US thought that they had been wrapped into WTO agreements and so did not require any further action from this group.

Department for
International Trade

Sanitary and Phytosanitary (SPS)

5. The US (Callahan) explained that agricultural chemicals give the US the most "angst". The EU used EU Regulation 1107/2009 to characterise substances based on hazard rather than looking at exposure. The US saw a growing number of substances that had formerly been approved by the EU "taken off the books". Producers were worried. There was a risk that there would be no sweet potato exports from next year. This was a cause of consternation. A second, earlier piece of EU legislation required the EU to conduct risk assessments.

6. The US considered the two pieces of legislation (EU Regulation 1107/2009 and this second one) to be in conflict. The Commission had a plan to modify the second piece of legislation allowing the EU to set standards based on hazard alone. EU Regulation 1107/2009 was quite prescriptive. It set the limit to the level of detection. There was a cross-cutting concern across agricultural commodities. The US had raised concerns about the EU's approach at the WTO SPS Committee. 30 other countries had supported the US. The EU said it realised this was against its WTO commitments. The US wanted to know if the UK could look at this.

7. The US was interested to know if the UK had heard from its own producers. The UK (Morgan) explained that it was part of an interesting triangle. The UK was simultaneously a part of the EU, negotiating with the EU, and then working closely with UK stakeholders. The UK explained that it routinely "banged the table" about scientific based assessment.

8. The UK (Phillipson) explained that discussion had touched on this point in the context of regulatory co-operation. The Agrifood sector was going to be an important part of what the UK was trying to achieve with new opportunities for trade. The UK would want to make sure that its relationship with the EU did not cut off all opportunities for trade with third countries. It would be important to keep the dialogue going. There were global rules and global standards and Agriculture and Food were an important part of that discussion. The UK (Phillipson) recognised that there might be a point at which the UK can no longer participate in discussions between the EU as part of the EU. The US (Mullaney) wanted to know if the UK could push for an outcome on EU Regulation 1107/2009 that would work. If that failed the UK would obviously have the challenge of working out how it could face both ways (towards the EU and US).

9. The US (Callahan) asked the UK what timeline it would be ready to discuss SPS specifics with the US on. The UK (Morgan) explained that it wasn't ready yet. Conversations in Brussels had only just started, but they would take an action to get back to the US on this timing question. It was very helpful to understand what was important to the US.

Equivalence determinations

1. The US (Callahan) noted that complex agreements underpinned equivalence determinations. In the context of the EU the US had to make judgements about different Member States. The US was interested in the UK perspective on whether the UK and US needed an agreement on this. Could the UK and US not just make equivalence determinations between individual regulators? The UK (Morgan) said that it understood and took the US' point on this one.

Department for
International Trade

2. The US explained that their understanding was that without a new agreement in this area existing trade wouldn't fall off a cliff. The UK (Morgan) agreed. The question really was about having a mechanism to approve new (regulators?). The US (Callaghan) was interested in whether the UK intended to establish a national mechanism or process for equivalence determinations. The UK (Morgan) explained that this was dependent on the transition. The UK would be working its way through the different issues. It was important to have experts involved.

3. The US set out that one evaluation (on Shellfish) was coming to a close. The US had been surprised by the UK decision to drop out of the shellfish equivalence programme. The UK explained that they had done so partly as a result of resourcing and party following stakeholder input. The US was interested in UK intentions moving forward. Would the UK allow the EU inspection of the US to read across to the UK? The UK (Surrey) said that they would take this away to policy leads.

Lamb/Beef

1. The UK (Surrey) set out the STOs on both Lamb and Beef. The process for securing approval to export Lamb and Beef to the US was underway. This was ongoing business as usual. The UK had provided material to the US. They were awaiting a visit from inspectors. The US (Callahan) said that the FISA was taking this forwards. There was no timeline.

2. The US was interested in whether the UK would receive US imports of beef and lamb. Could the UK and US establish a two-way evaluation? The US set out that on Lamb all the rulemaking had been going through review by the Administration. The US was "really interested" to have a UK evaluation of the US for equivalence in this area.

TRQs

1. The US set out that on beef the US saw the UK's exit from the EU as an opportunity to reset the market access relationship. The EU had hundreds of TRQs covering agricultural products. Not all were of interest to the UK – for example almonds. The US was interested to know if the UK planned to maintain EU TRQs when a TRQ didn't serve a real purpose for the UK.

2. The UK (Philipson) noted that there were some general questions around TRQs. There had been a few discussions with the Commission and conversations in Geneva too. The UK had met with the EU's Deputy Chief Negotiator on Agriculture. The UK had always been clear in dealing with its status at the WTO that this was not a negotiation it was having with the EU. This negotiation would be related to Brexit, but not a negotiation with the EU. The UK wanted to be able to lay down schedules.

3. The UK wanted to be transparent with the Commission. Some areas were quite straightforward to adopt the EU version of – for example, tariffs. TRQs on the other hand were very complex. The UK wanted to be co-ordinated with the EU on its outward position to the rest of the world on this so the rest of the world didn't find its trade impeded by the UK's exit from the EU. It would be important for the UK and EU to have a discussion about a methodology to split the TRQs. The UK and EU were at the start of this process. In April there had been a constructive conversation with

Department for International Trade

the Commission. In early June there had been a more constructive one. The UK was going to be going its own way in the world.

4. The UK (Morgan) explained that there was a team in DEFRA working on technical rectification. If the US didn't feel they were getting enough attention they should feel free to tell the UK. The US (Wentzel) explained that their biggest concern was that the process of rectification around TRQs would result in reduced market access for the US in either the EU or the UK market. One of their concerns was on data.

5. Lots of trade passes through Rotterdam. It was difficult to look at the export data and know where a good ended up once in the EU. For example, a lot of rice entered the EU through Rotterdam, but a fair percentage of it went to the UK. Short of talking to exporters the US wasn't sure how to work out what proportion. The UK (Surrey) explained that everyone was thinking about the same "Rotterdam" issue. Economists at DEFRA and USDA should talk. There might be some data that could be shared. There should be a VTC to discuss further. The US (Thorne) explained that the lack of data was why discussions at the WTO had focused on this not being a data driven process.

6. The UK (Phillipson) said that the aim was not to have trading partners being denied or having reduced access. The UK appreciated the complexities of this, but the EU negotiations would have an impact on this discussion. What if rice entering Rotterdam could still go to the UK without tariffs? The UK intended to have discussions on intra-EU trade as part of the discussion on TRQs. The US (Wentzel) explained that this is what made it difficult for the US. The US was worried. Did the UK have any intra-EU data? The UK (Surrey) explained that it had some but not a total picture. The UK (Morgan) explained that there were statistics for some intra-EU trade, on products that had to be tracked; some other information was available via regulators and trade associations.

7. The US (Wentzel) asked what the next steps were on TRQs. The UK (Phillipson) said that it would take this conversation away and find out where conversations had reached. The UK thought that there could be an ambition to have a meeting in Geneva in the margins of the October Agriculture Week. The UK (Phillipson) explained that for each agricultural issues there needed to be a critical path by the next meeting setting out what legislation would be needed, and the outstanding questions related to the issue.

Additional Action Items

- Action Item: Inform lead Departments that we need a steer on US questions on how we propose to replace EU references in transitionally adopted MRAs in advance of next Working Group meeting (done).

FOR INTERNAL DISTRIBUTION ONLY
Lead Negotiator Analysis/Comments

- USTR have no problems in principle, but want to know our intentions for replacing references to EU agencies, and our plans for UK designation authorities, before considering draft text. On the 1998

MRA, they were clear that they were only interested in transitionally adopting the three active (or shortly to be active) annexes.

- Atmospherics: Just to reinforce that USTR were perfectly content with the principle of transitional adoption of the MRAs, but were clear there was no point in looking at text until we had answered the questions on replacing EU references, and also that they had no interest in transitionally adopting inoperative annexes to the 1998 MRA.

Department for International Trade

Title of Meeting: ***Intellectual Property Rights***

Date: ***25 July***

Time: ***15.00***

UK Participants

Name	**Department/Directorate**
Maryam Teschke-Panah	Policy Directorate, DIT
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Mark Kent	British Embassy Washington
Adam Williams	IPO
Tom Surrey	DEFRA
Ceri Morgan	DEFRA
Christine Peterson	Director for Innovation & Intellectual Property, USTR
Shira Perlmutter	Chief Policy Officer and International Director US PTO
Robert E Copyak	US Customs and Border Protection
Kevin Amer	US Copyright Office

Key Points to Note

- At US request, UK explains structure of IP policy in UK and IP policy issues raised by Brexit.
- UK sets out proposal for short-term outcome around IP enforcement collaboration.
- US proposes short term outcome to produce an SME toolkit on IP protection. The goal would be to explain to SMEs how to protect and enforce their rights and (for the UK) how this will continue, after Brexit.
- Agreement to follow up by phone/VTC. US offers to share representative text of IP chapter.
- [FROM SIDE MEETING WITH USTR]: USG intend to appoint "IPR Chief Negotiator".

Report of Discussions and Outcome

1. The US highlighted significant levels of interest in IPR issues. In addition to USTR, US Dept of Agriculture (USDA), the US Patent and Trademark Office (USPTO) , the US Copyright Office and US Customs and Border Protection were in attendance. Other US agencies also had an interest. US (Peterson) asked how UK IP policy was developing and how HMG was structured on IP issues. UK (Teschke-Panah) gave a brief overview. DIT SoS recognises mutual interest in innovative sectors and the creative industries. The UK was looking to build confidence where possible and support

Department for
International Trade

the trading relationship. One possible short-term outcome could be around enforcement collaboration. DIT had a trade and IP coordinating function, working closely with IPO, Defra, DCMS, HMRC and other interested departments.

2. The US (Peterson) asked how Brexit affected IP policy. The UK reiterated the general approach to Brexit, including the Repeal Bill. The UK IPO (Williams) set out eight areas of IP policy affected by Brexit. Patent law is largely delivered via the European Patent Office (EPO) which is unaffected by Brexit. Copyright policy contains more EU touchpoints, with simplification procedures currently in place. There will need to be decision on the legal approach to 'exhaustion' of copyright. The more significant issue surrounds trademarks which currently operate in a largely harmonised regime. The overall approach will be to reinforce IP rights and the Repeal Bill will deliver the necessary transition of legal rights. Future opportunities to diverge from EU law would depend on the negotiation, but IPO is beginning to look at current policy areas which don't work as well as they could.

3. The US raised geographical indications (GIs). The US has an interest in how the UK continues to assess and recognise GI rights upon Brexit. The UK (IPO and Defra) highlighted that agriculture GI policy sits with Defra whilst non-agriculture GIs are led by the IPO. On day 1, the current legislation would be moved across as is. UK and US industry is stressing the need for continuity and we need to continue to recognise our TRIPS obligations. Precisely how the UK delivers that remains to be seen, including contingent on the EU negotiation. We have heard US concerns loud and clear, including from stakeholders. The US (Peterson) encouraged HMG to be open to hearing stakeholder concerns as these are central to US policy. The US (PTO) highlighted the US belief in transparency and due process. The current EU approach is flawed. Prior rights, coexistence and the removal of generic rights from the marketplace are current issues. The important goal should be the ability to challenge rights before they were granted. The US would welcome the chance to discuss further. The PTO would be happy to share stakeholder experiences. The UK (Defra) shared the importance of transparency. The UK was currently considering UK usage of GIs relative to other countries. For instance, there were no UK GIs in CETA.

4. The UK (Teschke-Panah and Williams) presented on the short term outcome proposal on IP collaboration and enforcement. The US Special 301 Report highlights UK enforcement efforts as best practice, like the US. Given this gold-standard, would be good to share our respective experience. The specific proposals follow a discussion between then White House IP Enforcement Coordinator Dani Marti and Baroness Neville-Rolfe and their exchange of letters. The UK proposal for a dialogue on IP collaboration and enforcement comprises five areas:

5. Working with rights holders. Government has a role facilitating the enforcement of private rights. Could share best practice of collaboration with private rights holders.

6. SME engagement. SMEs are a huge source of innovation, but IP rights protection seldom a top priority. Could share best practice of engaging SMEs. Are there institutional ways to facilitate access to justice for SME rights being infringed? The UK has a fasttrack claims system.

Department for
International Trade

7. E-Commerce platforms. How can we work with e-commerce platforms in support of accidental exporters in protecting their rights? The UK has facilitated an MoU with Alibaba for instance.

8. Education. The UK does a considerable amount working with students, both young and post-graduate, to highlight the economic detriment of IP theft and to encourage the use of IP protection. We could share ideas.

9. Third country collaboration. How can we collaborate on third country IP enforcement. The UK's PIPCU has been a model for several countries. What more can we do together?

10. The US proposed a short-term outcome around the development of a joint SME toolkit on protecting IP rights in our respective markets. This could explain how the UK framework will remain strong post-Brexit and how some processes might change. The UK noted the proposal and asked how the US engages SMEs. The US highlighted collaborative working between agencies, webinars (which might be done jointly) and a range of best practice for assistance and capacity programs.

11. There was a discussion of possible collaboration in multilateral and third country issues. The UK suggested closer collaboration between IP attaches in markets where appropriate. The US noted this was certainly desirable, but a lot of this already took place – what might be helpful was greater coordination of activity and programmes to deconflict and maximise the impact. The US also suggested greater collaboration in international fora. WIPO was an obvious one, where collaboration already existed. The US hoped the UK might have more freedom of operation in future, given currently operating within an EU bloc. The US also raised the OECD as an area that coordination might be welcome. The US was concerned about some of what was being discussed on IP, especially in the absence of an IP committee, a situation the US attributed to secretariat inertia and member state capacity. But IP issues arose in an accession context. The US supported a data and evidence driven approach to policy development and so had been supportive of OECD studies on the scope of illicit trade and reported some good studies on trade secrets. The US noted that the WHO also had some IP related initiatives. The US also noted ongoing collaboration between UK and US economists on the importance and impact of IP in the world trading system. The UK noted constrained UK capacity to do more in this space.

12. The US proposed a separate follow-up discussion on the typical US approach to IP issues in an FTA context by phone/VTC. The US (Mullaney) encouraged this approach and invited US IP leads to share a good representative text of a US IP chapter. The UK noted the need for prioritisation and agreed to a follow-up discussion.

<u>Action Items</u>

- Agreement to follow up by phone/VTC on Short term outcomes.
- US offers to share representative text of IP chapter.

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

Good engagement on proposed short term outcomes on intellectual property enforcement.
Broad consensus that this can help build confidence of business and support trade and help establish good practice models for third countries. There were good atmospherics around the potential for US/UK collaboration, though we should tread carefully here given the more heavy-handed approach to enforcement in third countries taken by the US.

Cooperation on IP enforcement and support for SMEs emerged as potential focus area with establishment of a toolkit a possible concrete deliverable. There was agreement to explore this and possible other priorities further in bilateral dialogue ahead of a second working group.

The US were keen to move quickly towards sharing of 'representative IP chapter text' in a next meeting. Again, we should be cautious in moving too quickly towards any substantive discussion before sufficient analysis of UK policy positions and need to be clear that we would be listening mode only in any early discussion.

US raised expected concerns with EU's system for Geographical Indications and pressed the UK to move away from current EU approach on generic terms. GIs are likely to emerge as a contentious issue as we seek a balance between a UK-EU and UK-US free trade deal. DIT, DEFRA and IPO policy teams will be discussing policy over the coming weeks and will seek DEXEU input given EU/UK dependencies.

The US did not raise other expected asks on, for example, grace periods or patent linkage issues in this first meeting. This may have reflected their desire to minimise areas of contention to a focus on GIs, which was a major dispute in the TTIP negotiations. It may also have reflected a lack of preparation across agencies, so we should be prepared for other areas to be raised in a second working group discussion and particularly so if the US plan to present 'template text'.

Finally, the wide range of US agencies and departments with an interest in IP is notable. The main attendees are listed below, but there were several others including from agriculture (GIs), Council of Economic Advisers, State, Commerce etc.

- *Christine Peterson, Director for Innovation & Intellectual Property, USTR*
- *Shira Perlmutter, Chief Policy Officer and International Director US PTO*
- *Robert E Copyak, US Customs and Border Protection*
- *Kevin Amer, US Copyright Office*

Informal bilateral side meeting: Maryam Teschke-Panah/Christine Peterson

- *USTR team of 7 people working on IPR; wide range of US agencies (including a range on enforcement)*
- *GIs major issue of interest (note TTIP history); US interested only in agricultural GIs.*
- *USTR intention to appoint a Chief Negotiator on IP; candidate and timing tbc*

Department for
International Trade

Title of Meeting: ***Closing Coordination Meeting***

Date: ***25 July***

Time: ***16.00***

Participants

Name	Department/Directorate
Dan Mullaney	USTR
Tim Wedding	USTR
David Weiner	USTR
Ram Rizzo	USTR
Alexandra Whittaker	Assistant General Counsel USTR
Oliver Griffiths	DIT, UK-US Trade Policy Group
Richard Salt	DIT, UK-US Trade Policy Group
Mark Kent	British Embassy Washington

Key Points to Note

- Agreement to set up UK-US phone call during w/c 31 July to agree actions following the working group.
- Agreement that both sides would continue to search for short term outcomes.
- Tentative agreement to structure dialogue as quarterly meetings of key coordinators, rather than as a full 'round' with all agencies represented. This format could receive reports from experts, but only discuss issues which were ripe or merited a deep dive

Report of Discussions and Outcome

1. Continuity Agreements. The UK noted great engagement, with clear evidence of a few months of thinking. UK was optimistic on MRAs, a good process was in train on wines/spirits. Broadly, our approach should be to make sure both sides were talking but to devolve the detail to them. The US (Wedding) noted that they wanted to coordinate with all leads on agreed actions and next steps. The US recommended a UK-US phone call during w/c 31 July to agree actions bilaterally. Mullaney noted some clear assignments for policy leads on the mechanics of agreements, what are they, when are they needed, what internal process needs following. The more precise we can be about options, the more comfort we can give stakeholders. The UK noted separate EWG agreement that now was a good time to be specific about the plan. Each agreement needed to consider a checklist – internal ratification, dependence on ultimate UK-EU goal, legal form etc. The US (Whittaker) noted discussion with UK legal directors and would join up with DexEU lawyers. Whittaker noted that giving stakeholder certainty might affects dates and legal form.

Department for
International Trade

2. Short Term Outcomes. The UK noted a rich discussion, albeit the delay in sending had limited some dialogue. A range of reflections, from a well-established dialogue on IP to other issues on which more time to reflect would be needed. The US (Mullaney) noted the need to reflect further on how to involve relevant agencies where USTR equities were limited or non-existent. The US wanted to delve deeper into the specific proposals and on broader trade deepening initiatives. The discussion had uncovered potential areas of UK policy flexibility that the US might not have known about. Medical devices might be one. Auditors could be another. Services in particular could be fruitful. The US planned to encourage deeper consideration and suggested there might be areas where EU competence was incomplete or contested which might also be fruitful to explore, including potentially investment. The UK noted potential EU sensitivities around mutual recognition of professional qualifications which we needed to be mindful of. The UK (Salt) noted that the UK was still thinking about potential STOs and suggested both sides remained open to new ideas emerging. The US (Mullaney) agreed, and hoped the US could come up with more ideas. Both sides also needed to ensure outcomes were politically attractive. 10 dialogues would appear like "weak tea" to our political masters. The UK (Griffiths) noted the need to reflect again on architecture and whether it made sense for some of these to move across to the EWG and Clete Willems had shown tentative interest in this.

3. Trade Strategy and WTO. The UK (Griffiths) welcomed the discussion with Dawn Shackleford. He would connect her to Chris Barton in DIT. UK noted on the three themes of deals, architecture (including the DSB) and transparency the UK and US would not be perfectly aligned, but there were certainly strong overlaps.

4. Future FTA. The UK (Griiffiths) noted the need to reflect hard on how, at this early stage, it made sense to think through a future FTA. What exactly would be constructive to lay the groundwork? The US suggested we try to figure out what a deal ultimately looked like given the huge value of the bilateral relationship. The Exit negotiators in DExEU need to know more about what that looked like, to avoid unnecessarily giving away the store to the EU. One example could be around data transfers and the need (or not) for an adequacy finding from the EU. If we submitted to have one, this might preclude or affect data transfers between the UK and EU. The UK suggested a need to think hard about the terminology of this, but there was merit in understanding what mattered to the US.

5. Process and Next Steps. The UK (Griffiths) suggested a quarterly rhythm and invited the US to the UK for the next round. The US was thinking about next steps in two distinct phases. First, immediate contact. We should encourage experts to have phone calls, VTCs and where appropriate meetings and visits bilaterally across all groups and all issues. The Second, was the role of the bigger group. Should we structure it as a large round bringing everyone together? This could be challenging to schedule and burdensome in logistical terms. Or would it be better to stick to coordination teams and have experts report back to a smaller group that could meet. The US preference was the latter – a smaller group meeting, focusing on issues which were ripe for discussion rather than everything, having deep dives on one or two issues (e.g. regulation) that merited deeper engagement.

Department for
International Trade

Action Items

- Set up UK-US phone call during w/c 31 July to agree actions following the working group.
- Continue to search for short term outcomes.
- Gain formal agreement on dialogue structure – whether as quarterly meetings of key coordinators, or as a full 'round' with all agencies represented. The former format could receive reports from experts, but only discuss issues which were ripe or merited a deep dive.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

N/A

For any queries about the contents of this dossier or the Trade Working Group meetings, please contact:
Richard Salt
Deputy Director, UK-US Trade Policy Group
Department for International Trade

Department for
International Trade

UK-US Trade & Investment Working Group

13-14 November 2017

Full Readout

Department for
International Trade

Agenda and Table of Contents

Original scheduled time/date*	Meeting title	Page Number
Day 1 - Monday 13 November		
10:00-11:00	**Coordination meeting**	
11:000-12:15	**Plenary session** -Overview -UK & US Updates	3
12:15-13.00	**Stakeholder engagement and communications**	8
13:00-14:30 - Lunch		10
14:30-17:00	**SMEs**	
14:30-15:30	**Sustainability / Labour and environmental standards**	15
15:30-16:30	**Goods: Agricultural market access**	19
16:30-17:30	**IP Enforcement**	22
Day 2 - Tuesday 14 November		
8:30-9:00	**Coordination Meeting**	
9:00-12:00	**Services**	27
9:00-11:00	**SPS – US presentation on current international work**	41
9:00-11:00	**Intellectual property (esp. in relation to SMEs)**	44
11:00-12:00	**(ad hoc) SME session**	52
12:00-2:00 - Lunch		
14:30-16:15	**Regulatory dialogue follow-up**	55
16:15-16:45	**Internal meetings**	
16:45-17:45	**Final review and coordination meeting**	61

Department for International Trade

Title of Meeting: ***Plenary Session***

Date: ***13th November 2017***

Time: ***11:00 – 12:45***

Participants

Name	Department/Directorate
Oliver Griffiths	UK-US Team, Trade Policy Group, DIT (Lead)
Richard Salt	UK-US Team, Trade Policy Group, DIT
Tom Josephs	Policy Directorate, DIT
Julian Farrell	Policy Directorate, DIT
Neil Feinson	Policy Directorate, DIT
Ada Igboemeka and Maryam Teschke-Panah	Policy Directorate, DIT
Sophie Brice	UK-US Team, Trade Policy Group, DIT
Katie Waring	UK-US Team, Trade Policy Group, DIT
Cordelia Jonathan	UK-US Team, Trade Policy Group, DIT
George Radice	UK-US Team, Trade Policy Group, DIT
Rebecca Schneider	UK-US Team, Trade Policy Group, DIT
Mike Bartling	DIT Legal
Edward Barker	DIT
Sarah Clegg	FCO
Paul Bedford	HMT
Hannah Young	DEXEU
Emma Coppack	DEXEU
Rhys Bowen	DEXEU
Tim Holmes	DEXEU
Jacques Sheehan	DEXEU
Ceri Morgan	DEFRA
Harry Lee	DCMS
Elizabeth Chatterjee	BEIS
Dan Mullaney	United States Trade Representative
Tim Wedding	United States Trade Representative
Katherine Kalutkiewicz	United States Trade Representative
Christine Peterson	United States Trade Representative
Thomas Fine	United States Trade Representative
Casey Mace	US State Department
Jessica Simonoff	US State Department
Whitney Baird	US State Department

Department for
International Trade

Joseph Burke	US Embassy London
Gregory Burton	US Embassy London
Jeffery Seigel	US Treasury
Rosalyn Steward	US Small Business Administration
Sarah Bonner	US Small Business Administration
Susan Wilson	US Patent and Trademark Office
Rachel Salzman	Department of Commerce
Andrew Lorenz	National Security Council

Key Points to Note

- All participants to continue engaging outside of formal TIWG and to be open to opportunities for short term outcomes.
- UK DIT and US USTR Legal Advisers to set up a call to discuss guidance document for TIWG participants on the arrangements for sharing information.
- US USTR and UK DIT to discuss creation of secure web portal with permissions for UK TIWG participants to facilitate sharing of documents.

Report of Discussions and Outcome

1. Oliver Griffiths (UK - DIT) opened the meeting by referencing the already strong bilateral relationship between the UK and US and setting out the objectives for the second UK-US Trade and Investment Working Group (TIWG). These were two-fold: 1. Deepening engagement (including in areas such as sustainability where leads were meeting for the first time), and building knowledge of each others' systems and processes, for example by discussing constitutional frameworks. On this occasion the UK's devolution settlements and the balance between London and the Devolved Administrations and hopefully picking up the US' state/federal split in future WGs; and 2. Driving forward discussions on Continuity Agreements and Short Term Outcomes, with a view to an announcement on progress at the end of the TIWG. In all discussions, participants should bear in mind the 4 pillars of the TIWG: Continuity Agreements, Short Term Outcomes, laying the foundations for a potential future UK-US FTA and cooperation on strategic trade issues.
2. Dan Mullaney (US - USTR) responded by commenting that the substance of, and attendance at, the TIWG demonstrated the importance that the current US Administration the US-UK relationship. Discussions would build on shared values and the already deeply integrated trade and investment relationship. He agreed with the overarching objectives set out by Oliver Griffiths (above), emphasising that discussion and action shouldn't be confined to the formal TIWG – there should be continuous engagement, including on new opportunities to deepen the relationship. Continuity Agreements were also critically important to provide certainty for US and UK stakeholders and to deliver the message that the current trading relationship would continue. The TIWG would help lay the groundwork for the future – post-Brexit - relationship, by identifying where priorities lie and how we do things differently. We should also use the discussions to agree how we can work together on shared global concerns/ strategic trade issues.

Department for
International Trade

Updates since last TIWG

3. Ceri Morgan (UK – DEFRA) updated on the **Spirits, Wine and Organics Continuity Agreements**, which had been discussed in a productive VTC between DEFRA and US Department for Agriculture last week. Parties were close to an agreement on Spirits (subject to a couple of outstanding questions) and the UK was now in a position to present text on Organics – to which we weren't expecting an immediate response from the US. On Wine, the UK had responses to US questions and we would hopefully reach agreement on text in the New Year.
4. Julian Farrell (UK – DIT) updated on **Mutual Recognition Agreements (MRSs) and the Conformity Assessment on Marine Equipment,** which fall within the Continuity Agreement basket. Jeremy Heywood and Gary Cohn had agreed that this technical replication exercise should be completed by August 2018, meaning that text had to be agreed by April to allow lawyers to complete a legal scrub. In the TIWG, leads would run through the key issues which would need technical adjustment and share thoughts on how to achieve this, with the aim of having text agreed in the New Year.
5. Tim Wedding (US-USTR) agreed with the assessments (above) and highlighted that a broader conversation on technical rectification was needed to iron-out some key issues, which would hopefully lead to resolution by the summer.
6. Alexandra Whittaker (US – USTR Legal Counsel) briefed the group on recently agreed information handling arrangements, which allowed both sides to share documents without them being disclosed via the US Freedom of Information Act. The protective marking on the documents circulated for the TIWG (***'UK OFFICIAL-SENSITIVE – UK/US official use only/U.S.-U.K. CONFIDENTIAL, modified handing authorized'***) should be used on all documents and emails shared between US and UK counterparts. She recommended the creation of a secure site to facilitate the exchange of documents and to enable US inter-agency circulation. This was also a good way of managing information. Alexander reassured participants that if they inadvertently omitted the protective marking on a document, they would not automatically lose protection privileges but that including the markings was best practice. Tim Wedding (US -USTR) confirmed that he would speak to DIT about the creation of a secure document site. Oliver Griffiths commented that it would be useful to have a guidance document on the process for protecting documents. Alexandra Whittaker suggested a call between USTR and DIT lawyers to take forward.

UK Context

7. Rhys Bowen (UK-DEXEU) updated on Brexit. The focus was now on the December European Council (15 December), where the UK had three objectives: 1. Progress on the separation talks; 2. Agreeing an implementation period; and 3.Agreeing guidelines on the U's future relationship with the EU. In turn:
   i. Separation. The UK and EU needed to agree on three key issues: i) citizens' rights, where there had been progress last week in Brussels; ii) Northern Ireland, in particular the border and Common Travel Area and citizens' rights with regard to the Good Friday Agreement – the area of separation talks most closely tied to the UK's future relationship with the EU; and iii). Money, on which the Prime Minister had made clear that she didn't want to leave other Member States worse off, but that this was a negotiation. The UK was hoping to wrap these issues-up by December.
   ii. Implementation period. In her Florence speech, the Prime Minister had set out her strong belief that an implementation period was in the interests of both sides. Any implementation period would likely be very similar to the current arrangement with the EU to provide certainty and it

Department for International Trade

should last as long needed, but we were expecting it to be for around two years. The Prime Minister has also been clear that the UK should be able to take forward trade negotiations with third countries during an implementation period. EU Member States are conducting their own discussions on an implementation period for discussion in December. The UK was hoping for a clear signal to be sent at the December Council Meeting.

iii. Future UK/EU Economic Partnership. This was also referenced in the Prime Minister's Florence speech. The UK was not intending on having an EFTA or EEA model, rather a bespoke arrangement. Options were being left open at this stage.

iv. Domestically, the key piece of legislation was the EU Withdrawal Bill. The Committee stages of the Bill would start in the House of Commons tomorrow: in total, there would be eight days of eight hour debates. The main objective of the Bill was to create certainty and continuity on day one after Brexit.

8. Tim Wedding (US – USTR) asked whether there was a relationship between an implementation period and discussions on the UK's future relationship with the EU. Hannah Young (UK – DEXEU) responded by explaining that the concept of an implementation period was a depreciating asset and for this reason the Prime Minister wanted agreement on the concept as soon as possible. An implementation period would provide a "glide path" for the future relationship, but it would also be important for certainty and continuity should agreement not be reached.
9. Alexandra Whittaker (US –USTR Legal Counsel) asked whether there was a distinction between the term "transition" and "implementation". Rhys Bowen (UK – DEXEU) explained that the Prime Minister had chosen the term "implementation period", because the UK would be taking actions forward on future economic relationship with the EU. The Prime Minister had been clear that she wanted the UK to be able to negotiate (but not agree) trade agreements with third countries during an implementation period.
10. Rhys Bowen (UK – DEXEU) also briefed on the UK's **"Future Partnership Paper"**. Discussions with the EU needed to be guided by what was in the UK's best interests, including: i) the future relationship with the EU being as frictionless as possible; ii) there being no hard border with Northern Ireland; and iii) an ability to negotiate our own trade deals and have an independent UK trade policy.
11. Dan Mullaney (US- USTR) asked whether the UK was considering a "tracing programme" to distinguish products for/ from EU and whether there would be a link to the EU Single Market. In response Paul Bedford (HMT) explained that there were two potential options regarding goods to/ from the EU: i) a tracking method; or ii) a re-payment method (high tariff initially with ability to reclaim). All of this was tied to the critical issue of the Northern Ireland border and the UK was thinking through options. The Customs Bill, to be introduced later this year, would be the framework for this – followed by a large amount of secondary legislation setting out the detail.
12. UK Edward Barker (UK – DIT) briefed participants on the development of the UK's independent trade policy. The Trade White Paper laid the ground work for the Trade Bill (recently introduced into Parliament) and set out a first pitch on how the UK proposed to use its independence when it left the EU, which were: i). Strong support for the rules based system; ii) An ability to enforce rules and achieve a level playing field; and iii) Maintaining existing and developing new trading relationships. Over the coming months, the UK would be working through strategic choices.
13. Amanda Brooks (UK- DIT) set out the legislative programme of work to enable the UK to have an independent trade policy. The Trade Bill was introduced into the House of Commons last week. This

Department for
International Trade

would enable the UK to: implement the Government Procurement Act; make non-tariff related changes to existing EU trade agreements with third countries; set up a Trade Remedies Authority (an independent arm's length body making recommendations to the Secretary of State for International Trade) ; and to share trade related data amongst agencies. The Trade Bill would link into the Customs Bill, which would enable the UK to set tariffs, impose retaliatory measures through the WTO and set up GSPs. Together the two Bills would provide the framework for the UK's independent trade policy.

US Context

14. Dan Mullaney (US – USTR) updated on **US trade policy**. The current Administration had been clear that multilateral and plurilateral agreements had not been kind to the US and were therefore focussed on bilateral trade agreements. Within this there was recognition that **TTIP** was a bilateral agreement (the President did make a decision to pull out of TPP, but not TTIP) and the Administration remained favourably minded when the time was right. However, the Administration wanted to revisit a number of bilateral agreements, as there was a sense they were not working for US in the way they should. What might be done differently to rectify deep and continuing trade deficits was the focal point. USTR were therefore engaged in discussions with Korea on how to amend the Korea-US Trade Agreement (KORUS) and a renegotiation of the North America Free Trade Agreement was taking place. On **NAFTA**, there had been four rounds so far and all text had been tabled. The fifth round would start on November 15th and negotiations would continue through the first quarter of 2018. Everybody was looking at the NAFTA renegotiation as a barometer of the Administration's trade policy. Dan indicated that he had no particular insights on where the negotiations would end up. He explained that the challenges with Mexico and Canada – high trade deficits, huge integrated borders etc. – were not necessarily relevant to a UK-US FTA.
15. Another priority for the Administration was dealing with common global problems, particularly **China.** The US had commenced an investigation on overcapacity of steel and aluminium vis-a-vis China, the outcome of which would be a standard through which to protect other industry (semiconductors, solar panels etc.). An important element of positive agendas with the UK and the EU would be shared action on China. On the **Trade in Service Agreement (TISA)** the Administration recognised the potential to come back to table, but no decision had been made to date.
16. Richard Salt (UK – DIT) asked how much the UK should read into NAFTA renegotiation objectives as priorities for KORUS and other bilateral FTAs. Dan Mullaney responded by saying that the focus was on "free, fair and reciprocal trade". Rules of Origin and dispute mechanisms were important issues and USTR Robert Lighthizer had been clear that he wanted to look at dispute such as ISDS to see if they were working for the US and to move more control back home.

Department for
International Trade

Title of Meeting: ***Stakeholder Engagement & Communications***

Date: ***13th November 2017***

Time: ***12:15-1:00***

Participants

Name	Department/Directorate
Oliver Griffiths	UK-US Team, Trade Policy Group, DIT (Lead)
Richard Salt	UK-US Team, Trade Policy Group, DIT
Katie Waring	UK-US Team, Trade Policy Group, DIT
Sophie Brice	UK-US Team, Trade Policy Group, DIT
Jack Kennedy	UK-US Team, Trade Policy Group, DIT
Magdalena Ruda	UK-US Team, Trade Policy Group, DIT
Timothy Wedding	United States Trade Representative
Alexandra Whittaker	United States Trade Representative

Key Points to Note

- The US provides updates on the trade dialogue with the UK to meetings of its cleared external stakeholders and Congressional staff, but there is no document sharing, and no confidentiality requirements at this stage.
- The DIT and USTR agreed to form a small stakeholder engagement group (with delegated responsibility from the TIWG) to continue discussion about stakeholder engagement and coordination.

Report of Discussions and Outcome

1. The UK (Waring) inquired about the US plans to engage with external stakeholders in relation to the UK-US trade policy dialogue, and the applicable rules, including possible requirements imposed by the Trade Promotion Authority (TPA) legislation.
2. The US (Wedding) explained they inform external (cleared) stakeholders about the trade policy dialogue with the UK; however, the intention was to share only publicly available information and no documents at this stage. Until the start of the formal trade negotiations, the rules set out in the legislation (including in TPA) will not apply.
3. The UK (Waring) asked if the USTR would also provide information to the Congress.
4. The US (Wedding) confirmed that oral information sessions are held for Congressional staff (on committees with oversight responsibilities for trade) both before and after the UK-US TIWG meeting. USTR does not have to inform Congress 'publicly' unless asked to appear before a committee - USTR raised the prospect of questions arising from a forthcoming congressional inquiry on Brexit.
5. The UK (Waring) provided information about the planned DIT engagement with external stakeholders, including public request for comments (to be uploaded on gov.uk), quarterly briefing meetings with a wide range of stakeholder groups, bilateral meetings, and sector specific workshops. Public request for comments may be coordinated with a similar US initiative or done unilaterally by the UK.

Department for
International Trade

6. Responding a question from the US, the UK explained quarterly meetings will initially focus on the UK-US TIWG but may expand to include other UK dialogues with partner countries.
7. The UK stated that stakeholder engagement initiatives following presentation of Trade White Paper and Trade Bill may encourage contributions related to transparency, sustainability, and the role of the Parliament in trade policy development and implementation, including in trade negotiations.
8. The US (Wedding) suggested staying in touch over plans for a UK 'request for comment. The US did not plan a similar engagement at present, and would like to receive more details on the information that would be sought and how it would be used (both internally and externally). In case the US wished to launch a public request for comments, there would be a need for the USTR to justify it.
9. The UK and the US agreed that TIWG should delegate responsibility for UK and US to have a continued and regular dialogue on stakeholder engagement. Moreover, conversation should continue on stakeholder engagement throughout the remainder of this TIWG in other sessions.

Action Items

- For UK and US to remain in contact over plans for a UK 'request for comment.' US not necessarily opposed to running a similar channel of engagement but would like more details on the information that would be sought and how it would be used (both internally and externally).
- Agreed that there should be delegated responsibility given from the TIWG for UK and US to have a continued and regular dialogue on stakeholder engagement. This might entail the planning of 'stakeholder days' in the margins of future meetings of the TIWG. If it was decided that if something along these lines was to take place at the next TIWG, planning would need to start soon.
- Conversation should continue on stakeholder engagement throughout the remainder of this TIWG in other sessions.
- For UK to make relevant contacts with US Public Relations team.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- Useful session. Different levels of experience and stakeholder framework on each side mean coordination (but not joint initiatives) are important so need to keep it on the agenda, even if covered briefly.

Department for
International Trade

Title of Meeting: ***SME***

Date: ***13th November 2017***

Time: ***14:30-17:00 pm***

Participants

Name	**Department/Directorate**
Julian Farrel	Policy Directorate, DIT (Lead)
Kate Maxwell	Policy Directorate, DIT
Daniel Harrison	BEIS (Co-Lead)
Andrei Murariu	BEIS
Huw Parker	BEIS
Oliver Nash	DCMS
Sophie Brice	UK-US Team, Trade Policy Group, DIT
George Radice	UK-US Team, Trade Policy Group, DIT
Bob Collier	ITI, DIT
Rebecca Schneider	UK-US Team, Trade Policy Group, DIT
Lawrence Key	DIT
Nick Morgan	Better Regulation Executive, BEIS
Ellen Duffy	Better Regulation Executive, BEIS
Ben Leich	Better Regulation Executive, BEIS
Muhammad Abbas	Policy Directorate, DIT
Christina Sevilla	United States Trade Representative
Lori Cooper	US Department of Commerce (by phone)
Richard Fergusson	State Department
Tricia Van Orden	Department of Commerce
Sarah Bonner	US Small Business Administration
Rosalyn Steward	US Small Business Administration
Additional officials	United States Trade Representative

Department for
International Trade

Key Points to Note

Good atmosphere and energy in the room. Clear sense that this was a positive area for engagement both pre- and post-Brexit, in particular given alignment with POTUS' interest in supporting SMEs and supporting parts of the US that are less economically vibrant.

- US tabled a one-pager summarising the main "trade issues" for SMEs, some that could be addressed now and others in an FTA – UK thanked US for tabling this and noted similarities with areas outlined in UK slides on the same subject.
- US mentioned that TTIP chapter on SMEs was 4 square brackets away from being finalised
- Digital is seen as the single biggest game changer for SME exporters – likely they will push for provisions (e.g. zero tax on digital sales) in other FTA chapters
- Both sides outlined their approach to Trade Promotion, noting many similarities
- Areas for potential collaboration that were discussed:
  - UK highlighted that exchanges between entrepreneurs would be highly beneficial, possibly by building on existing Start Up Exchange programme (between Newcastle, Atlanta and Toulouse) – likely will be wrapped into SME Dialogue.
  - US highlighted a joint brochure on support measures for SMEs as a first deliverable for the group – US to share draft with UK.
  - US outlined its Best Practice Workshops with EU, which were seen as a short term deliverable that UK and US could replicate as an SME Dialogue bringing together officials and SMEs to discuss trade issues for SMEs – UK provisionally agreed.
  - US outlined its MoU relating to SMEs with the EU as something that could be replicated between US and UK in longer time, building on the work of the SME Dialogue

Report of Discussions and Outcome

1. Daniel Harrison (UK – BEIS) explained UK's approach to SME policy. Whilst SME policy was spread across government, BEIS ensured that there was an effective framework for departments to work within and for SMEs to be successful. This included economy-wide issues such as flexible labour laws and specific policies like targets on government procurement. The UK also had an SME help line and 38 growth hubs across the country. In addition, sector teams (digital, agriculture etc.) all had an SME focus. The UK had a supportive framework for SMEs: reduced corporation tax (17% by 2020), increased employment allowance and innovation and R&D tax credits (18,000 SMEs claimed tax credits in 2016). 60% of Innovate UK's core budget went to SMEs. Access to finance was an important part of SME growth. By the end of 2014, the UK government had provided 60,000 SMEs with start-up loans worth £350m in total. BEIS had 5 priorities for SMEs: 1. Simplification and access to information; 2. Accelerating growth for the highest ambition actors; 3. Celebrating success and inspiring; 4. Growing future sectors (e.g. artificial intelligence) and capturing opportunities for the UK to become a leader in new areas; and 5. Engagement.
2. The key challenge was making sure all information was readily available and in one place. Many SMEs were not aware of the barriers to trade and didn't know where to get information from. A Federation of Small Business report in 2017 identified the US as a priority market for 50% of SMEs, most of whom would want an SME Chapter in a future FTA.

Department for
International Trade

3. Christina Sevilla (US – USTR) confirmed that the US had many of the same priorities for SMEs. There had been an increasing focus on SMEs in recent years. Most people tended to think that international trade was just for big multinationals. However, out of 300,000 firms which export from US, 298,000 were SMEs (Comment: US definition of SME is up to 500 staff: UK goes by the OECD definition up to 250 staff). If SMEs engaged in international trade, they grew faster than those just staying in domestic markets. The US was No. 1 destination for UK SMEs (96% UK firms exporting were SMEs by US definition). UK was the 3rd largest SME market for US firms after Canada and Mexico. UK-US relationship was therefore already very important. Christina also mentioned that a focus on new-disruptive technology was also considered as an important area for USTR.
4. Christina Sevilla (US – USTR) then set out the standard US instruments in SME Chapters of FTAs, designed to support SMEs trade internationally [final 4 bullets of US handout]: reduction of customs tariffs; reduction of unnecessary duplication of regulation; reduction of regulatory barriers; automation of documentation; advanced classification of documents; expedited release of goods. Digital trade had been the single biggest change factor for SMEs in terms of exporting; therefore keeping digital products duty free, promoting free flow of information (e.g. not requiring a server in every single market) and better protection of IPR, were all very important. In terms of US-UK cooperation, there was also potential for short-term outcomes such as cooperation dialogues. Cooperation within the Transatlantic Economic Council workshops informed much of the discussion on the TTIP SME chapter.
5. Lori Cooper (US – Department of Commerce, Brussels) explained how the US and EU cooperated to help SMEs access the transatlantic market. Talks started in 2008 and signed in 2012 Commerce and (then) DG Enterprise concluded an SME MOU – a very simple document, the basic framework of which was to provide a foundation to build cooperation. The MOU was renewed in 2015 and runs to end 2019. The overarching goal continues to be job creation and promoting innovation, investment and export. Under these SME cooperation arrangements the US and EU have shared resources, including joint trade shows, joint match-making and information sharing. Information sharing commenced with both sides becoming familiar with systems and resources: Enterprise Europe Network and US Commercial Service. The focus had since been honed to enhance business to business contact between US and EU SMEs. There has been particular success with match making at trade shows and the US took advantage of the MoU to bring 100 US entities to a trade show in Hannover resulting in 400 meetings/ leads. Now cooperation is being focussed at a more grass roots level (Industry Offices and Bilateral Trade Desks). There has been a history of cooperation between UK and US Commercial Service, and Commerce's Office of Finance and Insurance Industries has expressed interest in working on US/UK SMEs in Fintech.
6. Christina Sevilla (US – USTR) **then briefed on the US-EU SME Best Practices Workshops,** initiated with EU prior to TTIP. The format was for SMEs on both sides of Atlantic to meet with officials. There was an opportunity to go further with UK/US cooperation and best practice discussions, which would fall outside purview of an FTA. Agendas were jointly developed by both sides. Workshops led to deeper engagement and could potentially lead to an MoU. Output was usually a one page joint statement and some concrete initiatives. It was written into the US-EU MoU that all work would be carried-out within existing resources. By sharing information and sharing programmes both sides were essentially doing more within existing resources.

Department for
International Trade

7. Bob Collier (UK – DIT) agreed that this was a good way of cooperating and we would need to involve Innovate UK. The Enterprise Network was a good way to do this as it reaches directly into business. He then explained the UK model. There were 5.5 million business enterprises in the UK, a significant proportion of which were in the services sector. Economic development activity in the UK was devolved and Devolved Administrations organised export activity in their own territories, but when SMEs go global they liaised with DIT's international team. DIT's network was nationally controlled but regionally managed via a strong regional structure of 250 International Trade Advisers (trade advisers with business experience, not civil servants). The government wanted to drive more exports and get more business and more value exported. This was potentially scalable within the current model but resources would be a challenge. 90% of UK exporters were SMEs, around 40% of UK export value: DIT reached out to around 30-40,000 businesses every year. There was a strong link between exports and innovation.
8. DIT was rolling out a new strategy, looking at how many businesses could be engaged, to save on resources. There are three arms of the UK's model which had the most impact for SMEs: 1. Global Network; 2. Strong sector focus (campaign related activity around specific sectors globally); and 3. Supporting current exporters to extend their global reach. "Gov.UK" was a "one stop shop" which encouraged businesses to self-serve. The government was also looking at how to best help exporters in other regions (North and East and West Midlands). DIT were also trying to formalise/ build up support networks via Chambers of Commerce (overseas delivery partners in around 30 markets around the world). This would free up international staff (at post) to focus on more high value work. In terms of preparing small businesses to export, the idea was to start with a diagnostic process, analysing business strengths and development needs, followed with workshops and master classes (e.g. IP protection, trade finance - UKEF).
9. Trisha Van Orden (US – Department for Commerce) delivered a presentation on the **US Federal Trade Promotion Service**
10. Sarah Bonner (US - US Small Business Administration) delivered a presentation on the work of the **US Office International Trade.** A Cabinet level agency representing small businesses at cabinet level and the first place small businesses go for one-on-one help. Small Business Development Centres (SBDCs) consisting of 3000 business counsellors offer advice designed to provide an international soft landing for SMEs – UK subsidiaries were welcome to drop in. Enterprise Centres usually located in universities and colleges helped small business with research – counselling was free, with small charges ($40) for services. The SBDC network engaged regularly and worked on trade missions. The Small Business Association was co-located with Commerce in export assistance centres and had finance staff to help SMEs build business cases for export loans. They also provided Women's Business Centres, designed to help diaspora women and under-serviced communities by offering child care and weekend and evening classes. The Small Business Administration gave trade loan guarantees - not loans unless it's for disaster relief.
11. The group then discussed ideas for potential cooperation: exchanges between UK and US entrepreneurs (peer to peer support); sharing of best practice in developing business to get SMEs "export ready"; enabling conversations between Growth hubs in UK and Small Business Administration counsellors; bringing networks of entrepreneurs together – how to build on this to reach those business that might not seek support (e.g. small business in US having a peer relationship with small business in UK so when they were ready to export they already had access to a network); bringing two

Department for
International Trade

groups of entrepreneurs from UK and US together; using the current support infrastructure to link entrepreneurs even before they are ready for export.

12. The group agreed that the ideas would fit well with the general framework of SME workshops and a potential MoU. A UK-US SME workshop could be vehicle to start pilots such as this. There was lots of potential to connect government institutions, state service providers and SMEs. One outcome of the UK/US working group could be to announce launch of best practice workshops with a focus on entrepreneurship. There was also the potential to launch a joint "Doing Business In" brochure – a one pager on doing business in UK and US with links to available resources for SMEs - joint document.

Action Items

- US – USTR to draft the initial (US side) text for "Doing Business in UK/US" brochure and send to UK for comment/ contributions.
- First SME workshop to be planned for March 2018, likely in the margins of the next TIWG in Washington DC.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- High degree of common interest in establishing an SME dialogue to pursue exchanges of information on support measures for SMEs, and to produce a short brochure to assist UK and US SMEs to do business in the other country. Wording agreed on this for the joint press statement. A successful Short Term Outcome.

Department for
International Trade

Title of meeting: ***Sustainability / Labor and Environment***

Date: ***13th November 2017***

Time: ***14:30-15:30***

Participants

Name	Department / Directorate
Maryam Teschke-Panah	Policy Directorate, DIT (Lead)
Magdalena Ruda	UK-US Team, Trade Policy Group, DIT
Sohail Ismail	Policy Directorate, DIT
Joanne Lawson	Policy Directorate, DIT
Elie Howe	Policy Directorate, DIT
Sophie Hale	Analysis Directorate, DIT
Peter Gysin	BEIS
Trevor Salmon	DEFRA
Rebecca Lavery	DWP
Oliver Griffiths	UK-US Team, Trade Policy Group, DIT
Katie Waring	UK-US Team, Trade Policy Group, DIT
Timothy Wedding	United States Trade Representative
Alexandra Whittaker	United States Trade Representative
Carlos Romero	United States Trade Representative, Labour
Sarah Stewart	United States Trade Representative, Environment
Mark Palermo	US Department of State
Emma Laury	US Department of Labor
Anne Zollner	US Department of Labor
Brooke Hobbie	US Department of Interior

Key Points to Note

- UK and the US agreed that the objective for the first discussion should be to develop a better understanding of each side's institutional set-up (range of institutions involved in discussion and work on sustainability / labor and environment), current approaches (e.g. to scope, enforcement mechanism and stakeholder engagement), and elements which may be included into the sustainability / labor and environment chapters.
- US indicated there may be some room for manoeuvre to extend the scope of labor and environment chapters by including issues which are not covered by TPA, but these would be rather limited.
- US firm on dispute settlement mechanism based on sanctions, as well as main elements covered by labor and environment chapters (e.g. core labour standards, a list of Multilateral Environmental Agreements, and the obligation of domestic compliance and enforcement). These are enshrined in the US legislation, and as such guide the US team in the way it conducts negotiations with partner countries, and impose limits on what can be discussed and agreed upon in an FTA (both, concerning the scope, and the level of ambition). The FTA provisions are not seen as a right vehicle to force changes in the US legislation.

Department for
International Trade

- US see merits in having sanctions-based dispute settlement mechanism, even if it is rarely used (its presence encourages partner countries to improve their legislation and practice in the areas of labour and environment). The mechanism is supported by financial and technical assistance, as well as capacity building.
- US indicated climate change and greenhouse gas emissions are very sensitive in the US, and have not been included in the recent trade agreements (and tested yet with the current Administration), as there was no Congressional approval for it.

Reports of Discussions and Outcome

1. The meeting opened on a discussion of intent for the meeting. UK opened with comments indicating a desire to discuss the institutional set-up of the United States Trade Representative (USTR), and their cooperation with other US departments and agencies, so as to compare with UK set-up, as well as enquiries as to dispute settlement mechanisms pertaining to labour and the environment. Additionally highlighted was that these would be exploratory discussions for setting up future dialogues.
2. UK provided a brief outline of the UK's institutional framework; Department for International Trade (DIT) has a sustainability team who work closely with colleagues from other departments (such as DEFRA, DWP for labour interest and BEIS).
3. Intent for the UK was outlined in the context of the UK's departure from the European Union (EU); that the UK cannot actively pursue trade policy measures (such as negotiations of a trade agreement) while a member-state of the EU but has interest in scoping possible action for the future.
4. US responded with a description of institutional makeup around USTR: the US Constitution allocates power for negotiation of trade agreements to Congress; however in 1974 the US Congress passed the Trade Act which established the 'Trade Promotion Authority' (TPA) for the office of the President (ex-'Fast Track Authority'). As long as the administration of the President conducts trade negotiations along certain principles (outlined in the Trade Act 1974 and subsequent amendments, and the renewed TPA) Congress will expedite the legislative process, though USTR still maintains constant interaction with Congress pre-negotiation, during negotiation and afterwards. The TPA has evolved over time, and most recent version was adopted in 2015.
5. US highlighted the importance of the legislative component in their work (guiding USTR in negotiating the scope and level of ambition of trade agreements), as well as the extent to which the role played by labour and environment in US trade agreements has evolved over time. This was stressed multiple times during the meeting. US further commented that they felt that other countries consistently underestimated the role that US Congress played in negotiations.
6. Further comments described the interwoven nature of work between USTR and relevant departments for sustainability (environment and labour) issues (such as Department of Labor, Department of Interior, Department of Agriculture, Department of Energy, Forest Service and Commerce and Oceanic Agency) as well work with border agencies.
7. The most recent amendment of the TPA was adopted in 2015, which set out key negotiation objectives for USTR. In the field of sustainability (environment and labour) this included to seek commitments that parties to the agreement adopt and enforce domestic labour and environmental laws (consistent with their international obligations), and do not disregard them for the purposes of attracting trade or FDI; as well as that labour and environment chapters need to have the same dispute resolution mechanisms (based on sanctions) as other chapters.

Department for
International Trade

8. US also mentioned that as of the latest TPA, the US should seek inclusion into trade agreements of commitments consistent with 7 multilaterals on the environment that the US has ratified. In addition there are two new post-2015 objectives relating to sustainable management of natural resources, notably fisheries: clauses to prohibit harmful fishing subsidies that lead to overfishing, and against illegal unreported and unregulated (IUU) fishing.
9. UK response mirrored sentiments of US: regarding reliance on other departments. UK also pointed out the ongoing process of transposition of EU law through the EU Withdrawal Bill.
10. Climate Change. UK (Gysin) inquired about the possibility of including reference to climate change in a future UK-US trade agreement given that the UK has a strong historical stance on climate change and pushed strongly for the Paris Agreement. UK also highlighted the pressure for this that would come from civil society and NGOs. US (Stewart) responded emphatically that climate change is the most political (sensitive) question for the US, stating it is a 'lightning rod issue', mentioning that as of 2015, USTR are bound by Congress not to include mention of greenhouse gas emission reductions in trade agreements. US (Stewart) stated this ban would not be lifted anytime soon.
11. Stakeholders. UK (Teschke-Panah) also wanted to know which role stakeholders play within labour and environmental issues in the US. US (Stewart) provided a description of the institutional role that stakeholders play within USTR; there is the Advisory Committee for Trade Policy and Negotiations (ACTPN), containing 20-25 members, being drawn from NGOs, industry and academia. These stakeholders are given security clearance and allowed to offer candid input on trade agreement texts. USTR does engage with other stakeholders that operate outside ACTPN. These had been happy in recent years due to the inclusion of enforceability mechanisms (for environment) in trade agreements. For labour, US (Romero) said that there had been dissatisfaction among some stakeholders in recent years due to the fact since 2007, there has been no expansion of labour provisions in the TPA; there is a feeling that NAFTA affects jobs and working conditions and other countries should address these issues (the current administration echoes these sentiments).
12. TPA and labour. UK (Lawson) queried the nature of the TPA and its expanding scope with regards to labour. US (Romero) replied stating that the labour provisions of the TPA are the product of a political compromise within the US: when Democrats took Congress in the 2006 mid-term elections there was compromise to include a commitment from parties to the agreement to adhere to the core labour standards (1998 ILO Declaration on the Fundamental Principles and Rights at Work), and to adopt and effectively enforce domestic labour laws compliant with those standards.
13. Dispute resolution. UK (Teschke-Panah) enquired about analytical work that had been conducted on the US side around effectiveness of the sanctions-based dispute resolution for these issues (labour and environment). US answer was brief but stated that there had been no analytical work conducted on this issue by the US Government, but claimed that there were some robust studies carried out by research institutes. Additionally the US agreed to potentially discuss with the UK in detail the US-Guatemala labour dispute case brought about in 2010.
14. Dispute resolution. Another point that US (Romero and Stewart) raised were that the benefits of dispute resolution can be achieved without using it. US stated that dispute settlement and the use of sanctions is for the US a matter of last resort; most work is conducted through diplomatic and policy dialogue, as well as financial and technical assistance, and capacity building. The latter is the 'engine of progress' in the sense that partner countries are encouraged to improve their legislation and practice in line with the commitments enshrined in trade agreements.

Department for
International Trade

15. Joint-action. US (Stewart) stated that they felt joint UK-US leadership on sustainability (environment and labour) with regard to third countries was a possible way forward given the UK's prominence on these issues historically. UK noted the need for further and deeper discussions in future and responded positively to the idea for joint cooperation.

Action Items

UK and US agreed to continue discussion about the sustainability (labour and environment). Future discussions could focus on (but will not be limited to):

- The aspects of interest to the UK and the US which go beyond the basic provisions, and which may be covered by sustainability (labour and environment) chapters of future trade agreements (these could include e.g. anti-corruption, forced labour, modern slavery, sustainable management of natural resources, including fisheries and forestry, and others).
- The enforcement mechanism (US proposed to present more in detail the case of Guatemala, the reasoning behind including the labour and environment chapters into the general dispute settlement mechanism, and the benefits of having the sanctions based mechanism even if it is perceived as a "last resort" measure and rarely used).
- The opportunities for the UK-US leadership on sustainability related aspects worldwide and in relations with developing countries (this could include exchange of views about impacts of trade agreements on developing countries, and addressing development-related aspects in trade agreements).
- Sharing wider analysis and evidence of impact of sustainability (labour/environment) provisions in trade agreements

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- A useful introductory meeting, although limited by length of session and the VTC format. It confirmed that the US continues to see labour and environment chapters being subject to dispute resolution mechanisms of the agreement /sanctionable. There are some restrictions on extending the scope of issues with climate change being considered out with, but the possible flexibility on labour provisions e.g. forced labour, modern slavery, could be an area to explore in the next dialogue. It would be preferable to have face to face engagement with USTR (and possibly agency) counterparts in a next dialogue.

Department for
International Trade

Title of Meeting: ***Goods: Agriculture Market Access***

Date: ***13th November 2017***

Time: ***15:30 - 16:30***

Participants

Name	Department/Directorate
Ceri Morgan	DEFRA (Lead)
Oliver Griffiths	UK-US Team, Trade Policy Group, DIT
Katie Waring	UK-US Team, Trade Policy Group, DIT
Emma Coppack	DExEU
Jack Kennedy	UK-US Team, Trade Policy Group, DIT
Jack Moreton-Burt	Policy Directorate, DIT
Neil Feinson	Policy Directorate, DIT
Edwin Mangheni	UK-US Team, Trade Policy Group, DIT
James Dunn	DEFRA
Jonathan Hoare	DEFRA
Sinjini Mukherjee	DEFRA
Natalie Roberts	DEFRA
Russell Stokes	DEFRA
Roger Wentzel	United States Trade Representative (VTC)
Dana DuBovis	United States Trade Representative
Tim Wedding	United States Trade Representative
Alexandra Whittaker	United States Trade Representative
Sam Russo	United States Trade Representative
Julie Callahan	United States Trade Representative
Cheri Courtney	US National Organic Program
Stan Phillips	US Embassy London

Key Points to Note

- For Organics, Spirits and Wine: Ahead of technical VTCs, Defra is looking to share operability summaries as well as relevant draft continuity texts.
- Defra to provide response to US suggestion for formally launching an Equivalence Determination Procedure. US will also consider what informal processes can be utilised.
- US to highlight their priority annexes in order to inform our ongoing analysis of the VEA, and for Defra to consider whether we anticipate a future audit of US processes.
- Defra and US to facilitate regulator to regulator discussion on VEA.

Department for
International Trade

Report of Discussions and Outcome

Each of the four continuity agreements were discussed in turn:

1. Spirits agreement

The UK provided a summary of US questions, taken away from the recent VTC, with associated answers:

Q: The rationale for the inclusion of paragraph 3 in the proposed UK text.

A: Taken from the original text

US: No issues going forward

Q: More information sought on the proposed ratification processes

A: Should be discussed in relation to all continuity agreements; to be put on hold for now

US: Agreed legal discussion in the future

Q: References in the proposed UK text to the Republic of Ireland

A: Still a matter for EU negotiations, but in terms of GIs, if they are trans-border, the GIs will still be protected

US: Sounds fine, but should discuss further once had time to look at it

On operation of the agreement, the UK suggested sharing a summary of the operability assessment with the US and proposed future technical VTCs following a similar approach. The US agreed to this proposal.

2. Wine agreement

At the last working group the US asked a question on certification requirements and labelling. Here the UK stated that EU negotiations and the likely implementation period would need to be considered, however starting a discussion now on simplification of these requirements beyond the period of continuity would be welcome in order to give businesses lead time for changes, if they were to occur. The US welcomed this suggestion. The UK proposed to share draft continuity text on the agreement ahead of a January VTC, and to start discussions on potential future changes at the VTC.

The UK asked the US for their thoughts on the World Wine Trade Group. The US said this is something the UK should think about as the issues being addressed through this group are similar to those they would like to see addressed in a future agreement with the UK.

3. Organics Arrangement

The UK stated they are in a position to share draft continuity text on organics. The US stated that whilst they do not want to disrupt trade on day one, there are other aspects to consider, other than the agreement text. The US invited the UK to begin the formal process of applying for mutual recognition via the National Organic Program. The US also wanted to know if the UK were thinking of making the agreement more formally binding, in-line with the EU's thoughts, and if the UK plans to audit the US.

The UK wanted to make sure that this did not mean they were starting from scratch, and that common elements of the agreement would roll over, with the US focusing on how the UK will deal with changes.

Department for International Trade

It was uncertain whether a formal request for recognition could be made while the UK is still part of the EU. This is something the UK will explore. In the meantime the US agreed to explore options for informal progress on recognition to be achieved.

4. Veterinary equivalence agreement (VEA)

The US explained that the original VEA was produced to take account of the complexity in evaluating Member States, therefore a new UK-US VEA could be simplified and tailored to the UK-US relationship. The UK agreed there were opportunities to look at simplification, and have started by assessing the annexes. The UK would like to share information on this work as soon as possible. Both the US and UK agreed it would be helpful to include the regulators in this discussion.

- On the US question of what recognition would look like, the UK agreed work on this should take place in parallel with the annex work.
- The US asked if the UK would anticipate an audit sometime next year, and if so, they would need to make sure this was on their regulators agenda. The UK said they would get back to the US on this as soon as possible.
- On legislation, the US does not anticipate legislative fixes, but SIS will need to make rules, and this should not hold back VEA discussions.

<u>**Action Items**</u>

Key actions:

1. For Organics, Spirits and Wine: Ahead of technical VTCs, Defra looking to share operability summaries as well as relevant draft continuity texts.
2. Defra to provide response to US suggestion for formally launching Equivalence Determination Procedure. US will also consider what informal processes can be utilised.
3. US to highlight their priority annexes in order to inform our ongoing analysis of the VEA, and for Defra to consider whether we anticipate a future audit of US processes.
4. Defra and US to facilitate regulator to regulator discussion on VEA.

Other actions:

- Defra to clarify language on Irish Whiskey/whisky in the spirits agreement taking into account border sensitivities.
- Agreed to run twin track discussions on wine, ensuring continuity for businesses in one track whilst also understanding US approach to simplification and challenges of current EU arrangement.
- US to come back on Defra's request for more information on the World Wine Trade Group.
- Defra to share the Organics draft text ahead of Dec VTC.

<u>**FOR INTERNAL DISTRIBUTION ONLY**</u>

<u>**Lead Negotiator Analysis/Comments**</u>

- Objectives were largely achieved. The session demonstrated positive progress on all four of the continuity agreement texts. On Spirits in particular, resolution is close, aided by a technical VTC ahead of the Working Group. The US also responded well to the suggestion of maintaining the Wine agreement text while developing a twin track to discuss possible future changes. The situation is more complex with Organics and VEA, as the US' stated regulatory approach is likely to result in disruption to trade on Day One.

Department for
International Trade

Title of Meeting: ***Intellectual Property Enforcement***

Date: ***13th November 2017***

Time: ***16:30 – 17:30***

Participants

Name	Department/Directorate
Ada Igboemeka	Policy Directorate, DIT (Lead)
Mark Prince	Policy Directorate, DIT
Dara Beaulieu	Policy Directorate, DIT
Minh Tri Le	Policy Directorate, DIT
Ben Richie	Policy Directorate, DIT
Adam Williams	Intellectual Property Office
Megan Heap	Intellectual Property Office
Peter Cade	Intellectual Property Office
Will Steele	Intellectual Property Office
Tom Walkden	Intellectual Property Office
Katie Waring	UK-US Team, Trade Policy Group, DIT
Edwin Mangheni	UK-US Team, Trade Policy Group, DIT
Christina Sevilla	Office of the United States Trade Representative
Christine Peterson	Office of the United States Trade Representative
Susan Wilson	United States Patent and Trademark Office
Rachel Salzman	US Department of Commerce
Samuel Rizzo	United States Trade Representative
Alexandra Whitaker	Office of the United States Trade Representative
Timothy Wedding	United States Trade Representative (Europe Office)
Jessica Simonoff	Department of State
Joseph Babb	Department of State
Joseph Burke	US Embassy London
Julie Callahan	United States Trade Representative
Casey Mace	Department of State
Andrew Lorenz	National Security Council
Steven Shapiro (VTC)	Federal Bureau of Investigation
Steve Aiken (VTC)	US Intellectual Property Enforcement
Richard Miller (VTC)	US Trade and Patents Office
Additional officials	Head of Trademark and Enforcement
M.D (VTC)	US Patent and Trademark Office
Additional officials from Office of Regional Affairs, Department of State and United States Trade Representative	Via VTC

Key Points to Note

- Joint Economic Study on IP enforcement and global trade: US have no funding for commissioning the work – they will produce the content in house. Outcomes will be split into short-term and long-term initiatives.

Department for
International Trade

- Agreed to coordinate with the SME Group to coordinate activity and outreach.
- Work plan for STOs agreed with outputs and approximate timelines.
- Agreed that discussion on Illicit Streaming Devices would focus on 4 areas: public campaigns, role of intermediaries, sharing approaches to enforcement, approaches to tackling streaming. The discussion will be followed up via the US IPEC and IPO Copyright and Enforcement Director conversation taking place on 24th November 2017 as well as further discussions between UK IPO officials and counterparts in the US PTO and FBI.
- US suggested that both sides map out third countries where we have common interests to work. This work to be done through each side's respective IP attaché networks.
- The US proposed to share their list of nominations for their Notorious Markets List and requested access to PIPCU's List of Infringing Websites. UK (IPO) clarifying that IPO does not own the list but could request this from PIPCU.
- The US was pushing for Joint Investigation Operations related to illicit streaming devices. UK clarified that operations involve a range of UK agencies - HMRC, Border Force, PICPU, etc. who are not currently involved in the discussion. UK only able to commit at this point to focus on learning lessons from each other.

<u>Report of Discussions and Outcome</u>

Joint Economic Study

1. The UK (Igboemeka) suggested that the Joint Economic Study (JES) on IP enforcement and global trade could have outcomes such as: producing new knowledge on common global challenges in IP, building on and developing the existing evidence, sharing data and improving methodologies to strengthen the quality of analysis. The UK suggests discussing in the session: potential topics for the Joint Economic Study (JES), and agreeing forward processes.
2. The UK (Williams) stated it does not have the capacity internally to produce the analysis and is looking to commission this work out to independent institutions and asked for the US's view on this. The US (Peterson) states it does not have the budget for this type of project. They have in-house resources that can work on the data. The US can split the work between in-house and external tender. The UK (Williams) highlighted that the IPO budget for this Financial Year (FY) has already been committed and the work could only start from March next year. The US (Peterson) pressed as to whether there could be something we could deliver in the shorter term, within the next 6 to 8 months. The UK suggests that we split the work into short-term deliverables based on developing existing analysis and longer-term work. The UK (Igboemeka) suggested both sides to jointly come up with a specification and a joint decision to be made if we go out to third parties. The UK (Williams) also suggested that the work can be split depending on what both sides want to achieve and we could fill that out with tendering?
3. The US (Peterson) stated that the US has a lot of existing work that can be used again for the JES such as the 2016 Report from United States Patent and Trademark Office (USPTO) which refers to the Intellectual Property Office's (IPO) own work. The report is a granular report on counterfeiting, cease and desist orders, however it does not do a UK-EU comparison. A lot of goods that get counterfeited are sold locally. There have been private sector attempts to measure copyright loss, but the findings were never definitive and were controversial.
4. The UK (Igboemeka) suggested looking at the economic impact of counterfeiting and piracy following the 2017 OECD report and the UK's follow up report. The UK (Steele) pointed out that the IPO are

Department for
International Trade

currently looking internally at: online copyright infringement, counterfeiting in social media, and valuing IP Intensive industries. The UK (Williams) suggested that both sides share methodologies. Currently, the UK struggles to get data on the value of IP in trade within the EU because of the complexity of the extraction process. It will be useful to us if the US has good data on this.

5. The UK (Igboemeka) summarised that both sides agreed for a short-term deliverable within 6 to 8 months and another long-term deliverable in the next FY 2018, and that both parties should bring their economists together, US (Peterson) concurring. US (Peterson) asking that the questions for both short term and long term be mapped out together.

Illicit Streaming Devices

6. The US (Peterson) explained potential areas of interest, especially in the creative industries area, are films, sport, TV and video games as they constitute significant trade and investment relationships, and there is much cross investment by both countries. Online platforms generated $2billion US dollars' revenue in streaming content. A challenge to this is the pirated streaming sites and the devices that make these sites accessible. The US' notorious markets analysis identified some issues relating to illegal streaming platforms.
7. US (Shapiro) added that the FBI are aware of this problem and are going after these devices by focusing on the advertising network as an example. Their focus is to target distributors of these set-top boxes. The FBI are currently moving into the sporting events arena to try to shut down these boxes. They work with businesses such as Apple's ITunes to combat illicit streaming. The US highlighted that industry need to target these problems more effectively.
8. The UK (Walkden) agreed with what the US said, highlighting that the UK has done a lot of enforcement work. However, there is a need to consider the effectiveness of legislative change in this area. Industry are keen to tackle these boxes at source but there is an issue to see how possible it might be to outlaw these boxes, as legislative change can also capture devices used in a legal way such as laptops and mobile phones. This is a relatively new problem; therefore, the UK is happy to test prosecution under Fraud Act, Copyright Act, conspiracy to defraud (common law). We already have had some successful prosecutions. The UK have two financial investigators working in the IPO to assist law enforcement bodies and this was proving very useful in these cases in pursuing significant sums through Proceeds of Crime Orders. The UK have also published a guidance document for enforcement bodies to explain the enforcement technical side so we provide clear advice to clarify when and how we can go after people. There have been lots of seizure operations going on and this is an international problem, so the UK is happy to discuss this with the US. The plain or "vanilla" boxes are not illegal. The boxes when they come into the country are often in their legal vanilla form. The boxes become illegal when they receive modifications which turn them into illicit streaming devices. The scale is huge. The UK works closely with industry and have close links with US industry.
9. The UK (Williams) noted by saying it would be useful to collaborate on techniques to combat this. Such as communicating this effectively to the public. The UK (Walkden) highlighted we need to identify what resonates with the public such as the issue of identity theft, stealing of bank accounts, lack of child protection. The UK (Igboemeka) asked if there are areas for cooperation. The US (Peterson) said that National Intellectual Property Rights Coordination Center (IPR) has done public campaign awareness. The UK (Walkden) said a joint government/industry outreach campaign would

be launched in the UK in the run-up to Christmas and the IPO would share details with US colleagues when available. The UK said that working with intermediaries such as Facebook, Amazon, Alibaba, Ebay is key. Some of them had made changes to their global policies on ISDs, and processes for removing illegal content were seen by industry to be improving, but there was still a way to go.

10. The US (Wilson) noted that this phenomenon came to their attention two years ago. Companies began doing one-off ligation strategies against individuals. IPR, FBI, PTO have talked to stakeholders to steer them towards a different strategy. The US asked stakeholders for multi-jurisdictional strategies instead of individual litigation. Due to the breadth and depth of this kind of phenomenon, it also has an international reach because of the vast supply chains. There is a lot to do about talking to stakeholders but no real dialogue to work closely with enforcement. The US and UK cannot sequence this in old fashioned piracy way, so both sides need to work with stakeholders in the private sector. The UK engages with intermediaries such as Alibaba, Amazon. The UK highlighted the need for joint pressure on intermediaries and work on public awareness, as the devices are sold through channels that look legitimate. Both sides need to share details to amplify the message to the public.
11. The UK (Walkden) pointed out that both sides needed to look at actual streaming. Additionally, he highlighted that website blocking orders have been very effective in the UK. The US (Aitken) asked if the US and UK can work on joint cross operations? The UK (Williams) stated it agrees to a high-level conversation on this.

Notorious Markets List

12. The US (Peterson) explained that they are currently in the process of reviewing the Notorious Markets List submissions. The US are consolidating all the nominations. The US thinks it would be helpful to share the list with the UK for UK Operations. The US would like access to the UK Infringement Websites List
13. The UK (Williams) stated that the IPO does not hold the Infringement Websites List, another agency – the Police Intellectual Property Crime Unit (PIPCU) holds that list. The IPO can ask PIPCU for the list and IPO can thereafter send it to the US.

Work Plan

14. The UK (Igboemeka) suggested going through the Work Plan by headings. On the SMEs toolkit and SME roundtable the UK (Igboemeka) said the UK will work with our export promotion side to target the right SMEs who want to or are exporting to the US. The US (Peterson) said that this STO should coordinate with the SME group who are working on outreach events.
15. UK (Igboemeka): Global Leadership in IP Enforcement. US (Peterson) said that for the next Working Group, both sides should identify their shared interests in third country markets. The US said that both sides should ensure respective attachés are coordinating on the ground. The UK (Williams) noted that the attaché programme can be done before Christmas if the UK has shared contact information. The US (Wilson) stated they have quarterly meetings with attachés with one coming up in the 1st week of December. The US invited Adam (Williams) or someone from the UK to these meetings.
16. UK (Igboemeka): Joint Economic Study. The US (Peterson) said there is agreement that there are two tracks for the JES. Two different deadlines for the short and long term deliverables. In the meantime, both sides should identify any additional viable short term deliverables.

Department for
International Trade

Action Items

Joint Economic Study

- Bring US and UK economists together for a future meeting to plan the short (6-8 months) and long term deliverables of the Joint Economic Study, with both parties mapping out the questions that need to be answered for both the short term and long term deliverables.

Illicit Streaming Devices

- IPO Enforcement Director and IPEC's Director to follow up on key issues from illicit streaming devices discussion including: to work jointly on public awareness raising initiatives; working with intermediaries; sharing approaches to law enforcement; lessons on tackling illicit streaming.

Notorious Markets List

- US to share Notorious Markets List with the UK.
- UK IPO to ask PIPCU for the Infringement Websites List for IPO to send to the US.

Work Plan

- Christine Peterson (USTR) to send over full list of contact details to the UK so that the UK can liaise with the US.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- Very good atmosphere with both sides involved in an engaging discussion on illicit streaming devices and joint economic work. Session was in fact too short to allow for substantive discussion of all the issues. While there was a good brainstorm on potential topics for the joint economic study on IP enforcement and trade, the US was clearly hesitant around our proposal to commission out the work to an independent party - explaining that they did not have the budget and would conduct the analysis internally. This will impact on the perceived impartiality of any published work and we will need to take this into consideration as we agree on topics. US pushed hard for agreement to joint operations between enforcement agencies tackling illicit streaming devices and on third country cooperation. UK was non-committal but we can expect they will continue to do so. Meeting was successful in that there are concrete topics for follow up on illicit streaming and commitment to producing short term and longer term products for the economic work. Short-term outcome work plan agreed along with outputs and timelines. Progress on the work plan with a focus on the joint economic work are potential topics for the next Working Group.

Department for
International Trade

Title of Meeting: ***Services Plenary Session***

Date: ***14th November 2017***

Time: ***9:00-12:00***

Participants

Name	**Department/Directorate**
Tom Josephs	Policy Directorate, DIT (Lead)
Graham Floater	DCMS
Gila Sacks	DCMS
Rob Ward	HMT
Henry Shennan	DCMS
Chris Woodward	Policy Directorate, DIT
Ben Rake	Policy Directorate, DIT
Alessandro Fusco	Policy Directorate, DIT
Ben Aldred	Policy Directorate, DIT
Richard Salt	UK-US Team, Trade Policy Group, DIT
Cordelia Jonathan	UK-US Team, Trade Policy Group, DIT
Johanna Michael	Policy Directorate, DIT
Tamsin Morgan	DIT
Eva Smith Leggatt	Policy Directorate, DIT
Jaya Choraria	HMT
Sukhmani Khatkar	DIT
Additional officials	BEIS
Matt Mueller	HMT
Dan Rusbridge	HMT
Casey Mason	United States Trade Representative
Robert Tanner	United States Trade Representative
Jai Motwane	United States Trade Representative
Daniel Bahar	United States Trade Representative
Thomas Fine	United States Trade Representative
Jeffrey Seigel	US Department of the Treasury
Tim Wedding	United States Trade Representative
Alexandra Whittaker	United States Trade Representative
Andrew Lorenz	US National Security Council
Casey Mace	Department of State

***Bold** = lead/contributed to the discussion

Key Points to Note

Summary of discussions on the four pillars:

Department for
International Trade

- STOs: Good progress has been made by the regulators on the Audit STO, but we are not in a position to make any announcement yet. Language on the Financial Dialogue STO will be ready.
- Continuity Agreements: Further work needs to be done on Insurance, but both sides are keen to take this forward.
- FTA prep: Informative presentations from the US on their approach to services chapters, digital/telecomms, investment, PBS and FS, where the UK was in listening mode.
- Wider trade: US repeated that, while sensitive to the UK's position on technical rectification of our WTO schedules, they do still have concerns about this approach.

General Summary:

Both sides agreed that there are a large number of areas of mutual interest, including, but not limited to, PBS, FS and digital and that we should be working towards an ambitious agreement in areas where we have common ground.

- The US re-iterated their pitch for a negative list approach, arguing that the rest of the world was gradually adopting this way forward.
- The US requested that we refer to discussions on financial services as "US – UK financial regulatory cooperation".
- The US described TISA as "the universe of good ideas" in the PBS space, and specifically suggested the UK mine it for further ideas.
- US re-iterated the importance of giving businesses a clear signal on the proposed Financial Services regulatory framework post Brexit as soon as possible, warning that companies will shortly be forced to set up subsidiaries overseas (something that they are already preparing to do) if further clarity is not provided in the near future.

Actions:

- UK/US data experts to arrange follow up discussion, with particular emphasis on privacy protection issues and continuity discussion.
- UK/US telecoms policy leads to arrange follow up discussion
- On PBS, UK/US to arrange follow up discussions, probably in early 2018, once they have received feedback from the negotiating bodies, to discuss applicability to other institutions.
- General action point for all teams to arrange follow up discussions.

Report of Discussions and Outcome

1. The UK welcomed the US to the discussions and set out that the focus of the discussions would be on three key sectors: digital, professional and business services, and financial services. The US agreed and suggested beginning with a general update on the four buckets: continuity agreements; STOs; the scoping of elements of possible future agreements; and global cooperation within fora such as the WTO and G20. The US also offered a general overview of the US' approach across Services and Investment. DIT agreed that this would fit with the overall objectives outlined the previous day of trying to gain an understanding of each other's approaches towards future FTAs.
2. Continuity of existing agreements: The US highlighted that the main issue in Services and Investment is that of the US/EU covered agreement on insurance and re-insurance measures, noting that there was already an understanding of the kind of information exchange needed for the US to understand where the UK should be going.
3. The US wanted to re-emphasise their stance on WTO Services commitments. They acknowledged that the UK had already signalled interest in taking updated versions of the EU schedule and undertaking a technical rectification process. The US is aware of the complexities the UK faces in determining our

Department for International Trade

approach but they do have concerns - there are many exceptions in the EU schedule that clearly do not reflect the more open nature of the UK's services market. He suggested there would be value in the UK taking these points into account before we put our final proposed schedule on the table, notwithstanding the fact that our relationship with the EU is a key consideration.

4. DIT said that the UK has already set out our approach to GATS schedules. We have commitments in the WTO currently set out in EU schedules, which we want to maintain. Following the technical rectification approach is the way to give reassurance to businesses and consumers, which is the UK's priority. There is a process clearly set out in the GATS that accounts for the different views of WTO members in a formal setting. The UK wants to be transparent and to engage in open discussions with others. We hope to start the formal process towards the end of 2018.
5. The US explained their method of structuring FTA chapters. All sectors are covered by the cross-border trade in services and the investment chapters, other than financial services, which have a separate chapter. The cross-border chapter covers modes 1 and 2, while the investment chapter covers mode 3 issues. The investment chapter covers all services- and non-services-related investment. There are also rules on specific areas such as digital and telecoms on top of the basic, general disciplines. The US negotiates market access related commitments on a negative list basis. From the their perspective, this means that for key obligations in the services, investment and financial services chapters, each party can propose to negotiate exceptions, e.g. MFN or performance requirements in investment. Discussions on market access are generally carried out in the context of this negative list negotiation. Generally, the US has very open markets, but has significant offensive interests in foreign markets that are less open. The US encourages the UK to seek the highest level of openness to help create a global template for further negotiations.
6. Negative vs positive listing: The UK said that we are still in the early stages of developing our approach, and it was very useful to hear the US' perspective. The US said that negative listing has lots of benefits as it allows for high transparency and the ability to push for greater openness. A negative list approach doesn't prejudge a particular level of liberalisation. Some of these debates are not centred on the overall negative list approach, but on whether governments are willing to tie their hands in certain sensitive sectors. There is also a 'messaging gain' to be had with the negative list approach. Governments always have the right to regulate the domestic market, even if foreign service suppliers are given access. The US said that it was not a question of sensitivities, but the assumptions being made about everything else that is not sensitive. The US said that Canada had largely switched to a negative list approach (although this is not widely advertised), and that the EU was the last to hold out for positive listing. With CETA things entirely shifted gears, and China decided to pursue a negative list approach in 2013/14 – this is relevant to future templates and to the UK's potential future agreements.

DIGITAL

7. The US explained their 5 Chapter model. The E-Commerce chapter - increasingly referred-to as 'digital' – is not sector-specific, but essentially an 'overlay'. It applies to all the services and investment areas, with disciplines that have been developed to address issues emerging from the development of the internet and the changing way that businesses provide services, as well as new advances such as the Internet of Things and the increasing prevalence of sensors and connectivity. E-Commerce chapters, as in the original TPP, would include: substantive cross-cutting rules; more technical articles e.g. on SPAM

Department for
International Trade

or e-signatures; and more policy-oriented articles on issues such as consumer protection and cyber security.

8. The highest priorities for the US are the articles dealing with cloud services and the interconnectedness of businesses, cross-border data flows and provisions for preventing computer facility localisation requirements. Many companies across numerous sectors, including agriculture, retail and financial services, are using equipment increasingly reliant on cloud services and Artificial Intelligence. The key issue regarding cross-border data flows is to create a level playing field for businesses; decisions about localisations of computer facilities should be driven by costs and climate requirements involved, not by regulations. The scale of interconnection means that costs are driven down dramatically; the US is 'passionate' about advocating this, and about bringing together a first group of countries in agreement on this area. There needs to be a balance between gaining certainty from regulations, and other policy concerns.
9. The US formalise the WTO customs moratorium on E-Commerce (preventing tariffs on electronic transmissions) as a permanent commitment in their FTAs and ask trading partners to do the same. The US also strongly advocate against any rules that discriminate against digital products in terms of location of production or consumption. They aim to create a global norm. The app-based economy allows small businesses to become very successful very quickly thanks to the internet platform, but this depends on countries not putting up barriers that favour or protect domestic producers. The tariff moratorium on electronic transmissions and the principle of non-discrimination of digital products are the most important issues in terms of economic impact.
10. The US has also begun to pursue an additional article on source code, first developed in their work on TPP. There are other countries supporting this, namely Japan. This is recognition that the value in many companies' development is resident in source code work. It is not appropriate to demand that companies give source code as a condition of market participation. There was also recognition that this can evolve – from purely proprietary source code issues to the proprietary algorithms that support software.
11. Due to interest from stakeholders and trading partners, the US have had articles that address SPAM (unsolicited email), which tries to create standards allowing consumers to opt in or out; and e-signatures and e-authentication. The US has a federal law and similar state-level laws that prohibit discrimination on the basis of something being electronic, and thereby allows companies to do business using electronic means. The EU has a more regulatory approach.
12. There are also articles addressing broader policy concerns, including: articles requiring the US and their trade partners to secure consumer protection for online activities; those requiring parties to have a system of data protection for personal information; and one outlining principles around consumers' ability to access the internet ('open internet'). The US highlighted that some countries, perhaps including the UK, contemplate very detailed rules about what carriers can or cannot do, while the US takes a consumer-focused perspective, geared towards the pure trade issue. The US said that trade deals can facilitate cooperation on cyber security, but it depends on the specific trading partner.
13. The US has spent a long time looking at intermediary liabilities for platforms. This is a large part of the US economy, with many US companies relying on the ability to provide internet platform services on a large scale. US domestic law has provided these firms with immunity from liability for the behaviour of their users. The Commission has a similar approach in the e-commerce directive, but differs from the US in terms of the legal practicalities. The US feels this is an appropriate discussion to have around the

Department for
International Trade

digital chapters of FTAs, but it is still an area for development. The US is interested in talking with global partners about where there may be a potential need in future trade agreements; they are keen to create meaningful provisions that can solve problems, rather than merely drafting language or creating regulations.

14. The US has spent time talking to non-government stakeholders about the perceived challenges for telecoms and the Internet of Things, and where there may be barriers. Turning these discussions into discrete commitments is a work in progress but they said there are few new problems emerging that are not already under consideration.
15. DCMS highlighted that broadly, the US and the UK clearly have a lot of common interests in this area, and that this will be a fruitful area of future discussion. The US said that the most problematic area within the data localization issue is health information and the HIPAA (Health Insurance Portability and Accountability Act, 1996), which dictates that cross-border data flows are allowed as long as certain standards are met. The US Treasury said that in recent TPP negotiations, financial services were carved out of the data localisation prohibition. The obligation on the location of computing facilities is new to the e-commerce/digital trade chapter. After TPP was signed, there were further discussions with regulators, stakeholders and Congress. They confirmed that it was now clear US policy that financial services are covered in data localisation, but within the financial services chapter. This difference in drafting, as seen for example in TiSA, is based on the different way in which financial services are regulated, and the fact that regulators often need access to data, sometimes on a minute-by-minute basis – as witnessed in the recent financial crisis. The US tries to balance the interest in creating a broad, ambitious prohibition against localisation with respect for the fact that regulators need access to data.
16. DCMS then asked what the UK could learn from the US' discussions with the EU on TiSA. The US responded that the US had had simultaneous discussions on TiSA and TTIP with the EU Commission. The issue was that the Commission had yet to establish its position on data flows. The US had encouraged the EU to consider Member States' offensive interests. They said that the issue of data localisation, e.g. regarding HIPAA, can be a heated debate, but the US does care about privacy and has a fairly robust system. It is different in the EU; the two parties had a lot of debates about the strengths and weaknesses of both systems. The US said they do need to exercise the laws they have and give space to the Federal Trade Commission. In their models, FTAs incorporate the language of the GATS general exception as they find this sufficient. In taking measures to protect privacy, he said, you should have comfort that there is coverage in terms of general exceptions, and focus on making sure that systems are adopted that encourage that. It is important to ensure that there is legal accountability of the enterprises that hold the data. Until the Commission resolves its view, it will be hard to resolve the TiSA issue.
17. DCMS noted that, having seen the evolution of the US digital trade policy in FTAs, it is clear that there have been developments and that there is now a solid e-commerce chapter in TPP, for instance. He asked if the US thought it would be moving further ahead, perhaps integrating telecoms into the digital chapter. Could there be something more ambitious than TPP in the future? The US responded that the US would continue to look at whether or not they needed to add additional tools. The structure would not be changed, as telecoms remains useful as a sector-specific set of disciplines. E-Commerce is an over-lying area, and it is useful to maintain this distinction. The US will not be changing the current 5-

Department for
International Trade

chapter structure for the foreseeable future. Cross-references and overlaps between chapters are resolved by having a collaborative nature.

18. On future-proofing in particular, DCMS asked, given the fast-changing nature of the digital world, which aspects of the content the US see as more fixed and which could be subject to change. The US are confident that they have a solid set of articles and that there would be no immediate move to change what was already accomplished in TPP. It may be worth considering whether or not to add things. This conversation is informed by learning from industry stakeholders, who witness first-hand the effects of barriers in foreign markets. One example is the source code provision (as set out above).
19. DCMS asked if there could be further provisions for different platforms. The US responded that much of this is driven by industry concerns. Their model already has 27 or 28 chapters; they are already addressing a lot of the platform issues, so are not inclined to draft any additional rules. The US said that telecoms provisions are much more established. Telecoms chapters try to do 3 things: continue the GATS practice of having a strong article allowing access and usage of telecoms suppliers in US markets, without national discrimination; provide for suppliers competing in each other's markets, e.g. interconnection; establish a series of good government practices, e.g. on transparency in licensing and rulemaking – in a sector that is heavily regulated by other governments.
20. On value added services in particular, the US asks that trading partners take a lighter touch approach, and in particular not to treat them like public Telecoms providers, e.g. with requirements to make their services generally available, or to require cost model/rate review that public telecoms providers must do. DCMS asked about the differing approach the US took between landline and mobile Suppliers in a telecoms chapter. US responded that in terms of suppliers competing with each other, historically the US hasn't applied these to mobile operators, partly because a number of the provisions in the Telecoms chapter are directed towards 'Major Suppliers', and few US mobile suppliers qualify for this designation. Part of the explanation is that the US has always had a very competitive global market. They started with 6 national suppliers, and now have 4, and still numerous regional players. This scenario, in which they have never had one government supplier become privatised and remain dominant, is different from that of other countries. The mobile question is something they are looking at in discussions. DCMS asked if the US sees that as changing in terms of fixed vs mobile offerings. The US responded again that companies had to be in the fixed line business, with point-to-point lines, for provisions like interconnection to be a major issue. He confirmed that major supplier obligations don't really have mobile-specific obligations.
21. DCMS asked which countries the US see as being relatively open in terms of telecoms access, and where the common interests lie. The US responded that different stakeholders have different interests. There are numerous industries in which the primary interest is serving larger companies/customers, and focusing on supplementing their existing network(s). In some markets there are US companies competing on a global basis. The challenge with telecoms is that it is hard to compare and contrast levels of market openness. Generally, the US felt Europe has a good model; European countries are generally very open. In terms of the rest of the world, the US must work on a case-by-case basis.
22. DIT said that UK Ministers have made it clear that digital is indeed an area in which we want to be ambitious, with plenty of common ground in the future. There was agreement to follow up on this discussion with further detailed conversations in order to build up a deeper understanding of the

Department for
International Trade

specific issues raised, including organising further conversations around data, (including privacy protection aspects), and more generally on digital, including DSM issues and telecoms.

23. The US asked the UK how we see our internal policy formulation developing, and at what point we might be able to share options with the US. DIT reiterated that as an EUMS, we are not in a position to open up negotiations at this stage. We will be in this situation for some time and we will be using the time to develop our thinking and to learn from others as we build up our position. DCMS added that there would need to be a cross-government consensus on the sequencing of any talks with the US and with the EU. He also said that, in the meantime, there are lots of detailed discussions to be had to allow the UK and US to get to know each other's markets and regulatory environments, which will help inform future negotiations.

PBS

24. DIT began by presenting an update on the status of the PBS audit STO. ICAS and NASBA/AICPA have signed an MOU to take forward a recognition agreement. There is a process we need to go through; the Financial Reporting Council needs to sign it off to make sure it's compliant with UK legislation. The UK are quite hopeful that there is a will to move it forward, but we must respect the process they need to go through. It is too soon to make an announcement but we hope that is something that will happen before the next working group, and that it will serve as a case study or model for the future. ICAEW will hopefully follow.
25. The US team welcomed this and agreed that they were hopeful that a recognition agreement would take place, and also that it could be a case study for future work. It was also noted that there have already been discussions between architects. The US have been keen to encourage agreements like these for some time, including in TTIP, but had met a number of challenges at MS level – not least the EU's insistence on agreements they were party to being for all MS, or none. DIT welcomed this positivity. The UK was clear that we want to ensure our relationship with the Commission is right and that we are respectful of our obligations while we are in the EU. We said that this should be an area where progress can be made and that it would be useful to continue talking to industry to see where there can be future progress.
26. Both sides agreed that we should think about what communications can be done around the ICAS work – if there is an agreement. US noted that there will be a limited degree to which they can try and take credit, given it will not be the work of the federal Government – 'credit must be given where it's due'. Nonetheless, signs point to a concrete trade-related outcome well in advance of Brexit and both sides agree we should try and do communications to promote this as a positive step.
27. More generally, the US explained their approach to professional services. The US explained that, as jurisdiction over most professional services is in the hands of their States, it is difficult for them to commit to anything in an FTA on mutual recognition of professional qualifications that goes beyond 'best endeavour' language or commitments to try and help facilitate agreements through working groups.
28. The US picked up on the morning's conversation by bringing discussion back to the '5-chapter model'. They said that their standard services chapter is very similar to a GATS chapter, with a few differences; the main difference is the fact that investment is put into a separate chapter – covering the whole life cycle of an investment (i.e. including investment liberalisation and establishment – mode 3). For the CBTS chapter they also think they go beyond GATS on transparency and domestic regulation. They see

this, in effect, as a residual chapter in the sense that it covers trade in services where it's not covered elsewhere.

29. They described e-commerce and telecoms chapters as an overlay on the basic disciplines: those chapters take the market access commitments undertaken by FTA parties and lay sector-specific rules on top. The UK asked why they had taken the approach of taking some areas – like PBS or delivery services – forward through annexes to the CBTS rather than as specific chapters (though that doesn't mean they can't cover investment too). The US felt annexes were usually the most appropriate way of doing it but that e-commerce and telecoms had become so detailed that they need their own chapters.
30. The US were open to ideas for annexes with new rules and disciplines for specific sectors but felt most were reasonably covered by CBTS/Investment chapters. On PBS, the US responded that it is demand-driven, as they aim to serve their clients. The US does not generally push for a professional services annex, but they are often as a result of trading partners wanting more refined procedures, particularly post-agreement. They thought TiSA was an area ripe for harvest if we did want to look at doing anything – a 'universe of good ideas' worth mining. Financial services are a little different, as their chapter is a combination of market access commitments and specific rules. US then subject their '5-chapter model' to a negative list and ratchet.
31. The US noted a lot of discussion in Geneva and elsewhere around the 'wonders' of mutual recognition; the US agrees with this, but sees it as a 'limited universe'. The US has been as forward-leaning as any country about where they will do mutual recognition agreements (a misleading term, they said) – probably less than two dozen – but they tend to be with very specific countries with sophisticated regulatory regimes that US regulators are comfortable with. That is why they look to the UK with such interest. It doesn't mean that other service suppliers cannot access the US market, merely that they are not offered an accelerated pathway. There is a limit to what they can actually do, however, in an FTA because PBS is generally regulated at state level – hence their annexes in this area tend to be about encouraging regulators and facilitating through establishing working groups.
32. The US said they would be happy to talk us through the complexities of how the chapters link up with each other. They reiterated that digital is an area where the US wants to be ambitious, but that it is impossible to look at digital commitments without looking at all the other chapters. It is necessary, they said, to look at all the commitments with respect to cross-border and investment as a baseline. A lot of the rules that impact a service supplier are not in the digital chapter but the cross-border chapter. It can be difficult to ensure everything is aligned – you need to think about what kind of commitment you are taking in the CBTS chapter.
33. The UK asked if the US had any advice about engaging industry stakeholders. The US offered for their Europe office to brief us more generally on their structure for stakeholder engagement. In terms of a services-specific approach, he said that sometimes they become gradually aware of stakeholder issues, often related to market access problems, and that eventually they realise it must be dealt with horizontally. There is also a more formalised structure for dealing with stakeholder engagement: formal groups made up of environmental groups, labour groups, NGOs and others, whom they consult. These are broken down sector by sector. The issues raised may be within or outside FTAs. In the context of an FTA itself, there is a very formalised approach towards obtaining comments from stakeholders through hearings etc. Thanks to all of these strategies, stakeholders both inside and outside industry are not shy about expressing their views and their concerns about the direction of trade agreements.

34. The US said that they are conscious of trying to figure out the policy solutions that make the most sense in these negotiations. They need to understand the different concessions that might be made, or the policy process that might be taken to develop a negotiating position. On the informal side of processes, they are both proactive and reactive. It is often helpful to have a team who knows the issues well enough that they can bring them in to help frame the debate, and help policy makers to get ahead of a particular problem. The US added that in their formal system of stakeholder consultation, the different groups are each co-chaired by the agency heads and the USTR. They sign non-disclosure agreements to allow these group representatives access to some of the texts and confidential information.
35. The UK mentioned that business stakeholders often show concern about the extent to which businesses are regulated at state level, and asked how far agreements can go in terms of domestic regulation and PBS annexes. The US responded that all their commitments apply to the states, most importantly the national treatment commitment. The states are not free to discriminate. They believe that this satisfies one of the key desires of businesses and that it was rare to see another country causing problems for their industry. They said that, contrary to a misconception by the European Commission, many US states are forward-leaning and compete with each other for foreign investment, as well as being focused on ensuring they provide high quality services for their consumers. The main concern for regulators is consumer protection. In PBS there is no discrimination on the basis of nationality in terms of who can apply for access – you have to go through what any American from another state goes through. The OECD has concluded that there are few state-level barriers. The US said it would be open to hearing any thoughts to the contrary.
36. Continuing the discussion on state-level measures, they said that when the US moves forward with any FTA proposals, there is input from representatives of the state governors' offices, representatives of the Attorney-Generals' offices of the states, and sometimes also representatives of regulatory bodies. The states, he said, are not as fractured as often perceived. They feel they have a solid approach to consulting them and engaging them in what is going on in an FTA.
37. To sum up, the UK and the US agreed that PBS is one area in which the US and UK should be able to find common ground in the future. The US said that work should be able to go forward after the end of this year, after receiving feedback from the FRC and negotiating bodies.

INVESTMENT

38. Although UK investment experts were not present in the room, the US said that they were already in close touch with their counterparts in DIT.
39. The US said that the inclusion of investment as a component of trade is becoming the norm, and that the EU had also adopted this approach post-Lisbon. The investment chapter itself is neutral; it touches on Mode 3 (with reference made to the fact that this also applies to services). There are 3 sets of provisions: those that focus on measures that might distort competition or economic decision-making, or make nationality-based preferences; those that focus on protecting property and the rights of investments; and those settling investment disputes. The second of these sets of provisions gives assurance of fair compensation in the case of expropriation, or minimal-standard treatment, and safeguards against denials of justice. The most interesting provisions are those relating to competition, MFN and the national treatment obligation.
40. There is also a discipline in Mode 3 against discrimination of any company manager or board director based on nationality. This is not an agreement to allow immigration – that's a separate issue - but

about freedom for the companies to choose who they want from the choice already available within the market. There are also disciplines against performance requirements discrimination, and against the imposition of local content requirements or technology transfer, which are all very important in the Mode 3 context. There are other disciplines put forward in TiSA, e.g. regarding performance management. For cross-border trade in services and investment together, the US has one set of annexes (financial services have their own). It is possible to negotiate exceptions and there are areas in which space is preserved for future developments.

41. DIT said that they are familiar with this sort of division. The UK would be interested in hearing more about the main advantages of this approach as opposed to one in which there is an establishment chapter, for example. DIT asked if, regarding the discussion around Mode 3 and investment, there are any other provisions in the investment chapter that the US sees as particularly important. The US responded that they take a more common approach, with investment seen as one subject area.
42. The Commission's approach is to have establishment for services, so it therefore makes sense to have the same for non-services. The EU had foresight in keeping them segregated. The EU approach is fairly unique but it derives from a particular history and some internal EU law issues related to the sharing of competencies.
43. DIT asked about the US' latest thinking on dispute resolution in investment chapters. The US were unable to divulge much, but said that USTR had publicly made points about how US sovereignty might be subject to international view. The US is trying to swing the balance in favour of giving states a bit more flexibility or 'sovereignty'. This applies to the notion of dispute settlement more generally. The US reiterated that the ISDS conversation applies more generally to dispute settlement of other types. In NAFTA discussions the US is starting to think about the scope and mechanism for consent, which relates to ISDS. This is different from looking at what the procedures themselves should look like. Based on their experience, the best path is to have an ad hoc, transparent approach with numerous safeguards and mechanisms to ensure the state retains a certain amount of control. The US underlined that, even as they are changing their approach, what is not changing is their fundamental commitment to ad hoc arbitration.

FINANCIAL SERVICES

44. To start the discussion on Financial Services (FS), DIT recalled that earlier in the working group, attendees had mentioned the importance of considering continuity for the covered insurance agreement. The US had also raised data localisation as a potential challenge for FS firms. HMT laid out the agenda, and gave an overview of the recent developments regarding EU Exit and financial services issues. The first phase of EU Exit discussions have focused on other things, but financial services will be covered in Phase 2 as/when it is unlocked. The UK want to have a comprehensive agreement, as the PM set out in her speech when Article 50 was triggered, and in a number of subsequent public statements. The UK wants to achieve a high level of mutual access between the UK and the US, which implies high levels of supervisory cooperation; we want an agreement that is symmetrical, reciprocal and reliable in terms of financial stability. The implementation period is very important for the future of financial services firms from many different countries, including the US. The UK is confident we will be able to reach a form of agreement on that. HMT is keen to ensure continuity for the FS sector as much as possible. To this end they are working to on-shore the EU acquis and statutory instruments will be brought forward to give legal form to regulation currently applying to the UK through its membership

of the EU. The sequencing of the onshoring process vis-à-vis other ongoing processes is sensitive, but HMG will attempt to keep the US administration appraised of all relevant developments.

45. UST recognised that much of what is possible to agree within a US-UK FTA on Financial Services depends on the post-Brexit arrangement between the UK and the EU and the UK's ability to continue to passport financial services into the EU. They acknowledged the sensitive political concerns about the sequencing of talks and the internal UK government sensitivities. Nevertheless, they wanted to take the opportunity to raise the concerns of industry on both sides of the Atlantic: the desire for continuity is great not just in the Financial Services space, but in all sectors. The US wants to make sure that continuity is as smooth as possible, and encourages the UK to consider expediting the framework of the implementation period. Any kind of explanation or insight into the nature of the transition period would be very welcome and encouraged. Many Financial Services firms will soon have to start setting up subsidiaries on the continent (and many already have), which is an expensive process. The UST said that the UK is undoubtedly already aware of these issues, but he wanted to raise the concern while being respectful of the PM's difficult political position.
46. HMT said that we had established good channels of communication between our governments on financial services which we should seek to maintain. Over the past few months, the UK has made good progress on financial dialogue and continuity agreements. HMT had provided UST with a scoping note on a proposal for a financial regulatory dialogue, and this is still under consideration from the US. Ahead of this meeting, both sides had agreed some language for public use, which HMT regarded as a positive step. HMT said both sides would need to keep in touch regarding financial regulatory dialogue. UST said that they are working through the scoping paper and look forward to continuing discussions about this, their initial comments were that they would prefer to focus on "coordination", rather than "dialogue". A call had already been set up tentatively for the 22nd November, which would hopefully be an opportunity to move forward on this. US regulators work very closely with the PRA and FCA.
47. The UK said that on continuity of the covered agreement on insurance, there had been a preliminary exchange of views. The UK perhaps owes some more clarity about what the future UK regime will look like but progress will be made over the coming months. The UST is looking forward to seeing a more detailed outline of what the insurance regime in the UK will look like in the future. UST recently released a report on regulation of the asset management and insurance industries pursuant to President Trump's February Executive Order regarding his "Core Principles" for financial regulation. It says the US should consider a covered agreement with the UK. This was created as a vehicle through the legislation that created the insurance office in UST. HMT said that they had interpreted the language in the executive order positively, and that it would be good to keep working together to make sure things move forward within the appropriate time frame. The US echoed this by urging for action 'as expeditiously as possible'.
48. On the US approach to FS chapters in FTAs, UST explained that USTR and US Treasury co-lead on financial services chapters in FTAs. Insurance doesn't have a federal regulator in the US so they maintain joint oversight for the covered agreement and insurance issues.
49. UST set out an explanation of their specific treatment of financial services. Stakeholders, Congress, industry and the US Administration are all interested in having a highly ambitious Financial Services chapter between US and UK, which are two of the world's preeminent capitals for this sector. He noted that both the US and the UK markets are already very open and there is already a lot of cross border

activity between London and New York in particular. The US would like the financial services text to be a model for how countries around the world can raise the standard of standard financial services commitments. The US said they already have quite an ambitious text (from NAFTA negotiations etc.) but they want to think about a text that makes sense for the UK and US. They encouraged HMG to approach the talks creatively.

50. UST recognised that FS are different from other sectors because it is such a highly regulated industry that often demands emergency action from regulation e.g. in recent the financial crisis. It's a sector in which problems can have extremely damaging spill over effects on the economy, so regulators need to be able to take the necessary action. The US has included financial services in agreements since NAFTA (1994), but they have become increasingly ambitious over the years, reflecting market developments. This ties into an issue raised earlier on data localisation, which is a key priority.
51. Two of the most recent obligations the US has added to the financial services text and which are part of their model text for all trade agreements are: a provision that relates to transfer of information (data); and another one on location of computing facilities (prohibition of data localisation measures). Their approach to financial services differs from their data localisation approach in the core text, which reflects the different way in which financial services are regulated, and the need the industry has for data. The US obligation for data localisation is framed in a way that dictates that a country cannot impose arbitrary data localisation, while ensuring that the scope each regulator has in requesting data is protected. The UST works closely with regulators, going through practices and laws to make sure they fit within that structure. The default position is to allow no data localisation, providing regulator access is protected. The data localisation measures are proliferating around the world and pose a challenge not just for industry in terms of cost/operational complexity, but also from a regulatory perspective, e.g. cyber risks emerging from increased regulatory footprints; and it is harder to manage laundering issues for financial terrorism management. The US has had active discussions with regulators, who have become convinced that this prohibition would help them to regulate better. In the cross-border provision, like in PBS agreements, there is a caveat for the protection of personal data.
52. Transparency is another priority for the US; financial regulators have an open system that allows stakeholders to weigh in on how these regulations should be shaped. The US is committed to transparency in financial services.
53. Another key aspect of a financial services chapter is the prudential exception. The language has remained broad over the course of many agreements and the US tries to maintain this. It provides the space for financial regulators to do what they do on a day to day basis, as long as the measure in question is for a legitimate prudential reason and not for protectionism.
54. The US took the opportunity to flag a few changes from resulting from recent discussions, most of which are technical. In TiSA, they laid out the various market access provision requirements, but thought it better for financial services to lay them out in a specific way. They made changes regarding transparency that reflect the discussions they had had in the TiSA context, which added new provisions not previously included in FTAs, such as accepting electronic document authentication.
55. By far the biggest change is in data localisation. The US has an annex covering cross border financial services, specific to this chapter. The US is also seeking commitments for collective investment schemes, portfolio management services, mutual advisory services and electronic credit payment services. Given the level of openness that exists in financial services in cross border areas between the UK and US, this could be an area in which we could raise ambition in a way that protects the ability of

regulators to supervise market entry. There is concern about the right to regulate – this is why the US are insistent in maintaining the breadth of prudential exception in a financial services chapter.

56. The US is actively thinking through things and seeking feedback about where they could take new commitments. They have already moved forward significantly since GATS. USTR advised that this was a snapshot of something that was in motion, and likely to change further. The question of transparency is very close to the conversation about domestic regulation. There is an overlap in the case of some service suppliers between the general digital sphere and the general financial services sphere in terms of data. Some companies are financial services suppliers but do not see the rules as applying to them; we must keep thinking about where to draw the line. Much of this would depend on how a "public person" and a "financial institution" are defined in the text of an FTA. Companies defined as a financial institution should be covered under the data localisation obligation in the FS chapter. Others should be covered under the digital trade chapter.
57. HMT agreed with the US about taking an ambitious approach, and thanked the US for the detail on data localisation. The UK prides itself on our commitment to making sure regulations work for industry, which is similar to the US' approach. HMT asked the US about their thinking on the effectiveness of financial services committee structures, e.g. in NAFTA and KORUS, who participated from the UST and how their thinking had evolved (e.g. in the NAFTA renegotiation). The US responded that the Financial Services Committee was really about implementation of the trade agreement, and about having a vehicle for discussing (rather than resolving) issues and concerns around regulatory developments. UST's International Banking Office participated. They have changed the language in the NAFTA renegotiation proposals to better reflect what the committee actually does. HMT asked whether TPP provisions or US TiSA proposals for cross-border portfolio management services and electronic payment services (which differed in substance, e.g. TPP not including NT commitments – and form) reflected the US model. The US said that their approach was most ambitious in TiSA. HMT asked about reported US proposals for sunset clauses. UST responded that senior officials need an option to review the effectiveness of trade agreements more generally, e.g. to see if a single disputes mechanism serves the broader purpose and to ensure that agreements are effective. The US did not have a mandate to say anything more at this stage, given the confidential nature of the ongoing NAFTA renegotiations.

Summary

58. The UK summed up the key points form the discussion. Good progress has already been made by regulators to advance the STO on audit, although it was too soon for a specific announcement. There would be language on financial dialogue in the statement after this working group. Both sides were keen to take forward discussions on the continuity agreement on insurance. The UK said that both sides seemed to be keen to be ambitious in the digital sphere, as well as on financial services, and to continue close dialogues in these areas. The UK welcomed hearing US views on the WTO and gaining more of an understanding about the US' approaches to trade agreements generally, and chapters on digital, investment, PBS and financial services. The US said that there was a clear sense of the large number of areas in which the UK and US had shared interests and approaches, especially on digital and financial services. They expressed interest in having a detailed discussion about their approach to these areas within an FTA, which could also help inform the UK's approach to other relationships.

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- This was a positive and constructive meeting. There was agreement on the status and next steps on the STOs and continuity agreements. The US provided informative and open presentations on their approaches to services and investment generally, and digital, PBS and financial services specifically. The UK was largely in listening mode during these sessions, indicating that policy is still under development but that these are important sectors for the UK and ones where our Ministers have indicated their preference for ambitious agenda once we have left the EU, so that there should be common ground for a future agreement with the US.
- We agreed to follow-up with more detailed discussions between relevant experts, in particular on digital and telecoms. We will need to consider how we frame the discussions at the next WG, if we are still in listening mode, now that the US has set out its overall approach in some detail. We could consider more thematic discussions, for example on state vs federal in US, in these areas.

Department for
International Trade

Title of Meeting: ***US SPS Presentation***

Date: ***14th November 2017***

Time: ***9:00-11:00***

Participants

Name	Department/Directorate
Tom Surrey	DEFRA (Lead)
Jonathan Hoare	DEFRA
James Dunn	DEFRA
Neil Feinson	Policy Directorate, DIT
Jack Kennedy	Policy Directorate, DIT
Jack Moreton-Burt	Policy Directorate, DIT
Tom Aitchison	Policy Directorate, DIT
Gareth Evans	Policy Directorate, DIT
Oliver Griffiths	UK-US Team, Trade Policy Group, DIT
Katie Waring	UK-US Team, Trade Policy Group, DIT
Julie Callahan	United States Trade Representative
Jo Babb	State Department
Sam Russo	United States Trade Representative
Stan Phillips	US Embassy London

Key Points to Note

- The US repeatedly emphasised their view that the UK should seek regulatory autonomy following EU Exit to allow us to evaluate methods/products independently. The US suggested this would be beneficial for the UK not only in terms of trade, but in relation to productivity, competitiveness and driving innovation from our agricultural and bio-tech markets.
- The US saw their difference in approach from the EU as a `philosophical difference` between a risk-based approach (US) and an increasingly hazard-based approach (EU). They expressed concern about the process by which decisions were reached on SPS matters, critiquing the comitology process for perceived politicisation when member states are consulted. The EU aims to reduce chemicals on food; the US aims to reduce pathogens, and these two systems are not easily compatible. The illustrative example cited was the struggle to reapprove glyphosate in the EU.
- There was recognition from the US of the sensitivity of SPS issues in the UK in terms of attention from the media and consumer groups. They are also sensitive to the likely push from the EU for harmonisation during EU Exit.
- The US view the introduction of warning labels as harmful rather than as a step to public health.

Department for
International Trade

Report of Discussions and Outcome

1. The UK (Surrey) opened the session, welcoming the US presentation and explaining our position as being in listening mode.
2. The US (Callahan) opened with acknowledging the consumer interest in these issues on both sides of the Atlantic. The US considers their food safety system to be the gold standard, and offered to share their experiences and perspectives on how the SPS chapter of TTIP developed. In particular, there are differing approaches to science and risk between the US and EU.
3. Callahan highlighted a particular area of contention: the US is committed to reducing pathogens in food, and the EU is committed to reducing chemicals in food production. These two positions often conflict with one another; the US maintain use of pathogen reduction treatments (PRT) as a final double check to remove any traces of pathogens. Callahan used this opportunity to affirm that US industry uses PRTs other than chlorine. They offered to share information on this after the Working Group.
4. US (Russo) explained concerns with a secondary scrutiny process following regulatory approval. Glyphosate was used as an example; following relevant Committee approval in the EU, the media speculation resulted in the European Parliament over-ruling the Committee. The US does not believe that this secondary process is helpful, since it can overrule the verified science and risk analyses.
5. US (Callahan) highlighted the EU's increasing move to a hazard-based approach (from risk-based) as a cause for concern. An application that triggers a hazard automatically fails, whilst risk-based allows flexibility to address concerns.
6. Callahan explained that the US is aware of the pressure that the UK will be under to harmonise with the EU during EU Exit. She recommended that the UK maintains regulatory autonomy. The US maintains their own autonomy, and believe that they have been able to make great strides in productivity and competiveness (particularly in bio-tech).
7. The UK (Surrey) thanked the US for the presentation. He asked if Callahan could elaborate on pathogen reduction treatments, approval of new technology, pesticides, and the shift from risk-based to hazard-based. Consumers have a strong voice in the trade sphere, but is that replicated in the US domestic regulatory sphere?
8. The US (Callahan) indicated that every regulator has to go through substantial public engagement on any new rules. The US also receive a substantial number of petitions. The US cited an example of public petitioning triggering a review of rules around BPA (a plastic) in food packaging. The rule did not change, which was disappointing to campaigners, but the process for triggering reviews acted as a buffer between the regulator and campaign pressure.
9. The UK (Feinson) asked how accountable regulatory institutions are to their departments, and what freedom they have to make decisions in their respective spheres. The US (Callahan) responded that it depends on the nature of the rule being proposed. Major rules go through an interagency process. There is significant regulatory scrutiny in the US.
10. The UK (Surrey) asked how differing pathogen reduction treatment approach had been managed with the EU. US (Callahan) responded that some positive applications had been agreed, such as the use of lactic acid on beef. The US cited an obligation in US law to follow up strong hygiene standards with a chemical wash to remove any final pathogens. The US understood that the UK used PRTs until 2003, and wondered if there would be an interest in bringing them back post-EU Exit.

Department for
International Trade

11. The US (Callahan) discussed Hazard Analysis and Critical Control Points regulations. These regulations are important. If the US export to a country that bans certain PRTs (individually or on a wholesale basis) then the regulations ensure that producers use the correct processes (example cited was strawberry crop destined for Japan).
12. The US (Phillips) referenced the Secretary Sonny Perdue interview on Farming Today during his visit to the UK. Callahan spoke to the comments made regarding labelling for GM; notably, that the US is keen in making sure labels are useful and will be trusted by consumers without playing to fears.
13. The UK (Surrey) asked how new technology was received during TTIP discussions. The US (Callahan) were concerned that this was an area where the EU was moving away from science towards politics. She was also concerned at the pace of GM approvals.
14. The UK (Hoare) asked how new forms of biotech are processed under existing regulations. The US (Callahan) suggested that this was an area of intense interest at the moment, and wondered if the UK had any suggestions on our future approach to regulating biotech. The UK (Surrey) suggested that this was linked to EU Exit and could not be discussed.
15. The UK (Surrey) asked how the US works with international standards-setting organisations. The US (Callahan) spoke particularly positively about the relationship with Codex, but was concerned at the lengthy lead-in times for standards. Often, the standards are implemented before they are finalised because of how long it can take. She also referenced a NAFTA technical Working Group on MRLs.
16. The UK (Surrey) asked how public health, and broader issues like sugar content, fat, anti-microbial resistance fit into the regulatory system. Callahan acknowledged that these are important global issues. Whilst they follow the guidance set by WHO, they are concerned that labelling food with high sugar content (as has been done with tobacco) is not particularly useful in changing consumer behaviour.
17. The US (Russo) suggested that a future conversation on SPS, potentially ahead of the next Working Group, might be of us. The UK (Surrey) thanked the US for their presentation and the discussion and closed the session.

Action Items

- US to share their public lines on chlorine-washed chicken to help inform the media narrative around the issue.
- UK to look for where we have specific SPS interests and to explore this through engagement ahead of the next TIWG. The US suggested a regulator to regulator dialogue.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- The atmosphere, on all sides, was very positive. The UK delegation emphasised our position as being in listening mode, and the US respected that; there seemed to be good intent on all sides. There were repeated offers to initiate a regulator to regulator conversation (here and in other sessions).

Department for
International Trade

Title of Meeting: ***Intellectual Property Trade Agenda***

Date: ***14th November 2017***

Time: ***9:00 – 11:00***

Participants

Name	**Department/Directorate**
Ada Igboemeka	Policy Directorate, DIT (Lead)
Mark Prince	Policy Directorate, DIT
Dara Beaulieu	Policy Directorate, DIT
Minh Tri Le	Policy Directorate, DIT
Ben Richie	Policy Directorate, DIT
Adam Williams	Intellectual Property Office
Megan Heap	Intellectual Property Office
Sarah Whitehead	Intellectual Property Office
Peter Cade	Intellectual Property Office
Thomas Walkden	Intellectual Property Office
Ceri Morgan	DEFRA
Bilal Sameja	DEFRA
Andrew Gregory	MHRA
Jane Casterby	DCMS
Edwin Mangheni	UK-US Team, Trade Policy Group, DIT
Christina Sevilla	Office of the United States Trade Representative
Christine Peterson	Office of the United States Trade Representative
Rachel Salzman	Department of Commerce
Tricia Van Orden	Department of Commerce
Sarah Bonner	Small Business Administration
Rosalyn Steward	Office of Advocacy
Rachel Salzman	Department of Commerce
Ray Pavlovskis	Office of the United States Trade Representative (Europe Office)

Key Points to Note

- Both sides agreed to finalise Joint Statement
- US focus was on explaining their legislation and approach in FTAs on trade secrets
- US proposed several objectives for the UK to consider going forward in its approach to Geographical Indications (GIs)
- More limited discussion on pharmaceutical protection than planned given sensitivities in this area related to the NAFTA negotiations
- Both sides agreed to continue to discussions on GIs, Trade Secrets and Innovative Pharmaceutical protection at future Working Groups
- Agreed that topics for next Working Group could include: building a stronger understanding of each other's current IP system; understanding each other's governance procedures and processes for trade policy and negotiations; approaches to stakeholder engagement in the IP area

- Agreed to produce a shared brochure for the SMEs Toolkit with guidance on how to do business in both markets by first quarter of 2018 in Washington DC
- Agreed to coordinate our efforts with the wider SME group.

<u>Report of Discussions and Outcome</u>

Introduction

1. The US (Peterson) introduced their IP and trade policy agenda, outlining that they would focus on Trade Secrets and Geographical Indications. The UK (Igboemeka) asked whether the US would cover pharmaceutical protection as previously discussed. The US (Peterson) responded that they could currently only have a limited discussion of this issue given sensitivities regarding the on-going NAFTA negotiations and due to development of US policy in this area.
2. The US (Peterson) explained their agenda on General Provisions. The US sought commitments for international treaties such as accession to the Madrid Protocol and The Hague Agreement. The US seeks full national treatment and commitments on transparency for all IP users for example, electronic databased for registration of rights.
3. The US (Peterson) explained their agenda on Trademarks. The US seeks provisions for not only visual, but for non-visual representation – holographic works, sounds and the protection of similar signs. The US highlighted they seek commitments on electronic trade mark systems and seeks provisions for cybersquatting as well as expanding the wider definition of protection to cover similar signs. The US seeks to promote the protection of GIs through Trademark systems and looks for transparency and due process safeguards.
4. The US (Peterson) provided an overview of their approach to patents in FTAs. The US also typically seeks provisions for grace periods, data exclusivity, patent linkage, and patent term extension related to the market approval process.
5. The US (Peterson) provided an outline of their priorities for Enforcement, both civil and criminal enforcement. The US wants to tackle through its trade agenda issues such as trade secrets theft, cable and satellite theft, cyber theft and unauthorised camera recording. The US noted that new issues and challenges in IP enforcement are emerging and the US is working with sister agencies to work out responses.
6. The UK (Igboemeka) asked for the US to explain the evolution of their IP chapter within US FTAs and what have been the prominent issues over time. The US (Peterson) explained that some of the more prominent features in their current FTAs were around state-owned enterprises and issues on how to address trade secrets.

Trade Secrets

7. The US (Peterson) explained that Trade Secrets was an emerging focus in the Administration's 2013 strategy. There have been recent changes to domestic law and an increasing focus on the Office of the US Intellectual Property Enforcement Coordinator (IPEC). Businesses, especially SMEs are the innovators of IP which can lead to other forms of IP down the road, so where there are risks of infringements, the US tries to protect them by strengthening trade secrets laws. The US highlighted other companies and countries try to steal trade secrets to impede the US Trade Agenda. The US have statues in place to deal with this. The 1996 Economic Espionage Act (which focuses more on criminal penalties), Section 18, Code 1831 and Section 18, Code 1832 criminalises the misappropriation of trade

Department for
International Trade

secrets. The US encourages civil and criminal procedures to protect trade secrets. Criminal prosecution demonstrates that the US will not tolerate trade secrets theft. The US views all parties involved in the chain of trade secrets as liable. For example, breaches of computer systems can constitute as cyber theft and count as trade secret theft.

8. The US (Peterson) explained that in May 2016, the US introduced the Defend Trade Secrets Act (a Federal law that allows that allows an owner of a trade secret to sue in federal court when its trade secrets have been misappropriated). This act brings actions into the Federal arena but does not displace State Laws. The act can work in co-existence with State Laws. The Federal Law allows for broader scope beyond the 1996 Economic Espionage Act, allows for a greater scope of witnesses and allows coverage in International Trade; which opens new possibilities and allows the US to advance more aggressively. This demonstrates that the domestic and international planes do not exist separately. The US said it raised this point as it is timely given the EU Directive on Trade Secrets.
9. The UK (Walkden) said that they are in process of transposing the EU Directive by its June 2018 deadline. The UK does not envisage significant changes. The UK enquired how many civil cases the US have seen in Federal Courts under the May 2016 Defend of Trade Secrets Act. The UK (Williams) also asked whether the US has seen Cross Border cases under the May 2016 Act. The UK (Walkden) also asked what the US considered to be the particular barriers to market access in relation to international Trade Secret protection.
10. The US (Peterson) responded they would come back with a little more detail on which industries were affected, including some specific examples. The US explained that the Special 301 Report Review tasks embassies to answer a set of questions about the host country's IP regime and whether the country has any practical IP enforcement in place. The US do not hear back about a lot of problems, however the US highlights that this can be due to companies not reporting back to avoid negative press attention that could impact their stock prices. This is a challenge to the US as US policy makers find it difficult to identify where the problems are. The US highlighted that China is a concern and there is work to be done with India as India's Trade Secret Laws are not harmonised across the country. The US has heard about some issues in Austria but those are specific cases. The US stated that their criminal measures pre-date civil measures. The Special 301 Report is due to be released which contains data reflecting the number of successful prosecutions made under the 2016 Defend of Trade Secrets Act. The US Department of Justice also publishes summaries of Trade Secrets cases that the US can provide the UK with in addition to the Special 301 report.
11. The UK side (Walkden) said that the UK does have criminal remedies available where Trade Secrets are misappropriated through illegal activities, for example offences under the Computer Misuse Act 1990. The UK (Igboemeka) then asked what would be the US's ideal provision in an FTA?
12. The (US) responded that the Trans-Pacific Partnership (TPP) had a dedicated section for Trade Secrets which detailed what misappropriation meant, obligation for criminal enforcement, defined what criminal procedures meant and classification of the lawful use of confidential information. The US encourages the UK to look at the TTP text.
13. The UK (Prince) asked whether the US-Korea FTA (KORUS) and the US-Singapore FTA were a significant shift to TPP.
14. US (Peterson) confirmed that KORUS and the US-Singapore FTA were a significant shift.

Department for
International Trade

Geographical Indications

15. The US (Peterson) explained that they were seeking greater transparency, fairness and due process when it comes to Geographical Indications (GIs) and international trade. The US have concerns about the EU's approach of including lists of GI names to be protected within trade agreements which can have the effect of preventing US producers from using the name of the EU GI on their products. The US (Peterson) highlighted that recent trade negotiations between the EU and third countries on GIs, such as with Japan, Mercosur and Mexico, have raised concerns among their political leadership.
16. The US (Peterson) suggested several potential objectives for the UK to consider as it develops its future approach to GIs and international trade:
    i. Implement due process for the recognition of new GIs. This would include opportunities for all interested parties to be consulted and to make oppositions. The US (Peterson) also noted that in the EU system there is no recourse for opposing parties to appeal against decisions to award new GI protection, and that cancellation procedures for GIs could also be considered as part of the due process.
    ii. Distinguish GI names from terms that have become customary in common language. The US (Peterson) noted that the Consortium for Common Food Names regards the UK's approach to 'cheddar' cheese as an example of best practice here. The UK has specific GIs for 'West Country Farmhouse Cheddar' and 'Isle of Orkney Cheddar,' but the term 'cheddar' itself remains a customary term that any cheese producer can use. The US (Peterson) suggested that the UK could consider publishing guidance clarifying which terms it considers as customary in common language.
    iii. The UK could favour recognition of new GIs through domestic application and examination procedures, rather than the EU's favoured approach of exchanging lists of GIs for inclusion in international trade agreements. The US (Peterson) stated that although there are over 4,500 GIs on the EU Register, only 28 GIs from outside the bloc have been accepted through direct applications (as opposed to via an exchange of lists in a trade deal).
    iv. Infringement of GIs should be based on "likelihood of confusion" and the EU's interpretation of the evocation principle should be narrowed.
    v. GIs should be officially examined, like patents and trademarks, informed through international norms/standards on examination processes.
    vi. The UK should consider whether some of the EU GIs still meet British consumer expectations, or whether the consumer now regards some EU GIs as customary common language.
17. In response, the UK (Morgan) welcomed the US' thoughts on GI objectives, and would welcome ongoing engagement. The UK highlighted that the Government supports the appropriate use of GIs to protect UK food and drink names, but currently only has 84 GIs in the EU's GI register. The UK highlighted that GIs is a big issue for the EU, and will be a subject for negotiation in the UK-EU negotiation.
18. The UK (Morgan) stated that the UK is working on Transitional Adoption (TA) of existing EU FTAs as well as new FTAs.
19. The US (Peterson) enquired whether GIs will feature in the transitionally adopted FTAs.
20. The UK (Morgan) responded that it is too early to comment on the transitional adoption process for the GI elements. The aim is to transition as much of the agreements as possible as the UK does not want to disrupt trade flows.

Department for
International Trade

Innovative Pharmaceutical Protections

1. The UK (Gregory) enquired why the US have different data exclusivity periods for chemicals and biologics.
2. The US (Peterson) responded that there is data protection for big and small molecules. The US started with small molecule protection which is set as five years. The passage of the American Health Care Act extended protection to Biologics products as there was a need to incentivise R&D for Biologic products. The US highlighted that there are patent vulnerabilities as Biosimilars are not replicas of small molecules, therefore there is more of a need to have a longer-term protection for Biologic products which is current set as 12 years of protection; eight years of data protection plus four years of market protection.
3. The UK (Gregory) stated the EU and UK have eight years of data protection plus two years of market protection for all pharmaceuticals.
4. The US (Peterson) stated that 12 years was a compromise. The initial proposal was 15 years with possibilities for extensions to protect orphan drugs.
5. The UK (Gregory) stated in addition to the eight plus two years, there is an extra 6 months to a year protection for paediatric drugs. The UK enquired if there was a demand for a minimum level of protection.
6. The US (Peterson) responded that TTP did not get into the specifics of data and market protection timelines, it was all encompassing. The US negotiated to look at market realities and dynamics. Most countries approved Biosimilars after it was first approved in the US. Therefore, other countries have a de facto market protection for at least 10 years.
7. The UK (Gregory) enquired about pricing. The UK said that the longer you protect, the longer higher prices are maintained and asked if there is a trade off? How does this work in the US?
8. The US (Peterson) stated that pricing plays out domestically. The US said there is a lot of conversation on drug prices and looking at what other countries pay and this is causing angst. There are worries that the US is not getting a good deal in pharmaceutical industries.
9. The UK (Whitehead) added that the UK has Supplementary Protection Certificate (SPC) regimes to extend terms of protection for pharmaceutical products. The UK noted that it would be useful to look at each other's systems and learn from them. The UK asked whether the US Patent Term Extension (PTE) is only for pharmaceuticals and not plant protection products?
10. The US (Peterson) responded there are patent term adjustments (for office delays) which are available for any products. There are patent term extensions for pharmaceuticals but not for agriculture products. There is also 10 years data protection for chemicals.
11. The UK (Whitehead) stated the EU is looking at the balance achieved by the existing SPC regime in the EU. The UK asked whether the US had done any research on the balance between health systems and rights holders?
12. The US (Peterson) stated that it believes there was some done in TPP and the US can look into this for the UK.
13. The UK (Igboemeka) asked since grace periods are typical in US FTA provisions, has the US seen a trend in companies making use of grace periods?
14. The US (Peterson) said it would look into that for the UK. SMEs are not aware that grace periods differ, so they assume around the world they have a one year grace period. This will prevent them getting

patents protection in countries which do not have such a system, by then it will be too late. Harmonisation in this space will be useful.

15. The UK (Williams) added that the UK has similar issues with academics publishing their articles and disclosing their inventions.
16. The US (Peterson) stated as the US is undergoing North American Free Trade Agreement (NAFTA), this can be shifted in their trade policy and can go through what was considered in the past.

Conclusion

17. The US (Peterson) said for the next Working Group, it would like to understand the UK's trade and IP agenda and its IP system so both sides can discuss and identify similarities and differences. The UK (Igboemeka) responded that the UK is still at an early stage in developing their overall IP and Trade Policy. The UK stated that they can talk about their own IP Trade Policy in future sessions but offered a focus on the UK's current IP system as a useful start. This would focus on the status quo without prejudice to any changes post-Brexit.
18. The US (Peterson) said another fruitful topic for the next Working Group could be to understand each other's governance processes and procedures for trade policy and negotiations. The UK (Igboemeka) suggested a discussion on approaches to stakeholder engagement in the IP area could be another topic. Both sides agreed to continue discussions on specific issues at the next Working Group.

SME Toolkit

1. The US (Sevilla) stated that there is public misconception that international trade only affects big companies, however international trade has a major impact on SMEs. The UK is the US' third largest export destination for US SMEs after Canada and Mexico. The US highlighted that there needs to be joint information and publication to educate SMEs about IP as many SMEs do not understand how to protect their IP. Publications like the proposed SME toolkit would be useful for SMEs. This STO would also demonstrate an early outcomes of UK/US talks and demonstrates leadership for both sides. The US (Peterson) added that it is important to continue to coordinate to evaluate the work of both sides. SMEs are disproportionately innovators. One study concluded that SMEs outperform larger corporations. SMEs are 2.5 times more innovative and produce 15 times as many patents. The US (Salzman) highlighted no matter how good the intention, the benefits of our trade policy will not be effective unless SMEs are educated. SMEs lacked awareness and education usually around costs, perceived benefits and lack of information. The Department of Commerce aims to tackle this through establishing a website: stopfakes.gov, IT audit tools to identify IP and training modules in English, Spanish and French, Stop Fix roadshows to innovative hubs to help them export. The US reports that Select USA states that the UK has large trade investment in R&D worth 7.9 billion dollars in 2015 in US affiliates. There were 22 UK participants at the USA summit. The US and UK are Select USA's best customers in E-commerce. The US would hope that the SME Toolkit would bring more SMEs into the bilateral relationship. The US asked whether/how a web version could exist?
2. The UK (Williams) responded that this topic is very cross cutting and that the UK is entirely supportive with what the US said. The UK also recognises the statistics that the US outlines. The UK sees SMEs being its innovation backbones. SMEs spot the business opportunity first and (as demonstrated on his (Williams') recent visit to China, many UK businesses have not had their trademarks protected while focusing on gaining market access. The UK has a suite of tools; Country Guides detailing how to protect

Department for
International Trade

their IP abroad, YouTube channels. The UK would welcome collaboration with the US in this area. The UK stated that it wanted to bring SMEs into the wider dialogue to draw their attention to the importance of IP. The UK (Cade) wanted to highlight the differences of rights between the UK and US. The UK (Williams) highlighted that a lot of this will include links to webpages. SMEs can then see if they have IP via a list which needs to be simple enough to capture the eye. The UK highlighted that it is the promotion of information which may be sitting elsewhere that is important.

3. The US (Peterson) enquired whether to address Brexit in the product for SMEs so that US SMEs have continued confidence that their rights will be protected in the UK market.
4. The UK (Williams) replied yes, but highlighted as the negotiations were fast moving that the content can be outdated and suggested giving a link to the IPO website which will contain updated information. The UK suggested hosting a soft copy and a webpage. The UK highlighted that UK Digital Service has strict rules on term of webpage design which must be consistent with the wider .GOV layout.
5. The US (Salzman) responded that a hardcopy would be useful as well as a web link. The US (Sevilla) enquired whether there is a reduction in fees for registering rights such as trademarks, patents for SMEs.
6. The UK (Williams) replied that there is no reduction of fees for SMES; however the registration fee is low. The private legal fees are the most expensive part which usually stop patent protection applications. The UK (Whitehead) added that there are reductions on fees for electronic filings. The UK (Williams) noted that on the design side, the UK has rebuilt its digital platform where you can file multiple designs. Thus, the UK's designs registration has tripled.
7. The US (Peterson) agreed to have the web version of the brochure to state fees while the hard copy publication refers to the applicable website link for businesses to go to for updated fees. The US (Sevilla) agreed to create a brochure before the next Trade and Investment Working Group in the first quarter of 2018. The US (Peterson) agreed for the US and UK to exchange questions regarding materials that should be included in the brochure. The US (Sevilla) suggested a joint trade SME roadshow as there was interest from the US in the London fancy food trade shows and the Farnborough air show which would be places to hand out the brochures and have joint cooperative activities.
8. The UK (Williams) suggested for the IPO (Cade) and the USPTO (Salzman) to lead on this project. The UK (Igboemeka**)** suggested an idea of workshops with SMEs.
9. The US (Sevilla) suggested inviting the Chamber of Commerce and said that the workshops can happen in London or elsewhere. The US (Peterson) added that US Ministers are saying that IP is an area is not just for multilateral cooperation but it also beneficial for SMEs.
10. The UK (Igboemeka**)** actioned to follow up in the following weeks.

Action Items

- Agreed that topics for next Working Group could include: building a stronger understanding of each other's current IP system; understanding each other's governance procedures and processes for trade policy and negotiations; approaches to stakeholder engagement in the IP area.
- Agreed to produce a shared brochure for the SMEs Toolkit with guidance on how to do business in both markets by first quarter of 2018 in Washington DC.
- Agreed to coordinate our efforts on the SME Dialogue with the wider SME group.

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- Very good atmosphere with strong discussion on substantive IP issues. The US made a strong pitch on geographical indicators, proposing six objectives for the UK in this area. Provided a useful insight into the offensive areas the US is likely to pursue in an FTA. Trade secrets discussion was insightful, indicating this will be a key priority for the US. Unclear how far apart we are on this at present. A more limited discussion on pharmaceuticals. The US stated up front that they were unable to have an in-depth conversation given there are difficulties in NAFTA in this area. The US also said that the current Administration may want a shift in some areas of policy here so they were unable to answer some of the questions we posed. It was nevertheless a very helpful exposition on the key areas we can expect the US to push in an FTA and for us to start to determine the areas where we may find ourselves in difficult territory. The impact of some patent issues raised on NHS access to generic drugs (i.e. cheaper drugs) will be a key consideration going forward. Biologics were hugely contentious under TPP so one we were interested in discussing but unclear how far apart we are in this area. Agreed that for the next Working Group we would discuss: getting a better understanding of each other's IP systems; our respective governance processes and procedures in trade negotiations; stakeholder engagement in IP. We also agreed to come back to some of the specific issues such as GIs and pharma patents. Good progress on the SME work stream within the STO work plan with agreement to complete product first quarter of next year and to join up with the wider SME (regulation) group.

Department for
International Trade

Title of Meeting: ***SMEs Side Meeting***

Date: ***14th November 2017***

Time: ***11:00-12:00***

Participants

Name	Department/Directorate
Julian Farrel	Policy Directorate, DIT (Lead)
Kate Maxwell	Policy Directorate, DIT
Muhammad Abbas Abdulla	Policy Directorate, DIT
Minh Tri Le	Policy Directorate, DIT
Edwin Mangheni	UK-US Team, Trade Policy Group, DIT
Huw Parker	BEIS
Ellen Duffy	Better Regulation Executive (BRE)
Christina Sevilla	United States Trade Representative
Tricia Van Orden	US Department of Commerce
Rosalyn Steward	US Office of Advocacy, Small Business Administration
Sarah Bonner	US Small Business Administration

Key Points to Note

- Each side listened to each other's presentations on approach to reducing regulatory burden to SMEs in both markets, with the US kicking off proceedings followed by the UK presentation. They had commonalities in their respective approaches albeit the processes were different.
- The UK's presentation included an offer to share guidance on BRE framework due to be published in December 2017.

Report of Discussions and Outcomes

1. The US (Steward) presented on the Regulatory Flexibility Act (RFA). The US introduced the Small Business Administration's Office of Advocacy (OA) as the voice of small businesses. The US' definition of an SME or small business is considered to be 500 employees or less. Executive Order 13272 addressed a number of concerns about RFA compliance and mandated that the OA train all regulatory agencies in compliance issues. The OA's aim is to help US Federal Agencies improve their RFA compliance.
2. The US (Steward) went on to present that RFA compliance has real benefits to the agency and its regulatory development team. It minimises legal problems and challenges regulations which do not comply. The OA now has authority to file a brief as a Friend of the Court. Compliant regulations can avoid litigation and unintended delay. RFA compliance avoids delays. Beyond the delays represented by the legal system, reworking the rule to comply will take more time at the later stages of development, and can hold up your regulation at a key time. RFA compliance improves compliance with the regulation. Small entities are more likely to follow regulations they can understand and which do not impose an unreasonable burden. RFA compliance provides a more level playing field. Cost of regulation per employee is often less for larger entities. Not all entities even of the same size will be affected in the same way, e.g. some accounting or manufacturing systems might accommodate a regulation better than others. RFA Compliance supports the largest and most vital segment of the American economy.

Department for
International Trade

RFA compliance supports the growth and vitality of American small businesses in an increasingly competitive world economy.

3. The US (Steward) explained that there are two points at which the process might terminate without completing the whole RFA process. The first is Applicability; if the RFA does not apply no further analysis is required. The US highlighted that there was an exemption for foreign affairs and the military. The other is Threshold Analysis. A threshold analysis is performed to determine if there will be a "significant economic impact on a substantial number of small entities." If no, a certification statement can be placed in the rule and no further analysis is required. The US pointed out that most regulations should be assumed to fall under the Administrative Procedure Act (APA) and RFA unless there is specific reason to believe otherwise. The US emphasised that "significant" and "substantial" are not defined in the RFA, but in general must be interpreted in light of the universe of regulated small entities. A regulation may be exempt from the RFA altogether under the applicability decision. A regulation that is not exempt must undergo a Threshold Analysis to see whether it has a significant economic impact on a substantial number of small entities. If the analysis shows that there is no such impact, the Certification step completes RFA compliance.
4. The UK (Farrel) asked for the US' definition of "significant" and "substantial" economic impact
5. The US (Steward) replied that 1 to 3% of gross revenue – not profit – of SMEs is defined as "substantial". 10 to 30% of gross revenue is counted as "significant"
6. The US (Steward) explained that if the threshold analysis indicates there will not be a significant economic impact on a substantial number of small entities, the head of the agency may so certify. The US explained that the Initial Regulatory Flexibility Analysis (IRFA) is a critical step that represents the OA's best information about the impact of the regulation on small entities. IRFAs can sometimes be waived or delayed such as if it is an emergency regulation or compliance is impractical. However, the Final Regulatory Flexibility Analysis (FRFA) is still required, usually in 180 days. Both prongs have to be satisfied. It is not defined by Congress, rather case-by-case by business. Agencies calculate the direct effect but don't have to assess the indirect effect. Under the IRFA there are considerations of alternatives.
7. The US (Steward) explained compliance costs to consider are implementation costs, capital and equipment costs and operation and maintenance costs. The US went on to explain that an IRFA represents a major investment of time and effort as it provides greater transparency, and is available to the public for comment. However, the US highlighted there are data gaps, with the missing data of costs being revealed only when it is published.
8. The UK (Duffy) presented, firstly stating there is primary and secondary legislation in place. The Small Business, Enterprise and Employment Act 2015 sets out a target to reduce burdens on industry. The Government prepares an impact assessment which is then published alongside their consultation. The UK highlighted currently there is not a 2017 Parliament target. Last Parliament saved approximately £2 to £3 Billion in two years. SMEs matter as they are engines, incubators and accelerators to growth. The UK explained that the Small and Micro Business Assessment (SaMBA) is part of the impact assessment which measures the equivalent annual net costs to business of all measures exceeding £5 million a year. This impact assessment is subject to external scrutiny to decide whether the impact assessment has sufficient information. This is to ensure there has been a correct assessment to ensure it is not disproportionate. The UK seeks to ensure that no policy is introduced that unnecessarily burdens microbusinesses, and wherever possible microbusinesses should be exempt from new regulatory

Department for
International Trade

burdens. However, Health and Safety and Environmental areas cannot be exempt. Different sectors may have different approaches which may work better. The UK highlighted the charge for plastic bags as a case study. The UK explained that it introduced a mandatory 5p charge for plastic bags, which goes to charity. Most plastic bags were provided by big high street stores. Local corner shops were therefore exempted from the law, hence not burdening them in any way.

9. The UK (Farrel) explained that Minsters will not proceed with regulations unless the Regulatory Policy Committee is happy with the impact assessment. Public consultations and impact assessments are carried out on draft legislation before it becomes law. The Better Regulation Executive (BRE) in the Department for Business, Energy and Industrial Strategy (BEIS) monitors the measurement of regulatory burdens and coordinate efforts to ensure that the regulation which remains is smarter, better targeted and less costly to business
10. The US (Steward) asked if the UK keeps track of the impact of these policies.
11. The UK (Farrel) replied explaining that there are post-implementation reviews of legislation. After five years, there is an assessment of regulations. The UK offered to share the next update of the Better Regulation Framework Manual, which is due to be published before Christmas, which is a regulation framework for all civil servants who are drafting legislation. The UK (Farrel) asked for the US reactions to the proposal on MSMEs and good regulatory practice which had been tabled for the World Trade Organisation's (WTO) Ministerial Conference 11 in Buenos Aires.
12. The US (Sevilla) replied that the US share an interest in SMEs and want to reduce barriers affecting them. The US highlighted that there are appropriate SME committees that deal with these issues in the WTO.

Action Items

- The UK is to share guidance on BRE framework with the US.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- See the main SME session. Again, the atmosphere for this session was very positive with both sides interested in learning from each other's practices.

Department for
International Trade

Title of Meeting: ***Regulatory Dialogue Follow-Up***

Date: ***14th November 2017***

Time: ***14:30-16:25***

Participants

Name	Department/Directorate
Julian Farrel	Policy Directorate, DIT (Lead)
Peter Lee	UK Cabinet Office
Tom Surrey	UK DEFRA
Henry Alexander	Policy Directorate, DIT
Kate Maxwell	Policy Directorate, DIT
Motsabi Rooper	Policy Directorate, DIT
Richard Salt	UK-US Team, Trade Policy Group, DIT
George Radice	UK-US Team, Trade Policy Group, DIT
Sophie Brice	UK-US Team, Trade Policy Group, DIT
Tim Colley	BEIS
Cynthia Morgan	DIT Legal
James Dunn	DEFRA
Haroona Chughtai	DfT
Andy Wibroe	DfT
Jim Sanford	United States Trade Representative
Rachel Shub	United States Trade Representative
Kent Shigetomi	United States Trade Representative
Tim Wedding	United States Trade Representative
Alexandra Whittaker	United States Trade Representative (legal)
Nataliya Langburd	Council of Economic Advisors
Erik Puskar	National Institute of Standards and Technology
Ashley Miller	United States Trade Representative
Brian Trick	United States Trade Representative
Sam Rizzo	United States Trade Representative
Head of Multilateral Affairs	United States Trade Representative
Casey Mace	State Department
Additional official	State Department
Elizabeth W.	State Department
Emma Lloyd	Department for Labor
Wendy Liberante	US Office for Regulatory Affairs

Department for
International Trade

Key Points to Note

Atmospherics: positive and inquisitive on both sides

Devolved Administrations

- UK presented on Devolution, including a short history of devolution of powers and stressing the political attention on the return of powers from the EU.
- Outlined approach of Withdrawal Bill – and how constitutionally there is ambiguity around DA involvement in how this is approved in the UK.
- A number of US questions around current devolved powers, including around Agriculture (AMS) and Economic Development (EU structural funds).
- UK expressed interest to hear about State/federal split at a later meeting

MRA

- 1998 MRA: UK set out 10 categories of generic issues for discussion going forward: legal form for the agreement; inactive sectors; references to EU law; entry into force provisions; updated list of CABs, updated list of designating authorities; Joint Committees and Joint Sectoral Committees; translation of text; references to the EU; and the GMP annex.
- ACTION: UK to send list of issues via email to US for reflection and use in their inter-agency engagement.
- US question around UK engagement with regulators – initial UK engagement to raise understanding, next step to focus on details. US suggest regulator-regulator discussions to discuss operation of MRA.
- ACTION: UK and US to consider facilitating regulator-to-regulator discussions.
- Marine Equipment MRA: a lot of work ongoing to possibly amend product scope between the US and the EU – with the UK feeding in as appropriate; UK suggest keeping current product scope for TA.
- ACTION: US to facilitate contact at technical level for discussion of the marine agreement.
- General: US question around need for secondary legislation to enact MRAs into UK law or to set up bodies.
- Beyond MRA, US would encourage exploration of policy space for further cooperation.
- US see particular opportunities in medical devices single audit (MDSAP)— UK made clear that it is only an observer to MDSAP and this is unlikely to change whilst we remain in the EU, but will relay point to experts.

GRP

- UK keen to know where US looking to be ambitious in relation to GRP:
- US highlighted that TPP was not ambitious, TTIP was a good template, if not 100% clear in all areas;
- Guidance provided at federal level concerning development of regulations that contain standards (e.g. A119) – could be a useful area with UK, although not included in NAFTA template
- US highlighted that transparency and public input were most important to make the rest of the measures work.
- US interest in ways that stakeholders can “tickle” the system (i.e. change regulations), e.g. through a petition system.
- The US persuaded the EU to include a GRP chapter in TTIP, and GRP will continue to be a priority in any future US trade deals.
- UK highlighted the transparency of the UK consultation system on new regulation
- ACTION: US suggested that both sides exchange practices or guidance on how to develop regulations and policies that help trade.

Department for
International Trade

Report of Discussions and Outcome

UK presentation on devolved administrations

1. Peter Lee (UK- Cabinet Office) gave a presentation on **the relationship between the UK Government and the Devolved Administrations (DAs)**. There were three DAs and all were different: Wales did not have a separate legal system; Scotland had maintained its own legal and education systems: and Northern Ireland had had a relatively homogenous system with England for the past 200 years. In 1972 when the European Communities Act had passed, wide-scale devolution was not envisaged. In 1997, different devolution settlements were agreed for each DA: in Northern Ireland, the terms were driven by the Good Friday Agreement. The devolution settlements were slightly different in the 3 countries (e.g. justice and policing was not devolved in Wales). The "Reserved Model" meant that Foreign Policy, Trade, Defence and Security and Constitutional powers were not devolved. Until now, the UK had not had to consider having separate rules to govern its own internal market, as this had been covered by EU regulations. Due to Brexit, the government was now having to look at this. The plan set out in EU Withdrawal Bill, took those powers currently held at EU level which set market conditions in UK and brought them back to UK. At the moment, we were in a "holding pattern" whilst we considered what this meant for DAs. This would likely mean significant further devolved powers for the DAs, with central government retaining some powers (e.g. to negotiate trade agreements).
2. This was a very political space at the moment. A Joint Ministerial Committee involving the DAs was discussing. Trade interests were not homogenous across the DAs: food and drink and oil and gas were particularly important in Scotland; Northern Ireland had a joint food and drink economy with the Republic; and in Wales manufacturing was key. Agriculture was one of the main issues being discussed, as it was deeply important to all four nations. UK agricultural policy had been set at EU level for 50 years: setting this up in the UK, whilst respecting devolution settlements and managing an internal market was very sensitive/ complex. England was not a separate constitutional entity and the key difficulty would be how to differentiate discussions between England as a nation and as central government. Under the constitution, UK parliamentary legislation on devolution issues could only be agreed with approval of DAs, It is very clear that Brexit legislation will touch on devolution, and DAs were not currently content to recommend that their Parliaments give consent. Central government was working with DAs to try to get consent (heart of challenge).
3. The US delegation explained that in the US internal market products must be able to ship across state lines or federal govt/ courts get involved. They would be happy to share experience of how to retain an internal market whilst ensuring that states don't create barriers

Mutual Recognition Agreements

4. The UK (Julian Farrel) explained that both parties had already agreed the importance of the technical replication exercise (via JJH and GC exchange). The overarching principle was absolute replication and to change only what was essential. On conformity assessments, the ambition was to discuss generic issues today, share texts early in the New Year and to have final texts ready for a legal scrub in April 2018. This would allow for completion by the deadline of August 2018 as agreed by JJH and GC.
5. The US (Sanford) added two questions for discussion:
   i. What relationship the UK planned to have with EU regulators such as the European Medicines Agency and the European Maritime Safety Agency going forward; and
   ii. What policy space the UK may have to explore cooperation on regulation beyond MRAs with the US, for example on the medical devices single audit.
6. Henry Alexander (UK) gave a summary of the outstanding issues needing attention in the **1998 MRA**. The ten categories were:

Department for
International Trade

i. Legal form: The legal form for transition agreements could be: i) a full mark up of text (change EU for UK in text); or ii) an exchange of letters (with a *mutatis mutandis* mechanism). The aim is to have as simple a process as possible. The US (Sanford) pointed out that in a similar exercise with the EFTA-EEA states, a separate textual form was used.

ii. Inactive sectors. The TA guiding principle is to make as few changes as technically possible. Therefore the UK aims to bring across all sectors, including those which were inactive, but not operationalise inactive sectors. This is the line the UK is taking with all partners. The priority is to get this done as quickly to avoid a "cliff edge". The US (Sanford) questioned the utility in covering inactive sectors in TA whilst they had no interest in making them active.

iii. References to EU legislation: The UK explained that the intention of the EU Withdrawal Bill was to bring across all EU legislation into UK law and not diverge. A discussion is needed on how to refer to this in the MRAs.

iv. Entry into force issues (such as provisions on transition periods): The UK approach is to ensure continuity on day one. Therefore the text should reflect where transitional provisions have expired and where they remain operational (keeping to the schedule in the latter). The US delegation indicated they were broadly content with this approach and are not looking to extend transitional periods. Both sides agreed that the agreement should enter into force on a date that ensures continuity on day 1 of Exit.

v. List of conformity assessment bodies: The UK would want to update the list to reflect designated conformity bodies in the UK and US that are currently approved. The US asked if the UK was envisaging a re-designation process, to which the UK said it was not. The US delegation agreed that this made sense and that no re-designation would be needed.

vi. Updating designating authorities The UK would want to: i) remove EU-27 bodies from the list; and ii) update the names of UK and US designating authorities e.g. to replace DTI. The US agreed to this technical change.

vii. Establishment of joint committees and joint sectoral committees. The UK would want a joint UK-US Committee and to establish Joint Sectoral Committees where indicated. Both parties agreed that this should be as simple as possible. The US (Sanford) emphasised that in a recent exercise with EFTA, these committees were established but were less active in practice.

viii. Requirement to translate into EU languages. Both parties agreed that the text should just be in English.

ix. Generic references to EU. The general principle is to replace all references to "EU" with "UK" whilst ensuring the same effect.

x. GMP Annex. This was very recently updated and specific tweaks may be needed to ensure continuity with regards to the transitional provisions.

7. The aim of the UK is to attempt to share texts in the New Year.
8. In response, the US delegation:
   i. Agreed to the UK timetable of attempting to conclude the drafting exercise by April 2018;
   ii. Emphasised the importance of resolving technical issues before attempting to share text;
   iii. Asked that the UK send via email a list of the ten categories outlined today for review;

Department for
International Trade

iv. Questioned how the UK could transition inactive sectors which include an old GMPS annex, when a new GMPs annex now exists. The UK (Farrel) explained that the principle is to transition the agreement as it currently stands, i.e. the updated GMPS annex replaced the old one;
v. Asked how much the UK had engaged in technical discussions with regulators and how transition would work in practice. US regulators were already asking questions and there might therefore be merit in a regulator to regulator discussion, as MRAs could be difficult to implement. Julian Farrel (UK – DIT) confirmed that there had been initial discussions with BEIS and the MHRA and that detailed discussions would soon follow. The UK would be happy to facilitate bilateral discussions between regulators.
vi. Emphasised that particular 'opportunities for reflection' exist in the medical devices single audit and electronic labelling.
vii. Suggested that both sides exchange practices or guidance on how to develop regulations and policies that help trade.

Marine Equipment MRA:

9. The US (Sanford) emphasised that the US Coast Guard is looking to amend the product scope of this agreement and that it remains a work-in-progress with changes in the pipeline.
10. Haroona Chughtai (UK – DFT) gave an update on the **Marine Equipment MRA**. DfT have been contributing to the discussions on the product scope of the agreement with the EU and are aware of the upcoming changes. Meanwhile, DFT has been marking up the MRA for transitioning and would be happy to share this with USTR or the US Coast Guard accordingly. As with the 98 MRA, the priority is continuity.
11. EMSA managed the relationship on behalf of the Csion under the Marine Equipment Directive. The UK would look to replicate this and the Maritime and Coastguard Agency would become the regulator for this requirement. A discussion between the MCA and US Coast Guard would be needed. The US agreed that the technicalities needed to worked out ASAP and agreed to facilitate contact at technical level for this agreement.
12. In response to a question from USTR Legal Counsel, Julian Farrel (UK – DIT) confirmed that the UK would not need secondary legislation to transitionally adopt the MRAs. Royal Prerogative gave the Government the ability to conclude trade agreements. The UK already had domestic regulators in these areas so there should be no need to create new bodies.

Good Regulatory Practice (GRP)

13. Julian Farrel (UK- DIT) and Kate Maxwell (UK - DIT) updated on work in this area. The UK had looked at the text in TTIP and TPP on good regulatory practice: we would aspire to have ambitious provisions in any FTA. The US delegation expressed an interest in understanding how GRP applied in the context of EU regulation being transposed into UK law. The UK confirmed that our better regulation requirements, including consultation and impact assessment, applied equally to domestic and EU-derived legislation. The US did not think TPP was a high water mark of ambition on GRP: TTIP was more ambitious, but UK/US could go further. To the US, transparency and public input are the most important areas of GRP. The US did not prepare impact assessments for every regulation; they relied on evidence-based decision making. It was also important to enable stake holders to petition government to make changes to regulations, as this helped produce a regulatory regime more responsive to the market. It was agreed that the UK and US had a lot in common in this area. There was a difference in the US/EU

Department for
International Trade

approach: the US thought the EU focused on cooperation and one regulation common to all; whereas the US aimed for inter-operability in markets, which sometimes resulted in measures focused on outcomes (e.g. auto emissions rather than engine size). It would be important for UK and US regulators to discuss issues during the early stages of preparing regulation. The US had persuaded the EU to include a GRP chapter in TTIP, and GRP will continue to be a priority in any future US trade deals.

Action Items

- 98 MRA: UK to send list to US of 10 issues raised via email to US.
- Subsequent aim is to share a text in the New Year.
- UK and US to consider facilitating regulator-to-regulator discussions.
- **Marine Equipment:** US to facilitate contacts for DfT technical discussions.
- **General:** UK to relay US comments on medical devices single audit to MHRA.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- The atmosphere of the meeting was inquisitive and largely collaborative. It included several offers from the US for 'exchanges' over UK regulation and policy development.
- On MRAs, the US made clear where that they would only want active sectors of the 1998 MRA to be transitioned – this would exclude 3 inactive sectors (electrical safety, recreational craft, and medical devices) that the US insist have no chance of being made active anyway. The UK stuck to the line that TA means transitioning agreements as they currently stand.
- There were several questions on the implementation of the MRAs and what UK secondary legislation would be needed, reflecting the US emphasis on operability.
- UK objectives of the meeting were generally met – the main categories for discussion have been set out ready for future discussion and agreement was confirmed on the overall timeline for MRA transition. The US has also agreed to facilitate technical level contact for the Marine Equipment MRA.
- The UK will be ready to share a list of MRA issues in a couple of weeks.
- On GRP, confirmation of shared UK-US aspiration to see an ambitious GRP chapter in any UK-US FTA, and we succeeded in providing further reassurance to the US on the extent of UK domestic GRP disciplines.

Department for
International Trade

Title of Meeting: ***Final Review and Coordination Meeting***

Date: ***14th November 2017***

Time: ***16:45-17:45***

Participants

Name	Department/Directorate
Oliver Griffiths,	UK-US Team, Trade Policy Group, DIT
Richard Salt,	UK-US Team, Trade Policy Group, DIT
Katie Waring,	UK-US Team, Trade Policy Group, DIT
Sophie Brice,	UK-US Team, Trade Policy Group, DIT
Cordelia Jonathan,	UK-US Team, Trade Policy Group, DIT
Mike Bartling,	Legal, DIT
Tom Josephs,	Policy Directorate, DIT
Neil Feinson,	Policy Directorate, DIT
Julian Farrell,	Policy Directorate, DIT
Dan Lihou,	US Team, Trade Policy Group, DIT
Jack Kennedy	US Team, Trade Policy Group, DIT
Mark Prince	Policy Directorate, DIT
Henry Alexander	Policy Directorate, DIT
Edwin Mangheni	US Team, Trade Policy Group, DIT
Sarah Clegg	FCO
Emma Coppack,	DExEU
Tim Colley	BEIS
Harry Lee	DCMS
Ceri Morgan	DEFRA
Jaya Choraria	HMT
Dan Mullaney	USTR
Timothy Wedding	USTR
Raimonds Pavlovskis	USTR
Sam Rizzo	USTR
Katherine Kalutkiewicz	USTR
Alexandra Whittaker	USTR
Andrew Lorenz	US National Security Council
Whitney Baird	US Dep. Of State
Mitchell Ferguson	US Dep. Of State
Casey Mace	US Dep. Of State
Jessica Simonoff	US Dep. Of State

Department for
International Trade

Gregory Burton	US Embassy to UK
Joseph Burke	US Embassy to UK
John Simmons	US Embassy to UK

Key Points to Note

- This meeting summarised the proceedings and take-away points from all the sessions of the Working Group. There were no new key points to note.

Report of Discussions and Outcome

1. Dan Mullaney thanked the UK for hosting the US delegation. Good progress was made on three of the pillars of the Working Group: STOs, Continuity Agreements, and laying the groundwork for a future FTA. On STOs he was impressed by the SME group, with further UK-US dialogue expected on this before the next Working Group. He was also pleased there had been concrete outcomes and agreed public language from the discussions on financial services and intellectual property. On Continuity Agreements there had also been progress, particularly on the four agriculture-related agreements, where there was now a clearer picture of what needs to be done to ensure trade continues smoothly post-Brexit. In terms of preparations for a future UK/US FTA there had been very useful discussions in across many sessions. On services there were strong shared objectives and goals. Some good ideas had been presented on IP, providing a basis for moving this discussion forward. This was also the case with SPS, where the US had presented their views on some of the challenges in TTIP discussions. In sum, there was good progress on all three pillars. Dan also emphasised the importance for US business of having early predictability on what an implementation agreement would look like and how long it would last.
2. Oliver Griffiths agreed with this overall summary and asked the leads for the individual sessions to report back the headline messages.
3. Sophie Brice summarised the Sustainability session. This was a good opportunity for introductory conversations which laid clear groundwork for future work in this area. In particular future conversations were likely to focus on (i) aspects of mutual interest to the UK and the US (e.g. modern slavery/forced labor); (ii) enforcement mechanisms; (iii) opportunities for global UK-US leadership on sustainability and (iv) sharing wider analysis and evidence of impact of sustainability (labour/environment) provisions in trade agreements.
    i. Oliver Griffiths noted that there will need to be further scoping here to ensure alignment of expectations.
    ii. Tim Wedding agreed this had been a good introductory meeting that had set out where each side's interests were and where there was commonality. He agreed that the four priorities Sophie had laid out was where conversations should focus going forward.
4. Ceri Morgan presented the highlights of the Agricultural Continuity Agreements session. Good progress was made overall – it will be vital that work continues between Working Groups. For Organics, Spirits and Wine the next step will be to set up technical VTCs, ahead of which Defra is looking to share operability summaries as well as relevant draft continuity texts. On veterinary equivalence (VEA) the UK will need to look at the US proposals in more detail and revert to the US. The two sides will also facilitate a regulator to regulator discussion on VEA.

Department for
International Trade

   i. For the US Julie Callahan reflected that veterinary equivalency agreements and organics will need more work by regulators on both sides to ensure they are effective. However, there is clear commitment on both sides to have these in place on day 1.

5. Mark Prince summarised the two IP sessions, which covered enforcement, GIs and trade secrets. Good progress was made on the workplan and next steps. This included encouraging progress on SMEs in particular and Mark thanked the US for the first draft of an SME toolkit. The UK will work jointly with the US on developing this. He also thanked the US for the invitation to the annual gathering of attaches which will be attended by a UK representative from the IP Office.
   i. For the US Christine Peterson thanked the UK and welcomed the progress on the STOs in particular. Groundwork had been laid for a future FTA, with discussions about IP trade policy, geographic indication & trade secrets. The US thanked the UK for being open in these discussions.
6. Julian Farrell summarised the SME session. The teams had compared best practices and experiences of how to remove trade barriers and burdens on SMEs, and had laid the groundwork for future discussions. The work on STOs had been particularly productive over the two days of talks, and concrete outcomes had been agreed, including the intention is to hold a UK-US SMEs workshop in Spring 2018 and produce a short joint document setting support for SMEs.
   i. For the Christina Sevilla commented that the IP and SME brochures should be ready for early 2018. The discussions had been very positive and had demonstrated how much the UK and US had in common, but had only scratched the surface (including in terms of STOs where there was more we could do together). Looking towards a future FTA, discussions had covered the trade policy elements that will benefit SMEs.
7. Tom Josephs summarised the Services session. There had been positive and constructive discussion. Good progress had been made on the STOs, and there would be language on financial dialogue in the statement after this working group. Both sides were keen to take forward discussions on the continuity agreement on insurance. Both sides were also keen to be ambitious in the digital sphere, as well as on financial services, and to continue close dialogues in these areas.
   i. The US agreed there had been productive conversations. There are shared UK-US interests across most areas, especially financial services, professional and business services. The session had looked at past trade deals, building towards conversations on possible future approaches for a UK/US FTA.
8. Ceri Morgan summarised the SPS session. This had been a very useful session, covering a big topic. This was the start of a discussion, which would need careful handling collectively going forwards. The next step will be to move into technical exchange.
   i. For the US Julie Callahan agreed that the session had been a very useful start to what would need to be an ongoing conversation. She also noted (from the session) the US point that US poultry producers don't use chlorine in their food processes. She underlined the US view that US SPS measures are based on science and risk assessment. The US recognised that there are sensitive and critical issues for both sides in this area.
9. Julian Farrell summarised the Regulatory Dialogue Follow-up session, which covered 3 issues: 1) UK devolution and how this interacts with Brexit (the UK will look forward to hearing an equivalent US presentation on the federal/state split at a future date); 2) transition of existing Mutual Recognition Agreements (MRAs) – looking at what would need to be replicated to avoid a cliff edge – with the

Department for
International Trade

emphasis on this being a purely technical exercise to ensure continuity; 3) Good regulatory practice, discussing key topics the US would aspire to see in an FTA.

   i. The US agreed that there had been helpful discussion across these 3 areas. On MRAs they would need to get regulators together to discuss substance and ensure this worked on day one post-Brexit. Another theme was commonality of goals and thinking about how we can be ambitious in this area.

10. Oliver Griffiths summarised by noting the good progress across the discussions and particularly on STOs and continuity agreements. This Working Group had been a positive step forwards since July and there is a strong commitment on both sides to make sure everything is in place for day one post-Brexit. He committed to keep the US up to date on progress with the EU and would like to further understand where the main issues are for the US vis-à-vis EU regulation. He also suggested a US presentation on the state / federal split would be helpful. Finally, he noted the good practice on both sides and encouraged continued engagement in between the Working Groups.

    i. Dan Mullaney agreed and reemphasised the point about the importance of continuing engagement outside of the formal Working Groups.

Action Items

- No new actions from this meeting

Department for
International Trade

UK-US Trade & Investment Working Group
21-22 March 2018

Department for
International Trade

Title of Meeting: **Opening Plenary**

Date: **21 March 2018**

Time: **9:30 -11:00**

Participants

Name	Department/Directorate
Oliver Griffiths	DIT – UK-US Trade Team
Katie Waring	DIT – UK-US Trade Team
Sophie Brice	DIT – UK-US Trade Team
Neil Feinson	DIT – Goods
Julian Farrell	DIT - Regulatory Environment
Ada Igboemeka	DIT - IP, Procurement, and Sustainability
Rebecca Fisher-Lamb	DIT – Services
Lola Fadina	DIT – Investment
Rhys Bowen	DExEU
Oliver Wyatt	DExEU
Jaya Choraria	HMT Financial Services
Ceri Morgan	DEFRA
Elizabeth Chatterjee	BEIS
Antony Phillipson	HMTC for North America
Dan Mullaney	USTR
Tim Wedding	USTR
Alexandra Whittaker	USTR, Legal Counsel

Report of Discussions and Outcome

Dan Mullaney USTR (DM) opened the Plenary by thanking the UK side for their attendance and referring to the meeting between UK Secretary of State for International Trade, Liam Fox and US Trade Representative Ambassador Lighthizer the previous week. Both had acknowledged the good work being done and progress made by the TIWG. They had also agreed that the TIWG should continue to look for all opportunities to strengthen the UK-US trade and investment relationship now. A joint statement making reference to the TIWG and SME Dialogue had been issued following the meeting.

DM then focussed on "Basket 4" of the TIWG: cooperation on global trade issues. The US looked forward to working with the UK on strategic trade issues, particularly as we develop our own independent trade policy. The US were especially keen to engage on China and what they see as unfair trade practices/ mercantilist behaviour (excess steel/aluminium capacity, non-market economy, "China 2025" strategy. On steel/ aluminium, the President's proclamation imposing global tariffs had followed a S.232 investigation by Department for Commerce into the national security implications of imports into the US. There was a provision for exemptions for security partners as well as product exemptions. Leaders were in touch regarding an EU exemption. The

Department for
International Trade

challenge was a joint one and the US wanted to work with the EU and UK to find ways to address global overcapacity [NB: Postscript. On 22 March, the EU received a temporary exemption from steel and aluminium tariffs until 1 May]. Other area of concern for the US was IP theft and forced technology transfer by China. The report on USTR's S.301 investigation into these issues would issue shortly. Again, the US wanted to work with UK on this joint challenge, but in meantime US couldn't afford not to act unilaterally. Where the US saw issues of inconsistency with WTO rules, they would also look at WTO disputes [NB: Postscript. On 22 March, POTUS announced a package of measures under the S.301 investigation including, tariffs on $60bn worth of Chinese imports, restrictions on Chinese investment into the US and WTO disputes]. On NAFTA, negotiations were going full tilt and good progress had been made, including agreement on 3 substantive chapters. No dates had been announced for future rounds, but there was a desire to complete negotiations as quickly as possible. As a final point, **DM** highlighted that this Administration was approaching FTAs differently from other Administrations. It would be good in TIWG for leads to discuss the potential differences of approach. The UK/US had a unique relationship, so might be able to go further than with others.

Oliver Griffiths DIT (OG) also acknowledged the success of the TIWG talks so far – there were milestones on a journey and the journey was progressing well. The most recent successes were the SME Dialogue and the Audit Agreement. We needed to continue to look for ways to build on this. There was also lots of contact outside the formal TIWG and the more we could do to thicken these discussions the better. This week was a "very live" week for UK in terms of our future relationship with the EU, as the March European Council was taking place on Thursday and Friday. The UK was starting to think about what our future outside the EU looked like: the policy challenges in every sector were not to be under-estimated. **OG** also agreed on the importance of focusing on areas outside an FTA – there were some really high potential ideas on the "STO" list at the moment. **OG** then reiterated the UK position on steel and set out the case for an EU exemption – as SoS DIT had set out to Lighthizer the previous week.

Rhys Bowen, DEXEU (RB) then gave an update on Brexit. The March European Council was a major milestone, there would hopefully be agreement on an Implementation Period (IP) and fire the starting gun on the UK's future relationship with the EU. Earlier in the week, the UK's Brexit Secretary, David Davis, and Michel Barnier had agreed to legal text on the terms of an IP, as part of wider withdrawal agreement (the whole draft had been published). We were therefore hopeful that the IP would be agreed by EU Leaders at MEC – this would provide crucial clarity and certainty for Business. In terms of the timing, the UK would leave the EU 29 March 2019. The IP would then last for 21 months and expire on 21 December 2020. During this period, the UK would continue to benefit from the same level of market access it currently enjoys and the full EU acquis would apply. Also during this period, the UK would be able to negotiate, sign and ratify 3rd country agreements, which could then come into effect at the end of the IP. The UK would be bound by EU law during IP, but this would apply on dynamic basis. There would be some provision for the UK to participate in bodies and mechanisms and the details of this were still being discussed (this would be on a case by case basis). We would not however attend European Councils.

International Agreements (IA) were a complex issue. The UK had agreed an approach with the EU: IAs were seen as key part of the acquis: it was very difficult to separate the internal and external acquis. The UK and EU shared the aim that the UK should be treated as part of existing IAs during the IP. To facilitate, the EU would notify all 3rd countries that the UK would continue to be bound by IAs during the IP. The UK did however recognise the importance of reaching an understanding with all 3rd country partners to ensure they were comfortable with this approach. The Modalities of process may however vary by each country. We wanted to work with the US to understand whether this approach worked for them. We wanted to make progress quickly, so we could provide certainty. The UK and US had been making very good progress on new bilateral

Department for
International Trade

agreements in the TIWG and Economic Working Groups – we wanted to capitalise on that progress and we would in any case need to have new agreements in place at end of the IP.

On the Future Relationship, the hope was that Leaders would sign off Withdrawal Agreement text at the European Council, as well as agreeing EU guidelines for negotiations on the next stage: the Economic and Security relationships. The draft guidelines were continuing to evolve, but should be adopted by the end of the week. The UK position was summarised in the PM's Mansion House speech, where she set out some "hard truths" including, that the UK would not have the same market access as we have now and that as this would be a negotiation, we were unlikely to get everything we wanted. In terms of detail, the PM had set out the role of goods and services: on goods we wanted tariff and quota free deal and frictionless trade with a relatively small number of enforcement agencies. The EU guidelines were still high level and there was already some common ground, also quite ambitious - they provided a broad starting point for negotiations. On timing, the aim was to have political agreement on the future relationship by the October European Council: a broad political framework, not a detailed legal text. We would then likely move to the legal text agreement after formal departure. The principle on Northern Ireland was that there would be no hard border. There would be no agreed text on Northern Ireland at the end of the week. In one way, this had pushed the problem to the right, but this allowed the issue to be dealt with as part of wider talks on the future relationship (the UK had always seen the two as integral and linked). Extending the conversation on Northern Ireland into the next stage meant we were able to have those parallel and integrated conversations.

OG updated the group on the Trade and Customs bills. Both had completed Committee stages in the House of Commons and should move to Report stages soon. Future FTAs were not in the Trade Bill and as yet, there hadn't been much pressure around this in Parliament. Most of the tension had been on the new Trade Remedies Authority and a potential trade defence regime.

DM updated the group on Trade Promotion Authority (TPA), which laid out the Administration's objectives in any trade negotiation and detailed consultation mechanisms with Congress. Current TPA expired on July 1st 2018 and the President had now requested an extension. Unless subject to an extension disapproval by either House, TPA would be extended to July 2021. USTR would know by July 1st whether there had been a resolution of disapproval. DM judged TPA was likely to be extended on same terms, but that this was not guaranteed.

Department for
International Trade

Title of Meeting: **Legal Group**

Date: **21 March 2018**

Time: **11:00 – 13:00 (EDT); 15:00 – 17:00 (GMT)**

Participants

Name	Department/Directorate
Victoria Donaldson (via VTC) (VJD)	DIT Legal
Michael Bartling (via VTC) (MB)	DIT Legal
Cathy Adams (via VTC) (CA)	DExEU Legal
Colin McIntyre (via VTC) (CM)	DExEU Legal
Rhys Bowen (RB)	DExEU
Ada Igboemeka (AI)	DIT – Sustainability (covering anti-corruption)
Mark Prince (MP)	DIT – IP
Ben Rake (BR)	DIT – Services
Sophie Brice (SB)	DIT - UK/US Trade Team
Russell Stokes (RS)	DEFRA Legal
David Watson (via VTC) (DW)	DEFRA Legal
Gavin Bayliss (GB)	BEIS
Shirley Rhone (via VTC) (SR)	HMT
Jeremy Hill (via VTC) (JH)	FCO Legal
Tim Wedding	USTR
Alexandra Whittaker	USTR
Matthew Jaffe	USTR
Cathy Milton	State Department

Key Points to Note

The following are the key points from the session:

- US-concluded FTAs contain a number of common legal chapters and structures which negotiating partners should be aware of.
- Anti-corruption is an aspect in particular where the US considers that they could work closely together with the UK.
- It will be necessary to meet again to discuss further the issues which arise regarding Federal and State competence in negotiating and concluding FTAs, and for UK to provide sector specific questions to that effect for US colleagues to consider.
- US colleagues may similarly have questions regarding devolution for UK colleagues to consider ahead of any further meeting.
- Further thinking is necessary on the continuity of the multilateral agreements to which the UK will cease to be a party on leaving the EU.

Department for
International Trade

Report of Discussions and Outcome

1. Welcome and Introductions

Introductions

1.1 US and UK participants introduced themselves as per the participant list above.

Itinerary

1.2 The following itinerary was proposed:

1.2.1 Legal chapters and structures in traditional US FTAs
1.2.2 Anti-corruption provisions in US FTAs
1.2.3 Federal and State powers in the context of FTAs
1.2.4 UK presentation on continuity and implementation period
1.2.5 US questions regarding devolution

2. US presentation on US legal structures set up under FTAs

2.1 There were a number of common chapters in US concluded FTAs:

i. First chapter is preamble
ii. Initial provisions and definitions – setting out the scope of the FTA and establishment of the free trade area, contains agreement-wide definitions.
iii. Administrative and general provisions.
iv. Dispute settlement – this serves one of the main negotiating objectives required under Trade Promotion Authority (TPA), namely, settlement of disputes.
v. Exceptions – usually: 1. General exceptions; 2. National security; 3. Taxation
vi. Final provisions – annexes, amendments, how other countries can accede to the agreement, termination, entry into force, authentic text language.

2.2 VJD – asked for further elaboration on TPA objectives and how they relate to objectives in the preamble.

2.3 AW – preamble traditionally doesn't track negotiation objectives. It explains intention to accomplish an FTA. It's not as prescriptive as TPA. Note, TPA objectives need to be sufficiently detailed to allow for the fact that a condition to getting up and down vote from congress is to negotiate in accordance with objectives.

2.4 MB - What is it like negotiating an FTA where you don't have TPA?

2.5 AW – Do not have to have TP authority to negotiate – it just makes passing agreement in Congress easier if you do. You would ideally want TP authority if passing through congress. TTIP started negotiation without TP authority. You do not need it to conclude an FTA. TP authority prohibits amendments to implementing legislation regarding that FTA.

2.6 VJD – If talks move beyond scope of TPA – this might not be an impediment but may hold up the approval process?

2.7 AW - Yes

2.8 VJD – When does Congress sign off adherence to TPA?

Department for
International Trade

2.9 AW – USTR would present every stage to Congress – so Congress would be kept fully informed. At the end of the process they would make sure the objectives are met.

2.10 VJD – If there is a determination the TPA objectives are not met you do not get the expedited procedure?

2.11 AW - Yes

2.12 MB – UK has complex set of territories. What is in territorial scope in US FTAs?

2.13 MJ – Scope includes Puerto Rico and some territorial waters.

2.14 VJD – Elaborate on recent US practice of joint committees and the parameters assigned to them.

2.15 AW – Joint committee supervise and review implementation operation of agreement. USTR would co-chair with equivalent individual. This would oversee any other committees created to deal with particular chapters. Seek to resolve issues associated with agreement. It would act as an oversight committee to make sure agreement is working.

2.16 MB – Joint committees tend to have modification powers or powers to accelerate tariff elimination - what domestic process applies?

2.17 MJ – Joint committee consider amendments but cannot amend itself. This would need congressional oversight/approval. Sometimes there is leeway in the agreement in itself. Example given of an EU MRA from 1998, an annex was amended and concluded by the US as an executive agreement as authority already vested in the executive through the previous congressional authority.

2.18 VJD – Do joint committees typically have power to issue authoritative interpretations on provisions of agreement?

2.19 MJ – In context of resolving disputes – usually does arise regarding interpretation or application. But there will always be a separate dispute settlement chapter.

2.20 VJD – Do you have some agreements where there is modulated dispute settlement i.e. designated chapters for specific types of state to state dispute resolution?

2.21 MJ – Areas such as labor and the environment would usually engage state to state dispute mechanism. Competition chapters are usually not subject to dispute settlement. Others may have either different standards of review or different types of dispute settlement, e.g. consultations.

3. US presentation on anti-corruption provisions in US FTAs

Given by Matthew Jaffe (US) (MJ)

3.1 MJ – There is normally a dedicated anticorruption chapter in a US FTA. Usually falls on lawyers to negotiate this. Affirms aims to: eliminate corruption on matters affecting international trade and investment, and in the public sector, to protect individuals e.g. whistleblowers, to promote integrity of public officials, and to prevent and fight against corruption.

Department for
International Trade

3.2 UK seen by US as having a very extensive anticorruption programme. This would be a different discussion with the EU as there was a question of competence in the EU re. anticorruption.

3.3 AI – Anticorruption a top priority for UK – still considering how can we best approach the issue. Asked the US to say a little more about commitments and provisions

3.4 MJ – Follow OECD guidance – include references to: combatting and preventing public sector corruption, protecting whistleblowing, promoting integrity of public sector. Anti-corruption agreements are important in international trade – US has noticed other countries around world tend to 'copycat' US agreements, so if the FTA is clear on anticorruption then this can help set a global standard. Enforcement of anti-corruption has been excluded from state-to-state dispute settlement.

3.5 AI – has exclusion of anti-corruption from dispute settlement made FTA negotiations easier?

3.6 MJ – Hard to say – what is in a particular FTA depends on who partner on other side is. It's been evolving. If it was going to be subject to dispute settlement, what kind of dispute settlement should it be subject to? Consultations?

4. US presentation on Fed/state split on trade issues

Given by MJ (US)

4.1 Congress and the President work very closely together on FTAs. President has the powers to conduct foreign affairs but Congress has the power to regulate foreign commerce and interstate commerce, lay and collect taxes, duties and excises. The power is a legislative one vested in Congress which can then delegate powers to the President.

4.2 Federal authority pre-empts state authority. Congress has the power to regulate commerce in the form of foreign commerce clauses. This can also apply as between states in inter-state commerce clauses. A dormant commerce clause is the constitutional authority that even when the Federal Government has not exercised its competence, by implication States cannot pass legislation that burdens or discriminates interstate commerce.

4.3 Two other clauses on Congressional power – Supremacy clause: Federal law trumps state law where they share legislative jurisdiction. Necessary and proper clause: Congress has powers to make all laws necessary and proper; if ends are legitimate can use whatever means to get there.

4.4 Contrast US and EU system. Not a good analogy to compare them. EU does not hold itself out as a federal state. Member states are all self-governing nations. Very different from US and the constitutional mechanism. The fifty states do not have a direct or indirect role in US FTA negotiation – might consult but no real role in treaty negotiations or approval of FTAs.

4.5 VJD – States having no formal role in negotiations: 1. Is there an informal mechanism to ensure State involvement? 2. States do have competence on regulatory issues that FTAs touch on – what other areas of US FTAs are areas of state competence?

4.6 MJ – We have an inter-governmental affairs office and they keep states up to date. In the formal process States are not involved. States have powers and it depends to what extent that power extends to specific items in the agreement. Government procurement and the services

sector…. this is often a federal power which has been returned to the states. There was recently an accountants' agreement between the sector representative covering all states and Scotland.

4.7 SB – Regarding product regulation e.g. telecoms – where States might have different regulations, how does that effect FTAs?

4.8 MJ – State regulatory authority is one given to state by congress. Where there is federal pre-emption, Congress can still create exceptions. It would be helpful to bring specific areas to US attention as any talks develop.

5. UK presentation (DExEU) on implementation period.
Led by Cathy Adams (UK) (CA)

5.1 Main aim of the transition period is maintaining status quo. For period from March 2019 to December 2020 the UK remains bound by EU law subject to not participating in institutional affairs of EU.

5.2 Article 6 Withdrawal Agreement – provides for UK to be treated as a member state subject to derogations regarding institutions. EU law applies in transitional period even though we won't be a member state. Therefore for the purpose of external agreements, the joint aim of the EU and UK is that 3rd country agreements continue to apply. EU and UK accept and agree that as between ourselves we cannot determine that they continue to apply as a matter of law as the 3rd country has a role to play.

5.3 Continuity mechanism – Article 124(1) – there's an asterisked footnote providing that a notification by EU to 3rd countries that UK is to be treated as a member state for purpose of the agreements. Aim is to get 3rd country to acquiesce or to agree that agreements remain in force. Agreement was reached with the EU that the basis could be an exchange of notes with 3rd country to establish subsequent agreement that existing agreement continues to apply to UK.

5.4 Article 124(4) – Confirms that the EU has no objections to UK negotiating, signing and ratifying bilateral treaties to take effect post-transition.

5.5 US – Is the intention that the EU will send one letter to each 3rd country? Or will it be individual letters? Does the UK expect to send the letter or will it only come from the EU?

5.6 CA – Finer detail is still to be discussed but expecting it to be one letter from the EU for each 3rd country relating to all the agreements that apply between the EU and the 3rd country.

5.7 US – Is the intention for the trade partner to respond agreeing that they will continue to apply to UK?

5.8 US – EU preference is so far as possible using VCLT principles. This could be through an exchange notes or by virtue of practice, for the EU this means that there need not necessarily be a response to the notification. It will be a matter for the 3rd country as to whether it will respond. UK would favour a response as it gives greater degree of legal certainty.

5.9 AW – The current agreement includes end date for transition period. Can it be extended?

5.10CA – There is nothing in the current text on that.

Department for
International Trade

5.11MJ – Territorial application – most agreements say they shall apply to territory to which TEU applies. Given this, how would current agreements continue to apply to UK?

5.12CA – Article 6 provides for this – there is a conduit going between TFEU and TEU via the Withdrawal Agreement and into UK law. Article 3 – territorial scope. Reason treaties use this common clause regarding the TFEU is that certain bits of treaties don't apply to all territories of member states, so 3rd country agreements apply to the same extent as EU law applies to UK territories.

5.13MJ – Signatory process from EU perspective – who has competence?

5.14CA – EU side have made clear that this agreement does not require ratification from member states because of the special status of article 50. Legal reason is that art 50 is unique – it's about leaving EU and competence has been delegated to EU by member states.

5.15MJ – Useful for US to have some insurance on where the progress is at. US is concerned about member state role and European parliament role in holding this up.

5.16CA – There is a constant dialogue with the EU27 – the commission reports back to them. It has been made clear to the EU27 that this is an EU only agreement.

5.17AW – Discussion so far has been on bilateral approach. Do we envisage this approach going covering multilateral agreements too and if so how?

5.18CA – Important to distinguish from those multilaterals where UK is already a party – which is most agreements. There is a small number of multilaterals (c.20) where they fall in EU exclusive competence e.g. GPA. Discussion with the EU is still ongoing. At some point the UK will have to become party in its own right. The legal exam question is: how do we transfer the UK's current obligations as a part of the EU to apply to us as an independent party to the agreements?

5.19 AW – Would be helpful to know if the EU, on behalf of the UK, plans to send a continuity type letter. We'd want to discuss further.

5.20 CA – The letter would have to be different to the bilateral letter, it'd have to be adapted. It would be useful to have a sense of your perspective on this as it's a live issue.

5.21Cathy Milton (US) – Withdrawal Agreement – is it anticipated notification would come with list of agreements that apply or generalised "all agreements".

5.22CA – Not yet agreed. We are likely to prefer list approach, helpful for US view on which they would prefer. JH – it may very from one country to another. What would work best in the 3rd country legal system?

5.23MJ – What are the next steps on the agreement now?

5.24CA – There will be a ratification process – the text in green in WA is settled, and that is around 75%. Expect further negotiations between now and June. Ideally looking to settle the text by then. If not, negotiations continue, the backstop date for settling is the October meeting of the European Council. Once signed it goes to European Parliament for consent to ratify. Has to be ratified in the UK as well. Fairly light touch approach to treaties in UK normally but will need to legislate to give effect to it. Drafting of legislation has already started. Timetable is quite

Department for
International Trade

tight but achievable. JH – We hope notification to 3rd countries can be issued much earlier. Hope to take that forward quite quickly.

5.25MJ – What is the legal effect of notification prior to ratification of the WA?

5.26CA – Treaties cannot continue in force if there is no interim period. We see no major obstacle to going through the notification procedure on contingent basis. It would have no legal effect if Withdrawal Agreement doesn't come into force but the advantage to completing this process at a reasonably early date is to provide legal certainty.

5.27US – What chances that the UK Parliament could make a substantive change to the WA following signature?

5.28CA –the Withdrawal Agreement is accepted or rejected – there is no power to change.

5.29 AW – The Withdrawal Agreement provides in Article 121(4) that the UK can negotiate etc. Do the guidelines include consultation requirements on the UK or is it an exercise that the UK can do independently?

5.30 CA – Independently. Article 121(4) recognises that it's about the future and the UK's obligations after it's fully detached from the EU so there's no legal need in EU law for the UK to submit any agreements to the Commission. The safeguard in that Article is about the date of entry into force.

6. Concluding remarks

6.1 All agreed – Next steps are to prepare, pool and exchange any further questions – particularly on state/federal split and issues of devolution in the UK. Potential for setting up legal working groups ahead of next meeting.

Action Items

- UK to prepare more detailed questions, in particular regarding the division of competence between federal/state levels and its relevance in FTAs in specific areas.
- US may provide additional questions regarding the devolved administrations and their role in WA negotiations and in Bills currently before Parliament.
- Questions to be exchanged prior to the next meeting.

FOR UK INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

The meeting was useful and conducted in a cooperative spirit. The US nevertheless seemed keen to keep the discussions relating to their presentations at a general level. This manifested itself in the following ways:

- In response to probing questions from the UK regarding the legal structure of US FTAs, MJ mused that this "seemed like negotiations"
- In presenting the division of federal/state competence as regards trade, MJ kept the presentation at a highly general level, and engaged in extensive diversionary commentary, for example regarding American history and constitutional law.

Department for
International Trade

- The US questioned Cathy Adams extensively on her presentation, even though some of the later questions essentially repeated those already asked and answered. This resulted in very little time being available at the end of the session for the UK to ask its questions regarding the division of federal/state competence in trade issues, which appeared to be a deliberate tactic.

The session provided useful information regarding recent US practice on anti-corruption and on the legal structure of FTAs. Looking forward, the UK will want to obtain further information on the federal/state division of competence and, to the extent possible, on how this division plays out in trade negotiations and on the input and influence that states have, even informally, in such negotiations. Given US reluctance to elaborate in a meaningful way on these subjects, the UK will need to formulate very specific and targeted questions to elicit useful information. The UK will also need to be prepared to answer US questions regarding the roles and powers of the devolved administrations.

Department for
International Trade

Title of Meeting: **Small Medium Enterprise Session**

Date: **21 March 2018**

Time: **11:00-14:00 (EDT)**

Participants

Name	Department/Directorate
Julian Farrel	DIT – Regulatory Environment
Kate Maxwell	DIT – Regulatory Environment
Andrei Murariu	BEIS
Angelina Cannizzaro	BEIS
Lizzie Chatterjee	BEIS
Rebecca Fisher-Lamb	DIT - Services
Christina Sevilla	USTR
Ray Pavlovskis	USTR
Sarah Bonner	US – SBA
Tricia van Orden	US – Department of Commerce (DoC)
Lori Cooper--phone	US – DoC
Patrick Kirwan	US – DoC
Barrett Haga	US – DoC
Major Clark	US - Office of Advocacy
Ian Sherridan	US - DOS

Key Points to Note

The meeting began with agenda discussion from Julian and Christina. Christina welcomed the group and began to introduce the attendees around the table. Christina set the agenda order and turned the floor over to Barrett.

1) Barrett presented on two agenda points in one slideshow. American Competitiveness Exchange on Innovation and Entrepreneurship program and the Clusters Cooperation with Clusters MOU key points below:
   a) Barrett said part of the goal of his presentation was to get everyone on same page because the US model has changed from building things into building systems. He explained that alternative definitions are a large barrier to trade agreements. He said pinpointing how the US and UK define jobs and other terms is critical for supply chain information sharing. He envisioned bringing the EU and UK into the Clusters program via cooperation agreement. A portion of the presentation touched on developing all economic actors, meaning that clusters succeeding would lift struggling clusters. The US government has changed focus to expansion of capacity potential.
   b) The old US way of thinking was open to business, “big game hunting”, “next big thing” and “if you build it they will come.”

Department for
International Trade

i) The open to business idea was that trade can be driven by mutual tax cuts. He mentioned race to the bottom and said the data shows cutting taxes or regulation does no create significant or sustainable growth.
ii) Barrett explained that a model that seeks out giant multinational corporations and transnational corporations like Amazon and Google has drawbacks. They employ many people and bring economic development, but often at costs that pit cities against each other to offer the best subsides or tax breaks. Ultimately the "big game" received subsidies and concessions that reduce the positive impact.
iii) The "next big thing" was the concept that every country wants to have the next Silicon Valley. He countered by saying there are few places in the world with the intellectual capacity to develop an environment like Silicon Valley (London was one of the locations with the intellectual potential).
iv) "If you build it, they will come," meant that big infrastructure development means economic development. He said the data does not support infrastructure spurring economic growth.

2) The new economic model was called the Florida State model. Barrett based this name off of a US college football program. The new model develops systems of excellence by using data analysis to connect the economy.
   a) The goal was for incremental value changes to occur through small revenue increases. The system of excellence is created through leverage points where there is strategic advantage.
   b) The main points are to
      i) identify where strategic advantage is
      ii) deploy human capital in job pools
      iii) develop prescriptive infrastructure
      iv) increase efficiency
      v) Create public institutions.
   c) Barrett used Google as an example of how profits should be sought, mainly that high margin areas should be the focus.

3) The cluster program is a collaborative decision making model (five year economic plans to mitigate politics)
   a) In the plan the US government certifies local/state/regional process to develop greater metropolitan regions. The US government wants to share the clusters model with the UK.
   b) The clusters are regional concentrations of related sectors. The Florida coast was an example of a developed cluster. The aerospace tech sector has congregated in Florida and now provide top tech for aerospace. The US government wants other countries to map their clusters in order to identify areas of mutual development.
   c) A further example was given where a university with a developed movie production school used its expertise to develop its medical schools' imaging program. Barrett envisioned similar sectors of a regional economy helping each other. He said the US government is also conducting research on technology development trends for the next ten to fifteen years to support cluster growth.
   d) Clusters emerge where competition is at a national level, but growth is not limited by the local market. Barrett commented that much of the small business focus on the government side is supporting patents and innovation within clusters.

4) The US government plan is to share strategies (CEDS) with other counties (they want the UK to adopt some)
   a) Canada, Mexico, India, Argentina have programs

Department for
International Trade

b) At a high level clusters are a detailed SWOT analysis focused on "What is a country good at and where to invest". Clusters allow for quick identification of capacities across regions and countries.
c) The US has a MOU on the CEDS strategies with South Korea. The pilot program uses US firms in Korea and could serve as a model for future programs.
d) The larger strategy aims to develop nodes in order to connect clusters.

5) America Competitive Exchange on Innovation and Entrepreneurship
   a) Program ranging the hemisphere to increase overall competitiveness
   b) A forum of connected individuals convenes in a different region for ACE exchange
   c) The engagement tour seeks to share and coordinate best practices
   d) High profile attendees are invited
   e) The US is willing to offer the UK 2 spots of the 50 in the Central California tour for ACE 10
   f) Anyone who attends must be able to provide something. "Move the needle or you don't get to come back"

<u>That ended the formal presentation from Barrett. Some questions drove cross talk discussion.</u>

Julian asked what moving the needle meant for UK participation. Barrett said anything starting with a low point of access to laboratories as an example. Another example was a North Carolina textile facility sharing technology with Mexico and starting a school knowledge sharing agreement. The outcome was development of a shared textile created for Milan fashion week

Christina noted Germany was attending and asked about the level of seniority of the participant. Barrett explained that a Deputy Director General was attending, and that Israel had also sent a Deputy Director. The UK consensus was that for the UK this could mean representation by a junior minister or a senior official.

The US asked Angie about the UK industrial strategy. Angie laid out the areas of the BEIS strategy: ideas and innovation, infrastructure, place-based development (devolution to national governments), business environment for sector specific deals, and skills.

Barrett suggested the next step could be to look at clustering in UK. He emphasized the importance of defining sectors to avoid duplicating efforts. Pat suggested looking at the actual clustering tool in order to pinpoint where sectors are growing and where patents are growing.

Julian asked about how developed clusters stimulate lagging sectors. Barrett explained that US government is able to provide less money for more impact given the cluster interconnectivity in order to stimulate lagging sectors.

Julian said the UK action should be to identify a senior official in BEIS or DIT for the ACE 10 conference in California. On timelines, Barrett's explained that June 1st is when courtesy applications open to UK via email. Public applications open on 23rd June. The deadline for responses via portal application in August. The meeting is October 21st-28th. As a formality the committee must vote on applicants, however the US is confident the UK will be confirmed easily.

Christina recapped outcomes of Barrett's presentation: the ACE invitation, clusters mapping, strategy sharing, and technological assistance.

Barrett also added that an ACE member in good standing gets to attend the America Competitiveness Forum which is 3000 high profile and high access members. Communities that host the event gets 5 invitation spots.

Department for
International Trade

Julian asked if the ACE invite could be an outcome of the working group. Christina and Barrett agreed that the invitation from the US government for the UK to join ACE network should be a TIWG outcome.

Julian asked about the distinction between US unilateral work and the OAS. Barret said the Organization of America States is a forum for the US message to be multiplied to a larger audience and capture interest from audience members less willing to work with the US bilaterally.

In response to Julian's question on the US experience with clusters, Barrett said that the US is starting to see countries as a whole adopt the cluster model, and best practice sharing. The US wants to define the location quotient for nodes of connectivity. Christina suggested the clusters model could be a good for point for a future US UK MOU

SME Cooperation Arrangements—Lori Cooper (Deptment of Commerce)

Lori spoke briefly about SME cooperation. She said Commerce is developing an enterprise network to do more work in US states specifically with SMEs. Primarily that has been best practice sharing as well as coordination at trade shows.

The department of Commerce has a co-operation agreement with the EU to match make US and EU businesses. One hundred US entities participated and half of all the participants were SMEs. The difficulty now is determining the results of the four hundred plus peer to peer meetings. Part of the cooperation agreement with the EU is to confer with EU counterparts and others to identify who from around the world would worth meeting. A similar conferral process would be good from a UK cooperation agreement. Lori suggested a specific call on clusters.

Lori wanted trade show cooperation in smart cities for the US and UK. High interest from the US in Barcelona business to business meetings. She said the majority of the past year has been "on pause" waiting for instruction from the administration. There is high visibility for Commerce to show successful programs in order for similar programs and agreements to be renewed past 2019.

Lori offered an example of SME cooperation. Ecobio is a clean chemical company, Janet at Ecobio raised interest in a peer to peer meetings on UK and US green tech development. Janet is currently pulling together 5-10 US and UK SMEs in green tech to talk about issues and ways to enhance opportunism in green chemistry. If that pilot goes well it can be expanded to more sectors. Janet and the US side were looking for UK government suggestions for green tech companies. On a larger scale the US was looking to replicate EU US programs with higher intensity and coordination.

Christina raised the point that at the SME dialogue she heard interest in peer to peer connections. SME cooperation to date has been primarily government to government. Much of what Commerce does is cross cutting across member state and EU competencies causing some difficulties. EU US cooperation at trade shows does not have metrics on sales, but it was a good process for the US and UK governments as well as business network cooperation in general.

The rest of the session focused on questions between the delegations:

Julian noted that other colleagues in DIT worked on business engagement (ITI formerly UKTI). Rebecca said her team works closely with ITI colleagues on partnerships with businesses.

Department for
International Trade

Kate said that DIT officers are posted throughout the US for sector specific and cross cutting campaigns. She added that DIT sent a big delegation to Consumer Electronics Show (CES). Christina said Commerce also works a lot with CES. Christina asked if the delegation would go again and if the delegation could be a deliverable. She posed language that the UK and US are exploring trade promotion/collaboration at CES. Kate said the potential delegation should also add business to business element.

Pat explained that Commerce currently brings buyers and recruits delegations to take to CES which gives the US a large space at CES. The US is willing to share the large central space with a UK delegation. He asked if the UK takes a delegation to CES to visit or buy or something different. Sarah said that the Small Business Association is also at CES with a large presence. The SBA gives advice for identifying trade missions to the UK and sometimes organises these. The programs are aimed at state trade expansion by giving US states access to resources in order to internationalise businesses.

Pat said STEP Programs and Trade Shows certified through the SBA are highly regarded. He suggested that Commerce could make similar recommendations where foreign buyers and UK companies would find it useful to attend. Sarah asked for SBA certified trade shows to be included in those recommended by UK government in order to expand clusters

Future SME WG Cooperation and 2nd Us UK SME dialogue in UK – brainstorm ideas for topics e.g. digital trade and SME, other ideas; and SME Chapter in Trade Agreements—Christina Sevilla USTR

Christina set out what the US has done previously and what the US is seeking with other countries currently. The current administration remains committed to SMEs and SME development. The SME chapter was the first one agreed in the NAFTA renegotiations. The language is very similar to the TTIP language with some elements from TPP and beyond. The SME workshops were housed under technology chapters of the FTAs and the idea with the US UK FTA would be to institutionalise the SME workshop (the dialogue) under the SME chapter. The new NAFTA SME text contains language for a trilateral SME roundtable and the US UK text would build on it to capture current cooperation already underway. Christina explained that the whole NAFTA text would be available online once the principles are agreed.

Information sharing was a big obstacle in TTIP. Christina wanted to be clear that time needs to be spent on developing the content, not on how it’s presented to the home audiences. (She stressed TTIP negotiations spent too much time debating the platform). She said that online information sharing is very important but specific form was less important. Export.gov houses finance and exporting information because many US government departments touch on business and exporting.

Christina envisioned including a high customs de minims - a top demand of SMEs. Coverage for returns and sellers was also offered as something to be included. She noted that US would want SME definitions to be defined internally, meaning the US national standards of an SME and UK standards could be different. Christina said that the SME chapter would not have special and differential treatment for SMEs. The rules of origin would apply to all business.

The UK asked which other chapters are SME related in the standard US model and which chapters the range of government departments are involved in negotiating. Christina answered that there is an SME working group across the departments that is highly involved with the FTA including the SME chapter. Commerce is consulted on every chapter, USTR leads the chapter conversations and maintains high control on digital chapters. The SME chapter is a guide and will have cross

Department for
International Trade

references to other clauses in the FTA. A continual government dialogue will be in the SME chapter in order to ensure SMEs are receiving continual benefits. The idea is to allow stakeholders a mechanism with which they can engage within the text of the FTA.

The UK asked if the NAFTA chapter includes a lot of detail on information sharing. Christina confirmed that it is not overly prescriptive. Julian asked about appetite for embedding SME provisions across chapters and commented that there is a job to do, to sell benefits across chapters that will benefit SMEs. US delegates agreed and cited digital trade chapter example of where that is a clear example.

Christina said that both sides should create fact sheets for SME benefits after the text is agreed. She added that the chapter is not subject to dispute settlement. Portions of the SME chapter that are references to other chapters can be subject to dispute settlement. Digital trade and intellectual property are important clauses located outside of the chapter, but referenced in the SME chapter.

The US asked about the role of the Devolved Administrations in FTA negotiations. DIT explained that most issues on SME are not regulated at a subnational level. The US added that they will not "take a heavy hand on subnational level with national governments."

Christina stated in conclusion "Work being done in this committee is laying a lot of groundwork for SME cooperation section."

20 March SME Dialogue—Discussion of SME dialogue feedback

Julian commented that there was good discussion and he supported additional dialogues involving sector specific conversations. He made the point that the more content driven discussion the better understanding of how to make this FTA work, "This is how we find out the obstacles." There were some UK follow up ideas based on the previous day, but no definitive plan yet for the next dialogue.

Angie offered reflections on the dialogue. She said the messages fit the BEIS engagement plan. The dialogue was quite reassuring. Her aim was to see if the messages from the dialogue can be successfully captured in order to inform an FTA. Information sharing was a high demand message that could be considered for the next dialogue as well as banking. She commented that the questions and answers at the dialogue were similar from UK local conversations.

Christina said she was looking for policy recommendations based on the dialogue. She was looking at information sharing mechanisms and noted the importance of the SME reception to the US side. She said it was important for the business to also have a networking opportunity if they are giving up a day of work to engage with the government and their peers. In general she said the US policy toward SMEs was "do no harm." The de minimis value, SME chapter, data sharing (including cross border) and protecting IP were all areas she heard and was focused on translating to policy recommendations. Christina said she was surprised to hear from some SME's that they could benefit from basic information like what an LLC is, export bank information, and general exporting information. She said exploring investment incentives and sharing new regulations would also be useful to SME's for the next dialogue.

The US suggested group specific cooperation dialogues with the audiences primarily being service providers, veterans, and women owned business groups. The UK said we would explore.

The US suggested the next SME dialogue deal with Brexit. Christina said there was high interest on the US side, and it could be useful doing a session on business before and after March 2019.

Department for
International Trade

Discussion turned to the timing of the next TIWG – potentially in July. Kate said the European Council calendar needed to be consulted and digital trade and e-commerce could be good session for the next dialogue and working group. Christina said a dedicated e-commerce training session at the next dialogue with valuable resources could be a good transition to a session later in the date on digital trade.

Rebecca commented on services broadly, saying how important they are for SME engagement. She said that the UK is internally pinpointing their policy positions. She suggested the next dialogue have time devoted to services.

Andrei suggested conversation on innovation at the next dialogue and working group including a BEIS presentation similar to the competitiveness exchange presentation by Commerce.

Discussion turned to the format of the dialogue. Julian set out that regardless of topic, the next dialogue needs to be advertised more clearly as either a dialogue with lots of conversations and round table discussion or as a government presentation so UK audiences know what to expect. Christina explained that in the US-EU SME workshop the initiative started as a half-day session and moved into a full day. She was open to more time and different formats in the next dialogue. Angie suggested that a combination of presentations and interactive portions could make for a successful second dialogue. Julian said that in the next dialogue he would want more SME participation and less government presentation. Rebeca suggested a joint session at the next working group meeting to plan the second dialogue.

Christina summarised the discussion and noted that the next working group will take BEIS presentation on innovation. Julian requested a presentation on the NAFTA chapters in the next TIWG meetings. Major said he would send additional ideas to send to Christina.

Lizzie asked about stakeholder evaluation following the dialogue. Christina wanted US and UK feedback to be sought separately. She suggested that as a general plan the next SME dialogue could occur later in 2018.

Julian asked that new agreements in the SME session not be included in USTR's formal statement (published Friday 23 March). He suggested the previous statement agreed to by London and Washington be maintained as it had been approved considering sensitivities around the European Council. Christina and Julian agreed keep the previous statement and have a secondary conversation about a statement specific to the SME session.

Department for
International Trade

Title of Meeting: **Services (MRPQs/Professional Business Services)**

Date: 21 March 2018

Time: 14:00

Participants
(Please list both UK and US participants, even if joining via VTC or conference call)

Name	Department/Directorate
Rebecca Fisher-Lamb	DIT
Ben Rake	DIT
Matt Ashworth	DIT
Gavin Bayliss	BEIS
Lizzie Chatterjee	BEIS
Katie Waring	DIT
Rhys Bowen	DExEU
Oliver Griffiths	DIT
Meghan Ormerod	British Embassy Washington
Tom Fine	USTR
David Weiner	USTR
Ryan Barnes	Department of Commerce
Rebecca Nolan	State Department
Jessica Simonoff	State Department
Chris Mckinney	US Mission to the EU
Greg Burns	US Embassy Washington
Matthew Jaffe	USTR
Tim Wedding	USTR
Silvia Savich	USTR

Report of Discussions and Outcome

ICAS/AICPA/NASBA Agreement

1. Tom Fine (TF) opened the discussion for USTR, outlining the Mutual Recognition Agreement signed recently between the Institute of Chartered Accountants of Scotland (ICAS) and the American Institute of CPAs (AICPA), and the National Association of State Boards of Accountancy (NASBA) representing US state level regulators. He described auditors as being in a unique space in which there could be quick movement on bilateral work. TF said that USTR would like to go through some of the issues that this agreement had raised that would likely come up in the future.

Department for
International Trade

2. Rebecca Fisher-Lamb (RFL) agreed that this was a good example of positive bilateral work that we should look to build on. HMG was keen to build on the potential for auditors and then have a broader discussion on other service professions. This could include regulators. The UK is keen to learn from the US experience with other countries to see what we can learn and use in a UK-US context. RFL noted that it was important to get started and get planning on MRPQs given the large amount of coordination needed and time this is likely to require.

3. TF explained that NASBA is an umbrella group for state level regulators. The state level regulators work very closely with their umbrella organisation. Auditors are a very concentrated industry in which there are not a lot of players (a few big firms) they tend to face the same issues again and again. In practice, the states licence professionals in a uniform way. It is very easy for US licensed individuals to move from one state to another.

4. The agreement will not come into force in a state until that individual state has taken action to recognise it. NASBA does not have legal authority to bind a particular state, but they do have a lot of experience in signing this type of MRA. They know what they can persuade a state to do. As a result, they can sign this type of agreement, with a high degree of confidence that the majority of states will recognise it. However, in all MRAs signed negotiating partners take a risk in this space. The "rubber doesn't hit the road"; the benefit is not provided until the states take the agreement into their law. Following the signing of the agreement the process now turns over to the states to begin to start implementing this through their legislation or regulation.

5. RFL asked how long this usually takes. TF explained that it varied, but that in the case of another MRA in the architecture profession an MRA was signed last July and by December 30 states had signed up. The state level legislative process can happen much more quickly than at the federal level, and there is often the option of implementation through regulation rather than legislative action. Past auditing agreements have previously always enjoyed a high take up rate – almost always 49 of the 50 states have signed up. TF commented that auditing is the profession with the highest number of MRAs. TF reiterated that this is because auditors are very engaged; there are a very small number of very large firms. Firms have a very high interest in moving personnel from market to market very quickly to serve the needs of their clients so there is a high appetite for MRAs. Many other professions in the US have firms spread out across the states, but auditing is one of the exceptions. TF commented that this was just his "pop psychology" of the industry. Ben Rake (BR) noted that key personnel could also have influenced this and that Ken Bishop at NASBA had made a big push on it.

6. RFL asked if USTR has a role in arranging the MRAs, or if they leave this to the state and professional bodies to arrange. TF explained that USTR does not play an active role but is occasionally asked in to brief on the overall trade picture and some parts of the federal government might be asked specific questions on which they will provide advice to those negotiating the agreements.

7. TF explained the dynamic between the states and the federal government. The states' interest in maintaining their authority is paramount. They would not willingly invite the federal government in. They view MRAs as solely an interstate matter. As trade officials we think of MRAs as a type of trade agreement but this is not how the states see it. They consider an MRA to be both sides doing something unilateral but taking parallel action and making their own decisions. TF said that it's widely understood that this is something of a charade – in the Scottish agreement clearly the states only agree to sign up to it because

Department for
International Trade

Scotland is doing something similar. RFL said she wanted to work out how we can support professions in seeking this type of agreement for the whole of the UK. During the TTIP negotiations the US seemed to have a good balance between federal government involvement and recognising state and business'/professions' autonomy. RFL explained that this should be seen as a real opportunity: in TTIP the US repeatedly said that they would like to recognise the UK's professions but they could not trust standards in all EU countries.

8. TF agreed. The IQOP had already expressed to TF that they are beginning work with other institutes in the UK. They expressed a high degree of interest and optimism that within 2018 they would have more agreements of this nature. TF explained that this would vary from institute to institute and that each negotiation would raise different issues, but that they seemed optimistic.

9. BR explained that DIT hoped that it would be possible to agree something more widely than with Scotland and that DIT is working close with the relevant bodies to see what will be possible. From conversations with UK regulators he was reasonably optimistic, and it was good that TF was hearing similar messages. In the UK the Financial Reporting Council would have to sign off on any deal done, but there is no reason to believe that it can't be done.

10. In response to a question from TF BR set out the system of regulation in the UK. ICAS is a private sector body. There are four audit professional bodies in the UK overseen by the Financial Reporting Council which is quasi independent from government. The Financial Reporting Council would have to sign off on any agreement done by one of the regulators – e.g. by ICEAW. In the case of the Scottish agreement ICAS pursued the agreement independently but had to get sign off from the Financial Reporting Council.

11. TF asked if people who obtained their qualifications through ICAS could only practice in Scotland. BR didn't think so, but took an action to check this.

12. RFL commented that the Scottish agreement had made others think enthusiastically about the options available in this space and the potential for other agreements. TF said that the Scottish agreement was one that might appear to have been done very quickly but that actually took ten years; the parties had been working on it for a long time. BR agreed, the equivalent bodies for England and Wales said they had been talking about a similar agreement for 25 years.

13. TF said that the main focus from the US side in the immediate future was likely to be on ICEAW. The umbrella body in the US will maintain an open mind and treat all institutes evenly but equality of opportunity does not mean equality of outcome. TF noted that he was speaking frankly in saying that the US body did not see all institutes as being equivalent to one another. Some institutes are a much closer match to the US in the requirements they seek. BR noted that equality of opportunity was important and that the UK would want to see all audit bodies treated with an even hand.

14. RFL noted that there is a lot of interest now in the discussion and that the focus should be on how any agreements of this kind will be implemented. TF commented that the UK should expect to see rapid implementation. He said that he would put a word into his contacts and ask to see progress reports. BR said that he would do the same on the UK side.

Department for
International Trade

15. On implementation both sides noted that that the agreement would be operationalised on a reciprocal basis: e.g. Scotland will recognised NY qualifications when NY recognises those obtained through the Scottish body. TF noted that some agreements only take effect when a certain number of states have signed up. Architecture agreements are often designed in this way.

EU Audit Directive

16. TF noted that the US has some specific questions in relation to the Scottish agreement. The EU Directive requires that in order to get auditing rights you must have certain number years of experience and that experience must have taken place in the EU. ICAS has undertaken to seek a view on whether they can recognise years of experience in the US State of the MRA. TF described the rule as "pure, rank protectionism" and set out that in his view there is no relation between the location of audit and validity of experience. TF said that the US had a high degree of interest in seeing the UK step away from the Directive as soon as the UK is able to do so.

17. BR explained that the UK is still currently party to EU Directives and that the UK is still working on what the situation will look like post-Brexit. BR asked TF to explain some of their concerns in further detail.

18. TF explained that their main concern was US persons who wanted to perform audit in the UK. Currently very senior partners had to have their "homework" signed off by more junior colleagues, simply because the Directive does not recognise their years of practice in the US.

19. BR said that his understanding is that the UK and US systems of regulation have a degree of complementarity. TF said that the EU had taken wide reservations on auditing rights, but they understood that this was not driven by the UK. TF set out that the US is not pushing for people who are unqualified to be able to practice or sign off work, but they take issue with the Directive not recognising years of experience in the US because it is outside of the EU.

Potential Architecture MRA

20. RFL asked TF to explain why it is more difficult within the Architecture profession to get all states to sign up to agreements. TF said that this is still the second most active profession, but that it is structured differently. TF knew of agreements with Canada, Mexico, Australia, New Zealand and potentially one other country.

21. Australia and New Zealand agreements were signed last summer. There was a period when the architecture profession was not sure if it wanted to continue to sign agreements of this kind. The Architecture regulators took the question to their board of directors and there had been lots of internal debate. The regulators had finally decided that they do want to continue to move forward on MRAs last summer.

22. There is an active US-Canada architecture MRA. Mexico is less active, and TF suggested this is largely down to different operating languages. Architecture agreements tend to be more complicated in that the regulators take a "very hard look" at the partner with whom they are negotiating and take a decision about whether there needs to be a top-up qualification or exam before recognising their qualifications. For the Mexico agreement you can only access it when you have had 5-10 years' experience, so it is not designed for

young architects. Similar judgements are made in all agreements of this kind – for example in the Scottish agreement individuals on both sides must have 2 years minimum experience in order to qualify. BR asked why the US pursued an agreement with Mexico when the demand/take up was so low. TF explained – he suspected it was mostly politically motivated.

23. Gavin Bayliss (GB) asked if there was an examination requirement as well as an experience requirement. TF explained that there is. Regulators take into account the examination individuals in a country are required to do. If they think the examination is good there is usually still a secondary examination, there is also a portfolio review which many think is quite burdensome.

24. TF explained that in the TTIP context architects were leaping ahead of even the auditors. There had been lots of conversations, but it was always unclear to the US whether the Architects Council of Europe represented industry or the regulators. The problem in TTIP had been that notwithstanding the fact that there is a Professional Qualifications Directive that allows architects to move from one MS to another, US regulators/industry found huge differences between Member States. Some MS produced high quality architects with years of exams, apprenticeships and experience others did not.

25. TF explained that the US' initial approach in TTIP had been to offer three options: 1) Every architect in the EU would be treated in the same way, regardless of the member state. This resulted in a proposal on a fairly burdensome track that assumed the lowest common denominator; 2) Distinguish between MS. Those with higher education requirements treated slightly better than MS with lower requirements. USTR had assumed this would be attractive to the Cion as it would give them leverage over those MS with lower standards, and present a way to get MS to lift their standards. The Cion did not support this approach; 3) Forget MS and look at individual architects. If an individual architect has attended a challenging educational establishment, has long experience and taken a high degree of challenging coursework they should be given extra credit. The Cion opposed this, arguing that it was a backdoor to distinguishing between MS.

26. RFL asked why different states took a different approach to signing up to this type of agreement. TF explained that some regulators simply are not interested. All states begin from the position that they have a reasonable pathway open to everyone in the world. If an individual wants to practice in that state all they need to do is (for example) take steps 1-6 and obtain their licence. The regulators argue that this is what individuals from other US states have to do, so people from other countries should be required to do the same.

27. TF explained that that occasionally USTR stumbles upon a law covering a profession (e.g. undertaking or hairdressing) that requires citizenship for qualification (not the big four professions). When they are found they tend to be overthrown. TF explained that this tends to be the direction of US law – people don't have to be a certain citizenship to obtain licences for professions.

28. TF summarised saying that to the extent that States are not interested in the architecture MRAs it's because they have an existing route to licensing. This only accounted for a minority of states. New York is one of them. TF said that NY doesn't care about MRAs – their approach was that if you want to build in New York there is a pathway to follow for everyone. RFL commented that the industry is very focused on New York. It was difficult that there is a different expectation on both sides – states expected access to the whole of the UK whereas MRAs only offer the UK state-by-state access in the US. TF recognised

Department for
International Trade

this, but said that ultimately, the states were just cutting their own people off from access to the UK too – no one was able to free ride on an agreement.

29. BR noted that NY had opted out of the national agreement and then made their own MRA with Canada. TF explained that he wasn't sure why this was, but could reach out to contacts to ask.

Engineering

30. TF explained that engineering offered a good illustration of how states view MRAs: as nothing to do with international trade. Texas needs lots of engineers and as a result has lots of MRAs. It's all based around demand.

31. TF set out that the US reported to the OECD on its MRAs a couple of years ago and agreed to share the report with RFL.

32. RFL said that the UK and US needed to be practical and pragmatic on this issue. Where there are states that have an interest we should take the opportunity – even if it is just a few states.

Cross-Cutting

33. TF agreed. He explained that the US had filed a paper in 2013 during the TTIP negotiations. The view expressed there was that where regulators want to sign an agreement the government should let them – where they don't there should not be pressure from government to do so. This approach shocked the EU. TF explained that this facilitative approach meant that the US has two dozen MRAs whereas at the time the EU had none. This approach means that regulators don't have any fear that the federal government is trying to step on their toes and as a result they had been very successful.

34. BR asked if the US had prioritised different sectors/professions in their "cheerleading" approach. TF explained that their approach was just the more the merrier.

35. TF said the only role they actively take is to call the regulators in fields where there is a big interest from industry or the negotiating partner and ask if they are considering an MRA or talking to their counterparts.

36. RFL asked how USTR stays hands off but engaged. HMG wants to support, enable and encourage but without stepping over the line to interference and appearing to take control away.

37. TF explained that USTR meets with industry and professional bodies constantly, but not always through formalised processes. USTR lets the professions know that they are available, and attends their regular meetings. There is interest from the professions in what is going on with the US' trading relationships, what is going on with Brexit for example. This gives them the appetite to engage with the US government. The states and industry are involved in the trade agreements and negotiations. They have a role in the formalised review system. There is a role for cleared advisers and for representatives of every state. All know that there is a way for information to be exchanged.

38. TF explained that the relationship between the states and the federal government means that if USTR said it was their intention to issue federal licences for architects they "wouldn't survive a day", the states take their autonomy in this area very seriously and there would be "uproar". RFL said that she understood this point, and recognised that this needs to be about creating the right forums for the UK to engage with states and to facilitate the engagement of the right professional bodies.

39. TF said that the "fortunate thing" is that states largely did want to cooperate with trading partners. In auditing the professional body sets out every year which their priority countries are, and which countries they want to do deals with.

40. Lizzie Chatterjee (LC) asked if USTR sees a trajectory towards reducing barriers to state-to-state movement within the professions. TF thought there was. In auditing it used to be more difficult than it was now, there had been movement on this over the last few years. Within the legal profession they saw more states developing tools to allow attorneys from one state to act in another state. There had been a strong show in the nursing profession where there were recently established compacts between 20 states. TF thought this might be because there was more mobility now than there had been fifty years ago. He could not think of anywhere where there were retrograde steps towards less movement between states. TF said that as states were doing this they were also thinking at the same time about individuals who had qualified in different countries.

41. BR asked if the states worked together on other issues relating to the professions, whether if an auditor is struck off in one state and tries to move to another is there a notification requirement. TF said that states cooperate very closely on questions of professional responsibility – there are computerised databases within some professionals (e.g. legal profession).

Next Steps

42. RFL asked how the UK and US should take this conversation forward and what might be possible in an FTA context.

43. TF said that both sides should bring their auditors into the conversation, particularly if there are specific areas where the UK wants to move forward. He outlined that in the TTIP process the US took their architecture auditors over to Brussels to sit down with the Cion and EU regulators and encourage them to pursue an MRA. USTR said they were open to doing similar but that all they could do is ask.

44. TF suggested that there would need to be a conversation at some point about Market Access and National Treatment. There would need to be a conversation in each sector and they would focus very closely on what the UK's plans are post-Brexit in the professional services area. TF said that the US had "bumped into some unfortunate areas" in the EU as a whole in this area. The US would be interested in whether the UK is planning to adopt the EU approach in the future and this conversation would need to take place in the process of preparations for an FTA.

45. TF said that there is much in TISA that the US had brought across from TTIP. TF suggested there is a lot in TISA that could be brought into a UK-US agreement. TF said that the UK should take a look at Part II of the TISA Professional Services annex. This talks about setting up a process for negotiating future MRAs and co-operation on mutual recognition. TF said that this is the type of language the US would look for in a future FTA.

Department for
International Trade

The language “has a softness to it” because of the challenges the US has in enforcing trade rules on its states.

46. BR said that CETA could also be a guide. This sets up a model that professional bodies can follow while still being relatively “soft”. TF said that the US’ general attitude towards CETA is that it was too detailed for the US. This wasn’t inherently a problem, but they don’t think that 14 pages of rules are necessary. This is something that can be discussed further in April 2019.

47. RFL asked how the NAFTA negotiations are progressing in this area. TF said that if DIT looks at TPP and TISA it will have a good idea of what is in NAFTA. The US is moving as quickly as it can on NAFTA. There are lots of MRAs already in place between the US and Canada so it’s not highly controversial. TF said that the US always treats MRAs as part of the cross-border services chapter rather than breaking it out into its own chapter. Pushed on this TF said that the US would want to stick with its own structure and to have this included as part of a cross-border chapter.

48. RFL noted that the Australian model has a standalone chapter for this and that doing so could be helpful in explaining to people how it works, giving people just one place to go in an agreement rather than requiring a lot of cross-referencing. TF was reluctant arguing that this had never been an issue for the US. The argument for doing so seemed based on rhetoric rather than logic. RFL said DIT was looking into this.

49. RFL asked if USTR undertakes communications work to explain how an FTA will benefit professional services bodies. TF said this had never been a major concern.

50. RFL asked if there is action in APEC on this issue. TD said this was less of a priority. A number of APEC countries would not qualify any time soon as MRAs tend to focus on developed countries. The US approach of leaving regulators largely to their own devices meant that generally they wanted to agree MRAs with regulators they already know.

51. TF said he wanted to flag legal services – there were not currently any MRAs in the legal profession. BR said that DIT hears a lot from the UK profession of the complexity of operating across different states. They experienced many different levels of permission to act. There was interest in looking at what could be done in this area but awareness of how difficult this would likely be. TF agreed that this is a complicated area. DC has a very liberal fly in fly out rule, some states have very different rules – for example California is much more closed. However, TF had been struck that the legal profession keeps approaching him to say they want to ’do something’.

52. BR suggested that this might be an area for both sides to take away to consider further. TF agreed and said that at an appropriate point it might make sense for HMG and USG to sit down with the professions on both sides to tease out exactly what they want the governments to do. RFL commented that the UK legal profession has a very long list of things they would like the parties to do and that she supports TF’s suggestion of bringing them together as part of a future working group. She agreed that the legal sector would be one of the most challenging areas, but the issues show it is worth looking at and it’s good to hear there maybe interest on the US side. TF said that even if the parties do not come up with something binding, devising a set of recommendations for good practice for facilitating transnational practices could be a positive outcome. The state of Georgia had previously published an international best practice toolkit that could be an interesting starting point.

RFL said that the UK would not want to limit the level of ambition to this, but that it would be good to get the professions round the table to set out their list of wants.

<u>Trade in Services Agreement (TISA)</u>

53. RFL noted that TF mentioned TISA at a couple of points during the discussion and asked if US thinking had developed since the US paused the discussions after the election. TF said that the US remained focused on NAFTA in the first instance, especially on goods and the problem with the trade imbalance on the goods side. The Administration had never been hostile towards TISA and Congress remained enthusiastic about it, asking at every opportunity. The Coalition of Services Industries continued to push the Administration forward on this, but had been strategic in recent months raising in the right way. Lighthizer was interested in studying it more and was very interested in ecommerce and digital issues. TF noted that this was one area of progress in Buenos Aires at MC11 and that Lighthizer was aware this was a big piece of TISA.

54. However, TF suggested that the digital and data conversations within the EU continued to present challenges. Officials face the following question from Lighthizer: “I could tell you to go and negotiate TISA, but it sounds like the EU is still sorting itself out on data flows”. TF said that Lighthizer is not hostile to TISA, but the Administration is still thinking about how it fits into their overall scheme on trade.

55. TF suggested that work on NAFTA was “rapidly accelerating” and that if that moved towards conclusion it could free up a lot more resource to work on TISA. TF described himself as being “guardedly optimistic” that at some point the US would begin to move forward on this, perhaps at a slow pace initially, but that further political guidance was required first. RFL asked for TF’s thoughts on timing. TF declined to give a set time frame saying he did not want to mislead the UK as he could be total wrong in his impression of the mood towards the agreement. As NAFTA progresses it seems more realistic that there could be forward movement now than a year ago. Strong hints where made that the US may reengaged ‘in the summer’.

56. TF said the Administration’s “learning curve” on the importance of services, and the potential advantages to the US had moved in the last 18 months. RFL noted that every time SoS Fox sees USTR Lighthizer he raises TISA and that there is “huge enthusiasm” for the agreement in the UK.

57. TF asked about the UK’s status in TISA during the process of Brexit. RFL explained that the UK sees itself as a member of TISA currently. TF asked if the UK sees TISA in a similar way to the WTO. RFL replied that this was correct. The UK is already a member. As TISA has paused we’re not able to have a conversation about the UK’s role within it. RFL noted that HMG has always said that TISA is different to concluded bilateral agreements. The UK sees itself as part of the agreement and would like to maintain that. Once conversations begin again or active negotiations start the UK will discuss its status with other TiSA parties. TF asked if TISA was unique in this regard. RFL explained that it is, and certainly different to CETA as an existing EU agreement – TISA is a plurilateral agreement and an ongoing negotiation. TF said he could see this logic but it would clearly be an issue to agree, including with the EU.

58. TF suggested that from March 2019 the UK would presumably have the right to come into the room during TISA negotiations but the EU could argue that the UK should be treated as China – or any other third country – and be held in the ‘waiting room’ by the EU. TF asked if

HMG thought the EU would have the right to veto the UK's position in the room. RFL said that her hope was that the Cion would be pragmatic about moving the discussion forward on TISA, as the US has regularly stated without the UK the value of the EU offer goes down and the value of the overall agreement reduces for every member.

59. TF said that the US would strongly support the UK's presence in the room during the negotiation but this would be dependent on the UK being able to support the US approach where we had shared interest in the negotiation, which could include with the EU.

60. TF explained that the practical concern for the US is that an ideal outcome for the US is to have an independent UK as part of the TISA negotiations, speaking freely (and in line with the US). He queried if it was worth the political capital to get the UK into the negotiating room, or even restart negotiations before 2021. RFL said that until it looks like the negotiations are about to re-start it would not be possible to have a detailed conversation about this. RFL outline that given most of the challenging issues in TiSA had been resolved this could be a fairly limited issue and the UK would want to access each issue in turn based on its economic interests.

61. TF said that in the context of TISA the US' two big issues with the EU are on new services and data flows. RFL said that she would take this point away. She would also be interested to hear from USTR if there is a good moment for the SoS to reach out to USTR Lighthizer on this.

<u>Implementation Period</u>

62. TF asked to discuss the implications of the IP for recognition of professional qualifications. In Chapter 3 of Article 25 of the Withdrawal Agreement TF had noticed that the article covers citizens of the EU 27 and UK nationals, and asked about the reason for this difference. TF noted that USTR had not yet had this conversation with the EU, but that the US would not be the only country with an interest in this distinction. TF was concerned that this might limit the rights of US workers, and dual nationals. TF's understanding is that for the IP a UK citizen or national will have the right under the MRPQ Directive to continue or obtain licensure in the EU. GB confirmed that this understanding is correct; if the process of licensure is under way before the end of the IP then it will be recognised permanently. GB explained that this had been a point of contention in the UK but that it appeared that any licence in train by 31 December 2020 would be grandfathered in forever. Other issues would be have to be taken back to our experts.

63. RFL explained that the position for the IP was that a British citizen based in France with their licensure in train for France during the IP would have that grandfathered in forever, but there is not a guarantee that they could use this in another EU Member State. This is just the agreement for the IP and there will need to be a discussion about the future permanent relationship during the negotiation this is getting underway now which will set the terms going forward. TF asked if it was possible that the UK would negotiate the right of British citizens holding a licence in France to allow them to work elsewhere in the EU. RFL explained that it would need to be negotiated as part of the future relationship. TF said that this was not reassuring, and that the EU does not have a lot of incentive to carry this forward.

64. RFL said she would take back the question of why there is a distinction between EU citizens and UK nationals in the chapeau of Article 25.1.

Department for
International Trade

Action Items

- Secure copies of the US list of MRAs by state paper they submitted in TTIP from EU reading room and OECD study
- Both sides agreed to take a pragmatic demand lead approach to MRAs, with flexibility for both sides to persue agreements below national level, i.e. with specific states on specific sector issues
- Set up a series of discussions between subsector bodies and regulators, covering audit, Architects and legal as a starting point.
- Both sides will review CETA, TiSA, APEC and NAFTA Text as a starting point for future commitments
- UK to follow up questions on the implementation period text on MRPQs and respond in writing to the US
- Both sides to keep in close contact on next steps with TiSA
- Both sides to consider where they can work together to improve the trading environment for professional services globally, looking at where are firms are facing the same challenges.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

A good discussion that lead to a meaningful way forward. Started with US reluctance to give any suggestion that the federal Government play a role in these agreements. Accepting they could not mandate or 'force' state level activity and using words like facilitate, engage and support saw a step change in the tone of discussions. It became clear USTR do a huge amount to facilitate these discussions. They have very close relationships with the relevant bodies and stakeholders that enable them to track progress, identify priorities and facilitate discussions between bodies on both sides. The agreement to take a pragmatic approach to gain traction with the states that mater, on the sectors that matter to both sides will enable progress. This could be a real area for substantive outcomes but will require some heavy lifting and facilitating that is resource intensive. Both the US and AUS have dedicated PBS units and we will need to consider our model as we move into negotiations.

The TiSA discussion was a very clear signal by USTR, that is echoed in recent US press, that they are considering reengaging in the summer. They are going to ask for something in return for supporting the UK continuing role in the negotiations, so this will require political level discussion. Timing for the conclusion of negotiations against the UK relationship with the EU could become problematic, we will try to influence this to ensure it happens during the IP period.

Department for
International Trade

Title of Meeting: **Intellectual Property**

Date: **21 March 2018**

Time: **14:00–16:30 (EDT)**

Participants

Name	Department/Directorate
Sophie Brice	DIT – UK-US Trade Policy Team
Ada Igboemeka	DIT – Sustainability
Mark Prince	DIT – IP
Meg Trainor	DExEU
Thomas Walkden	IPO
Adam Williams	IPO
Jennifer Blank	USPTO
Sarah Bonner	US - Small Business Administration
Miriam DeChant	USPTO
Christine Peterson	USTR
Rachel Salzman	US - International Trade Administration
Michael Shapiro	USPTO
Steven Shapiro	FBI
Ian Sheridan	US - State Department
Anne Snyder	US - Department of Health and Human Services
Alexandra Whittaker	USTR

Key Points to Note

- Stakeholder engagement on IP toolkit at US-UK SME Dialogue was positive and US-UK collaboration will continue in this area, including ensuring the inclusion of IP in the next SME Dialogue.
- The US outlined their approach to prosecuting trade secrets. While the UK noted that its approach is different, it stressed that outcomes can be the same. The UK will produce a paper outlining its approach on trade secrets.
- The US provided an overview of possible changes to US copyright legislation including the Marrakesh Treaty Implementation Act and a cluster of bills aimed at improving the efficiency of music licensing. The US will provide the UK with more details on these potential changes.
- The US voiced concerns around the protection of US business' EU trademarks in the UK following EU exit. The UK provided assurance that it was working to ensure there would be no gap and outlined some of the possible options being explored.
- There was agreement on the value of the US-UK collaboration on tackling illegal content online which had taken place since TIWG2. This will continue and the UK will produce a paper on its approach in this area.
- IP enforcement will be a focus at upcoming meetings.

Department for
International Trade

Report of Discussions and Outcome

1. Update on Intellectual Property (IP) toolkit and SME dialogue

MD (US) updated on the IP toolkit brochures, each tailored for a US or UK audience and designed to raise awareness of key resources for SMEs to consider when exporting from the US to the UK or vice-versa. Both are available online. All agreed that the promotion of the IP toolkit at the first US-UK SME Dialogue went well. RS (US) noted that the event was oversubscribed and full despite extreme weather conditions, and that the event had emphasised the operational value of the toolkits for SMEs. AW (UK) noted the high level of engagement and interaction from SMEs on IP issues at the session.

RS (US), MD (US) and AI (UK) remarked on the positive US/UK relationship on IP and the collegiate process between the US and the UK's IPO and DIT which built the toolkit over the last six months. All agreed on the value of continuing to collaborate in this area and of leveraging the toolkit to further promote awareness of existing resources. AW (UK) suggested assessing the toolkits' effectiveness and whether the toolkits are reaching the right people. MP (UK) proposed a US-UK brainstorming call to follow-up on this discussion. It was agreed that a webinar moderated discussion with SMEs would be held to further promote the toolkits. AW (UK) noted that UK trade advisors could also help to further promote resources in this area to SMEs, and that it was important to look more regionally in the UK.

During the earlier 21/03 TIWG3 SME session, it had been agreed that the second US-UK SME Dialogue will be hosted in the UK; IP session attendees agreed to link with SME Dialogue leads to ensure IP is incorporated. SB (US) noted that surveys will be conducted of SME stakeholders, and that IP leads should link with survey leads to ensure IP is included. CP suggested that attendees collate and share the key areas of questions from SMEs going forwards.

2. Update on US & UK IPR systems and likely future changes

2a) Defence Trade Secrets Act (2016)

CP (US) provided details on the implementation of the Defend Trade Secrets Act 2016. The Act did not displace state laws which continue in parallel and often in conjunction.

The US presented the criminal case example of the Sinovel Wind Group prosecution. This was a long case, initiated in 2011 and concluded early 2018. Sinovel was successfully convicted of stealing semiconductor source codes from AMSC semiconductors. The theft had serious implication on AMSC's value and resulted in the loss of half of the company's workforce. Sentencing will take place shortly. SS (US) noted that the prosecution was not looking to hold the individual employee accountable but to focus the prosecution on the company which incentivised them to act.

The US presented the civil case example of Waymo vs. Uber relating to self-driving car technology. An executive had left Waymo for a position at Uber, taking proprietary files. The parties settled, with Uber agreeing not to use the proprietary information.

KP (US) observed that the Defend Trade Secrets Act was supported by industry as they wanted a federal cause of action which in particular would allow for civil prosecution. It had taken several years to enact with lots of negotiation on seizures. CP (US) noted that stakeholders see having consistent right of action to prosecute trade secret misappropriation as crucial in the US and that there is enormous stakeholder interest in seeing this pursued in trade policy; it is part of NAFTA negotiations. In terms of difficulties caused for US business due to lack of a similar provision in

Department for
International Trade

other jurisdictions, KP (US) highlighted China and disparities such as the fact that in last year's EU directive trade secrets was not considered intellectual property whereas in the US it is. CP noted that the OECD had indexed countries on trade secrets, with China ranking low. The US has also had complaints on access to cause of action on trade secrets in Austria and India. On Austria, the US is conducting further conversations to understand this better. On India, AW (UK) noted that the challenge in India – like Indonesia - is access to justice, rather than any issue with the statute books. AW (UK) noted that while issues are raised by UK stakeholders on access to justice in other countries around trade secrets, with the exception of China the UK does not get the same level of stakeholder interest as the US on the legislation around trade secrets in other countries, perhaps due to sector skew.

AI, AW and TW (UK) noted that while the UK does not approach trade secrets in the same way as the US, the outcomes can be the same. They highlighted the importance of outcomes from a trade policy perspective. For example, in the UK the Computer Misuse Act or Fraud Act would cover the criminal case mentioned, and are well known in policing and the prosecution service. The UK agreed to provide a written summary on the UK's approach to prosecuting trade secrets including case examples. This will take place after 9 June when the UK will have implemented with the EU directive. A follow-up VTC will be held for any questions.

2b) Trade Facilitation and Trade Enforcement Act

The US presented on the Trade Facilitation and Trade Enforcement Act, which allows customs and border protection to enforce IP rights at the US border. The Act enhances the exchange of information relating to IP trade enforcement and allows for the seizure of circumvention devices. The Act makes enforcement at the border for copyrights pending registration equivalent to that for copyrights already registered. It requires the allocation of sufficient personnel, and the provision of training and consultation. It also requires education, related to which the US described an IPR ad campaign in US airports on dangers associated with buying counterfeit goods. This ran from July to August 2017 and November to December 2017 and reached 202m people. It included roadshows reaching 5,000 people in person. This campaign was planned prior to the Act as there was existing authority for such activity, but the Act makes it mandatory. RA (US) does not believe there are measures for gauging whether the US campaign is impacting buying but will confirm. The suggestion was proposed that such activities in future could be something which stakeholders might lead rather than the state.

AW (UK) and TW (UK) noted that the UK has run similar campaigns on counterfeit goods with trading standards organisations, and has discussed this issue with other EU Member States. The UK is planning to survey markets across the UK to gauge whether the campaigns are working.

The Act introduces amendments to S.301 such as empowering USTR to create action plans for countries on the priority watch list and the President to take appropriate action in response to countries failing to comply with benchmarks. CP (US) noted that USTR has always had strategies surrounding these countries and that this change makes these more statutory and formalised in nature.

MS (US) provided an overview of possible changes to US copyright legislation, noting that the Administration has not yet weighed in. The Marrakesh Treaty Implementation Act was introduced last week in the Senate Judiciary Committee. The legislation will make tweaks to the S.121 copyright exception for the blind and visually impaired, and will introduce a new S.121a applying to the export/import aspect of Marrakesh. Hearings will be in mid-April. MS outlined a cluster of bills with aimed at improving the efficiency of music licensing. The Music Modernisation Act attempts to improve the statutory license system, with blanket licenses for all musical works. There is significant music industry support and it is in the mark-up stage in congress. The CLASSICS Act

brings pre-1972 sound recordings – currently covered only by state law - partially under copyright protection and digital audio protection. The AMP Act ensures music producers receive royalty payments stemming from the digital recording of public performances. MS (US) will share details on these possible copyright changes with TW (UK).

2c) UK IP protection systems
AW (UK) and TW (UK) outlined the UK system for protecting IP.

Devolution is not a major factor for IP protection given the that IP protection is a reserved power with a UK-wide framework. However, there are different legal systems in the Devolved Administrations, so there are differences in how the rights are litigated, particularly in Northern Ireland and Scotland. While decisions will be the same, court procedures differ. Cases can be prosecuted in the Devolved Administrations if a company's headquarters is in the Devolved Administration or if the infringement occurred there.

The UK has long had a small claims court and small claims track for non-IP cases; it now also has SME-friendly structures allowing for relatively cheap court access for IP cases. The UK's IP Enterprise Court gives SMEs access to court for small claims with a cost limit of £50k, with a damages limit of £500k. The court has sentencing powers. The value limits mean that the IP Enterprise Court tends to be used for copyright and trademark cases. It operates due to the largesse of specialist IP judges who use case management techniques such as limits on levels of discovery, limits on the amount of paperwork, and limits on hearing times. SMEs can still take cases to the High Court should they wish. The UK has discussed this approach with China and believes similar courts may be starting in Beijing and Shanghai. The UK also has a copyright tribunal with a particular focus on licensing disputes pursued by consumers who believe they are being overcharged, though the number of cases is low. While the UK offers ADR (Alternative Dispute Resolution) and mediation, this is complimentary to the legal process rather than part of the legal process itself. There is very low take-up for ADR on patents as claimants want the force of the courts, though mediations which do take place have a high success rate. MS (US) noted that the US Copyright Office conducted a 2013 small claims review, the recommendations from which were incorporated into the CASE Act 2017. TW (UK) suggested that the UK could look into setting up a call between UK and US judges to discuss the UK court system for IP protection.

CP voiced concern that US businesses may find their EU trademarks no longer protected in the UK post-EU exit. AW (UK) noted that this is subject to the Withdrawal Agreement and other future agreements. The UK is clear that the EU 28 trademark gives rights in the UK and that we will not throw this away. Subject to negotiation, one option is that there will be a system in place whereby companies with EU trademarks will be given UK trademarks either automatically or by application. The UK trademarks would protect in the UK only and there would be an additional renewal fee, though the length of time the EU trademark has been held would be recognised. Subject to further discussion, there is also an option that the future economic partnership may see the UK remain in the EU copyright framework. The UK is working to ensure there is no gap in protection, noting that the UK also has a key interest in this as UK companies have lots of EU trademarks. CP noted that the more automatic any process for granting UK trademarks the better, and that if an affirmative step is required from the rights holder then as much notice as possible should be given.

3. Discussion on IP protection for innovative pharmaceutical products

AS (US), JF (US) and Paolo (US) provided an overview of patent and pharmaceutical IP protections.

Department for International Trade

Patent term adjustments compensate for USPTO delays and are available for all patents. Patent term extensions are only available for products with pre-marketing regulatory approval such as pharmaceuticals, medical devices and food additives. They apply to the whole patent. Conditions include requirements that the patentee must request the extension (unlike adjustments which are computed automatically). Additionally, the patent cannot have expired when the extension request is filed, there can have been no previous extension, and it can also depend on how the product relates to the patent. The extension is determined by the FDA and calculated as a half day restoration for every day investigating new drug testing or a full day for every day while the applicant was awaiting regulatory approval, up to a maximum extension of five years and maximum total term of 14 years. The extension can be reduced if the applicant didn't show due diligence. AS (US) will provide detail to the UK on how often patent term extension and adjustments are used (in terms of volume and proportion of patents) and will set up a call between US and UK patent experts to discuss in more detail.

US provided an overview of pharmaceutical data protection. Agro chemicals have 10 years of exclusivity; biologics have 12 years of exclusivity; and small molecules have 5 years of exclusivity. The latter can be extended by new combinations. New clinical information – such as a new indication, new formulations or new routes administration – has exclusivity of 3 years.

US outlined pharmaceutical dispute resolution mechanisms, which differ between small molecules and biologics. Most of the steps by statute have a period of time associated with them of 30-45 days, with some exceptions noted below. The small molecule dispute process takes place through the orange book of new drug applications (NDA), which is not reviewed by the FDA. If a company submits an NDA for a generic then it will have to make a certification on whether the generic infringes the patent for the drug referenced. And if certification means invalid or not infringed by generic then the generic producer has an obligation to inform the patent/NDA owner of the generic application submission. The patent holder who becomes aware of the application can notify the generic producer that it intends to start legal action. The small molecule patent holder can seek a form of preliminary injunction with an automatic 30-month stay. Following the 30-month stay or final ruling by the court, the FDA can issue an approval - even if litigation hasn't concluded.

In the biologics dispute resolution process, section 351(k) applicants have to provide a quote to the biologic holder and inform of them of the biosimilar application. Once the sponsor of the original drug is informed they have to provide a listing of the patents they feel are infringed. The biosimilar applicant is informed and can then make certification of whether the biosimilar infringes those patents. There is 60 days for the process of exchanging list patents and making certification on whether it is believed that the patent is infringed. The biologics patent holder can start legal action but has to limit to what is defined in the Biologics Price Competition and Innovation Act (BPCIA). The biologics patent holder has to petition court should they want an injunction.

CP (US) noted the extensive US legislative history on biologics protection based on how long it takes to develop drugs. Given the clinical data and trials required to support drug approval and how many drugs do not make it to the application stage, term protection is intended to compensate for the effort required to create the supporting dossier and encourage companies to innovate. There have recently been calls for more protection for orphan drugs and paediatric diseases to encourage innovation in those areas. The protection discussed is part of a larger ecosystem including data protection for first generics. The biologics process allows biosimilars to enter the market without submitting an NDA from scratch, allowing them to get to market more quickly.

AW (UK) noted that the UK looks at this issue from the perspective of balancing incentives for generics and incentives for innovation. The UK allows patent term extensions via protection certificates, though this is a separate right that enters into force once the patent expires. The UK

exclusivity period is 5 years, while paediatric products can get an extra 6 months of exclusivity given that they have a slightly longer regulatory process. This exclusivity only applies to products with active ingredients, and therefore does not apply to medical devices. The UK recognises the importance of SPCs, and the fact that pharmaceutical companies will have made decisions years before the EU exit vote. The UK will have the right to issue once we leave the EU.

The UK suggested further discussions on the impact of US pharmaceutical data protection systems on generic entry and drug pricing would be valuable, and US suggested discussions on US legislative history behind the biologic protection period would be interesting to cover. The UK will invite MHRA to participate in follow-up discussions as they lead for the UK on data exclusivity.

CP (US) inquired on whether the UK was participating in the European Commission's ongoing pharmaceuticals incentive review, on which the US has heard concerns from pharmaceutical and biotech companies regarding some of the likely proposals. AW (UK) noted that the UK is working through it, that it may impact SPCs, and that they have concerns on the economic evidence behind of some of the changes. The UK is aware of the review as an area of concern for stakeholders.

4. Discussion on ways to combat illicit intellectual property content online that is hosted in either UK/US

The US's Intellectual Property Rights Centre (IPRC) was initiated in 2010 and focuses on investigations, outreach and training to counter IP theft, including countering the online distribution of counterfeit and copyright materials. IPRC's initial strategy was to close websites but it encountered a 'whack-a-mole' effect, whereby hundreds of websites would subsequently appear when one was closed. It therefore began to target individuals and their assets, and found that – despite US website domains - the individuals responsible often operated outside the US, sometimes in countries where the US does not have good law enforcement cooperation. Unlike the UK, the US cannot ask a registry to take down a website without a federal court order. For websites seized, IPRC redirects users to a seizure warrant which serves to educate. IPRC works with Interpol and Europol, and since 2012 has had numerous Europol joint initiatives supported by the UK. IPRC has involved rights holders, who patrol the internet for infringing materials and report such materials. IPRC highlights the benefits of publicising law enforcement and industry collaboration. US shared a case study of a music file sharing website based on international servers which made money from subscriptions and advertising. The US had international cooperation in evidence gathering and was able to prosecute the individual responsible who was given a 3-year prison sentence. In FY16 IPRC seized 199 websites and had 7 arrests; in 2017 this increased to 1,121 website seizures and 10 arrests.

AW (UK) noted that the UK's activity in this area includes collaboration with the US and bringing up messages when a website is seized informing the user that the content is illicit and redirecting them to where they can buy the content legitimately. Search engines in the UK have agreed to put infringing content far down their results. AW (UK) flagged the importance of goodwill from businesses involved. He emphasized that businesses need to instruct advertising placement agencies that they do not want their advertisements to go to illegal websites. TW (UK) noted that the UK's Intellectual Property Crime Unit runs Operation Creative to identify these websites to advertisers.

During the November meeting SS (US) highlighted the potential for collaboration on illicit streaming devices and wider discussion on infringing content online. There was a discussion in December and a workshop in February, with the decision taken that the group should continue. It was agreed that the group's actions to disrupt and deter illicit activity would start with live sporting events. The last call had included broadcasting and tech experts, and European IP prosecutors. MP (UK)

suggested the group could link with business as a next step. CP noted that the US/UK dialogue in this area has helped the US as they implement some of more longstanding trade policy mechanisms.

The UK will produce a discussion paper on the UK's activities for tackling illegal content online relating to website blocking, takedown, domain registration and advertising. It will also touch on other areas and – should the US want more detail – the UK will link the US to the UK enforcement team.

5. Update and next steps on the STO Workplan

US and UK teams ran through the work plan with updates from the November 2017 TIWG2 meeting. It was agreed that positive progress had been made to date, via the IP Toolkit and SME Dialogue IP panel. Agreed to seek out further areas for collaboration in the future.

Action Items

Actions agreed and confirmed by follow-up email with USTR

1. SME Dialogue – IP panel
- Agreed that the SME dialogue was successful and provided a good platform to discuss IP and launch the Toolkits.
- Agreed to continue to work with the SME workstream towards the next SME dialogue (London, date TBC, but likely to be aligned to the next working group)
- Next steps – Ensure that the Toolkits are distributed to SMEs at suitable events and via public engagement sessions. Ideas include: Trade shows, Education chat sessions, Webinars, online links/resources, SME starter packs. Bring together existing distribution channels including: ITI (division of DIT), UK and USA IP attaches, Small Business Association events.
- ACTION – Setup a brainstorming call to discuss details of distribution plan – MP to arrange with Miriam Dechant (Scheduled for 12th April)

2. Updates on the U.S. and UK IPR system
- ACTION – UK to produce a paper outlining how the UK Trade Secrets system works – TW/MP
- ACTION – Arrange VTC to discuss Trade Secrets paper – MP
- ACTION – Arrange call with Mike Shapiro to discuss the Music Industry Bills in further detail – MP

3. IP protection for pharmaceuticals in the U.S. and UK
- ACTION – Follow-up discussion to be arranged between US & UK patent leads and MHRA, DHSC, OLS at TIWG 4 – MP

4. Discussion on ways to combat web pages with illicit material that are hosted in either the UK or the United States
- ACTION – Potential Enforcement theme for TIWG 4 – MP/CP to discuss

5. Short term outcomes: review of work plan and next steps
- ACTION – Setup VC for Joint Economic Study in early April – MP (Scheduled for 11th April)

Department for
International Trade

- ACTION – Review the STO Workplan one-pager (MP and CP shared respective versions). Continue to share latest version prior to TIWGs. – MP to send UK draft to CP prior to TIWG 4.

Other actions/follow-up

1. SME Dialogue – IP Panel
    a. Potential Action - A moderated webinar discussion with SMEs will subsequently be held to promote the toolkits. US and UK to share key questions they receive from SMEs on IP. – MP to discuss with JF/KM
    b. ACTION - IP session attendees will link with leads (JF/KM) on second SME Dialogue to ensure IP incorporated. – MP

2. Updates on the U.S. and UK IPR system
    a. US will confirm whether there are any systems in place for gauging the effectiveness of their campaigns on counterfeit goods.
    b. US will share further details on possible US copyright legislation changes with the UK.
    c. UK will explore the potential of setting up a call between UK and US judges to discuss the UK court system for IP protection in more detail. – To be discussed between AW/AI/TW/MP

3. IP protection for pharmaceuticals in the U.S. and UK
    a. US will provide detail to the UK on how often patent term extensions and adjustments are used (in terms of volume and proportion of patents) and will set up a call between US and UK patent experts to discuss in more detail.
    b. The UK suggested further discussions on the impact of US pharmaceutical data protection systems on generic entry and drug pricing would be valuable, and US suggested discussions on US legislative history behind the biologic protection period would be interesting to cover.

4. Discussion on ways to combat web pages with illicit material that are hosted in either the UK or the United States
    a. ACTION - The UK will produce a discussion paper on the UK's activities for tackling illegal content online relating to website blocking, takedown, domain registration and advertising. It will also touch on other areas and – should the US want more detail – the UK will link the US to the UK enforcement team. – TW/MP to discuss
    b. US-UK group collaborating on tackling copyright infringing materials will continue, linking with business as a next step.
    c. Potential Enforcement theme for Q3/4 2018 working groups

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- Positive atmosphere, benefitting from significant progress on STOs and rapport built over TIWG 1 & 2 + calls/VCs held in the interim.
- An extensive discussion covering several large policy areas. The US are eager to engage and discuss policy in-depth. We should be aiming to engage in more in-depth discussion on how the UK system works eg on pharmaceutical protections as a means of positioning ourselves in relation to future US asks. This session was a start and we should aim to make

further progress on this in the lead up to the next WG. This will require engagement from key experts. We should also aim to focus discussions at the next Working Group on some of our offensive interests. This opens up the potential for topic specific sessions at TIWG 4 and several workstreams highlighted in the action points above to drive forward positioning during Apr/May/Jun 18.

- We should also adopt the case study method used by USTR, which incorporated highlighting business-based examples and illustrating specific policy points. Used effectively this could help outline UK policy interests in future working groups.

Department for
International Trade

Title of Meeting: Services and Investment Session

Date: March 22, 2018

Time: 9:00am

Participants
(Please list both UK and US participants, even if joining via VTC or conference call)

Name	Department/Directorate
Thomas H. Fine	USTR, Director, Services and Investment
Robert S. Tanner	USTR, Director, Services and Investment
Matthew P. Jaffe	USTR, Associate General Counsel
Lauren A. Mandell	Deputy Asst. USTR for Investment
Elizabeth Wewerka	US Dept of State, European Bureau
Lola Fadina	DIT – Investment
Matt Ashworth	DIT – Investment
Rebecca Fisher-Lamb	DIT – Services
Ben Rake	DIT – Services
Jaya Choraria	HMT
Janet Shannon (sp?)	US interlocutor
Matt Sullivan	US Treasury

Key Points to Note

The attached note should be read with significant caution. The discussion was a presentation of the US approach, with the UK focus on trying to move the discussion onto investment rather than really probe the US approach. As such the below hides a number of weaknesses in the US approach. It is not an accurate portrayal of the strengths and weaknesses between negative or positive listing in services. It is also misleading on a number of the issues that occurred in the TTIP negotiations. It is however a good outline of the US position on both services and investment

Report of Discussions and Outcome

Thomas Fine (TF), Director of Services and Investment at USTR, led the discussion on the US side.

TF: Thank you all for coming. We look forward to having a fairly general discussion on services and investment based on past Trade Working Group meetings. I plan to give an overview of the US' Non-Conforming Measures (NCM), or "negative list," approach to FTAs, particularly as regards the services and investment chapters. There is so much overlap in our FTAs between the investment and services disciplines. As we run this conversation, let's open it up to experts on their patches so they can talk directly. Let's build on our conversation in London last time, where the 5-chapter approach was discussed. To reiterate, the 5-chapter approach was:

1. Investment
2. Cross-border services

Department for
International Trade

3. Financial services
4. Telecommunications
5. "E-commerce chapter," aka digital trade chapter

Today, we will focus on the investment and cross-border services chapters. In future meetings, we may need to focus more in-depth on financial services, but we thought would leave financial services out for now because the approach to the financial services chapter is a bit different.

The "NCM" or "negative list" approach is different from the General Agreement on Trade in Services (GATS) approach because it contains additional disciplines not included in the GATS framework. The NCM approach includes market access, national treatment, nationality of board members, local presence, and performance requirements. In contrast, GATS has only market access and national treatment requirements.

Since the Uruguay round, many other nations have argued for following the GATS-based approach as the traditional approach, while NCM was a newer, less-established approach. However, this was and remains untrue because these two approaches grew up in parallel in the mid-90s, around the same time as NAFTA. We in the US believe the NCM approach is now more common that the GATS approach.

Rebecca Fisher-Lamb (RF-L): Why had the NCM approach proven challenging when negotiating the TTIP agreement with the EU?

TF: We in the US are wedded to a negative list approach. There is the unfortunate experience of sectors being left behind as they can't find themselves in the CPC from 1991. Also, GATS commitments are of such low quality that positive listing feels like a poor use of our time. Most fundamentally, though, positive listing creates a very different dynamic within the actual negotiations.

The EU pointed out that the US's negative approach has hybrid aspects and that the US 'weren't as pure as the snow'. Tom said that we could have this debate. On the EU's part, their insistence on using a positive list system was largely rhetorical because it was clear that they were willing to make much deeper positive list commitments than most WTO countries. In some ways, the GATS has positive listing embedded in ways that people don't want to admit e.g. MFN is done on a negative list, e.g. once commitments are taken in a sector it then flips to "none except…", A pure positive list seems impossible.

It was as much of a political issue as anything within the EU. There were assumptions from the EU that making any commitments on a negative list basis would limit the government's ability to self-regulate and make decisions in their people's interests. However, we in the US didn't find that approach particularly effective. In part, we felt that a negative list was inevitable because once you've taken a commitment *for* a sector under GATS, you then wind up having to do a negative list of what would be excluded within that sector anyway.

In any event, the basic objectives of the NCM approach, from the US perspective, are:

1. <u>To achieve freer trade</u>
    a. The US thinks the NCM approach incentivizes freer trade, because the assumption is that everything is included unless something is explicitly excluded. This is the opposite of the assumption made by a positive list. The NCM approach makes total market access the baseline assumption of the trade negotiations and requires countries to identify exclusions, not the other way around.
    b. The positive list approach tends to lead to a lot of strange situations where commitments are not taken in particular areas. USTR had "endless fun" with the EU

over their refusal to commit on various sectors. The EU could never wrap their minds around this situation. They kept asking for US priorities, which was not something the US was asking for, and therefore not something we would or could offer up. The US wanted total market access to be the baseline, and the EU simply didn't understand that. It led to stalemate in the negotiating process.

RF-L: How does the NCM process lead to a more outcomes-focussed discussion?

TF: It creates the baseline of complete openness, and then you build from there—not the other way around.

During TTIP negotiations, the EU wanted to identify a few big prizes to take home, but that wasn't the case for the US. What the US wants in FTAs is confirmation that new barriers to US companies won't be thrown up—that there won't be surprises in the future. So it's a fundamentally different kind of conversation.

The US approach is aimed at preventing technical barriers to trade in services, while the EU approach felt more aimed at gaining access to particular sectors. The US is focused on locking-in existing market access and does not expect new market access in a specific sector be an outcome of any FTA negotiation.

2. <u>To more closely reflect "realities"</u>
3. <u>To secure future liberalisation through the ratchet</u>
    a. The ratchet approach basically means that, should a new standard be agreed that allows for greater liberalisation in any area, then that new, more liberal standard automatically becomes the new standard from the US perspective. As such, standards continuously "ratchet" upwards from "standstills," as newer, more liberal deals are secured.
    b. The NCM approach also allows for no gaps in sector coverage.
    c. In the US, our FTAs in the services and investment areas are commitments that we won't be placing new barriers to any foreign businesses. So the EU's positive list approach didn't fit with US objectives and was particularly unpalatable for US political leaders. It struck them as untenable to have an FTA partner who had the ability to impose new discriminatory measures against us.
4. <u>To provide clarity for traders and investors</u>
    a. NCM annexes contain consolidated snapshots of the restrictive measures in a particular sector. Businesses find this kind of knowledge and transparency highly valuable.
    b. Positive lists don't allow for that kind of knowledge or overview, because it's impossible to know, after the fact, why that sector wasn't included in the positive list. For instance, was it a political issue, or did negotiators simply not get to it in time?

RF-L: Do businesses really read these lists?

TF: Yes, they do. Cleared advisors read the list itself when the negotiations are live.

Lauren Mandell (LM): While NAFTA negotiations are underway, cleared advisors have the benefit of looking at the NCMs in TPP and seeing if they remain an accurate characterization.

RF-L: The political input from NGOs on the EU side was a significant contributor to the broader issues we've discussed here.

Department for
International Trade

TF: We understand how 700-page annexes can seem intimidating, as well!

RF-L: In your NAFTA renegotiations with Mexico, are you seeing them utilise different negotiating tactics as they negotiate with the US versus when they negotiate with the EU?

LM: We can't discuss ongoing negotiations.

TF: The typical cross-border services chapter obligations include:
1. National treatment
2. MFN treatment
3. Market Access
4. Local Presence

Under GATS, local presence was treated as, "there must be a local agent to provide services." But ultimately, was that about market access or national treatment? There was an extent to which it was both, as well as an extent to which neither applied. This was particularly problematic for the US because sometimes these restrictions can apply to US states. In the US, our long history of interstate commerce being totally open, under the Commerce Clause, made that kind of state-based footprint really tough. There seems to be a lot of support for adding a local presence requirement.

LM: On performance requirements, we in the US were mostly on the same page as EU during TTIP negotiations, especially when those performance requirements were targeted and clear.

Lola Fadina (LF): are the investment protection elements focused on establishing a global framework or are there particular issues that you see in the UK?

LM: We obviously don't think the UK would treat a US business poorly, there's just a track record, much more broadly, of US businesses being treated badly overseas. We believe in narrow, transparent exceptions to those rules.

RF-L: Was TISA unique?

TF: Yes, because we wanted to have a monopoly on understanding TISA because no one else will ever be able to read these schedules—I'm kidding, of course.

RFL: Have you ever allowed an FTA partner to veer from an NCM approach?

TF: I don't think so. The EU is comfortable with varying from that, but we have never done so.

LM: Our view is that each obligation—national treatment, most-favoured-nation (MFN) status, et cetera—needs to be calibrated in a way that allows for legislation to be made in the public's interest. If you look at MST (Minimum Standards of Treatment - MST), at the article on CIL (Customary International Law), we take an article-by-article approach. In the US, we question: first, what is the legal effect of that language? Any third party will need to be able to understand it. Also, we're aware of the need for consistency in any language that is linked across chapters —that would also influence a third party tribunal in its decisions. But we do respect and understand other nations' concerns. We've put stuff in the preamble of agreements, like GATS, saying that the right to regulate is understood. The US approach and preference is to think through the full lifecycle of the investment. Pre-established national treatment is crucial and post-established only national treatment causes major difficulties in market access and has proven problematic in a number of other ways.

Department for
International Trade

LF: Could you describe more about the differences between the US and EU approaches to non-discrimination and MST?

LM: The US' approach on MST is that firstly, it's tethered to CIL, and secondly, that CIL evolves over time, so we're not willing to commit to a closed list. The EU instead say its fair and equitable treatment clause is an autonomous standard not tethered to CIL and that it's a list—a long list—that is fairly closed. Our view is that having a standard linked to CIL provided critical guidance to an ISDS panel. The EU approach is more risky in terms of potential claims as it opens up new avenues for claims not covered by CIL.

LM: We have not recognised a great deal of the EU's standards on gender discrimination, et cetera simply because they are not included in CIL.

TF: Let's dive deeper into the NCM approach. First, in Annex 1, it's determined whether an existing measure is inconsistent with a discipline. This is where our trading partners set out the areas they may take as exclusions. There are then two main questions:

1. <u>Has it been scheduled?</u>
    a. Are there any existing NCMs maintained by a central, regional, or local government which need to be included?
2. <u>Has it changed, subsequent to the FTA?</u>
    a. Paragraph B is about measures that were continued, or effectively continued, from the status quo.
    b. Paragraph C talks about the ratchet mechanism—what happens if changes are introduced that improve access.

RF-L: Were the EU comfortable with this approach?

TF: No, but it was a constructive conversation. There were lots of debates about what "regional" versus "central" versus "local" levels of government meant. Finally, everyone acknowledged that these three levels don't really work with the EU. USTR look forward to talking to UK regarding whether devolution in the UK will constitute regional government, or another level of government. Generally, we in the US don't have that many Annex 1 NCMs—there are not many secrets.

LM: Our main effort when doing an FTA is to make sure there hasn't been retrenchment in a certain area and that it still reflects the level of liberalisation in that area.

RF-L: How do we make sure that everyone at all levels of government understands this?

TF: It's easier in the US because the states all have precedent of being unable to erect trade barriers against each other, so they just continue those same practices with foreign partners. If you're having any problems on a state level, though, please do let us know!

LM: In our system, the Commerce Clause Constitutionally enshrines this lack of trade barriers between the states.

TF: If a state is imposing restrictions on UK businesses, it's a Constitutional issue before it's an FTA issue. If this is happening, we're just not hearing about it. All we've heard about are little issues like undertakers in Mississippi, et cetera. That's why we typically provide an illustrative list of all state measures—to be as transparent as possible, not because there's a legal requirement. For example, look at the TTIP Annex 1 NCM for customs brokers, where the US made an exception requiring customs brokers to be both US citizens and locally based—so requirements for national treatment and local presence. We made a law, 19 U.S. Code § 1641(b) for the provision, which

Department for
International Trade

includes a description in Annex 1. Descriptions for all provisions are included in Annex 1 to provide transparency, not to demonstrate all the legal intricacies—for that, people should refer to the law itself.

Jaya Choraria (JC): What happens when the law is updated? Do the annexes become out of date?

TF: Because our FTAs automatically ratchet, to the extent that areas get more liberalised, there is overall improvement.

The other annex is Annex 2, which is for policy or political sensitivity exclusions. Annex 2 is for the areas where there's judgment, in the view of a trading partner, that they'll need space for future regulations. Our approach to Annex 2 is to ensure there are a limited consistent set of protections for a few key areas that are legitimately required. The length of the Annex 2 section in TTIP was of concern to the US.

RF-L: Could you speak more to US concerns regarding the Annex 2 exclusions proposed by the EU in TTIP negotiations?

TF: Our concern was always about the scope and the complexity of the EU offer. The real question was, why do you need Annex 2 reservations for quite so many things? There are exceptions in GATS, TISA et cetera that apply to the UK and EU that don't make a lot of sense to us here in the US. A lot of effort goes in to the drafting of the NCM annexes here at USTR, specifically into limiting them as far as is possible. This caused a great deal of difficulty in the actual drafting of TTIP, meaning it had to be heavily lawyered.

More broadly, our experience was that the EU's process was to propose exclusions before running them by their legal team, whereas the process was the opposite in US—all potential exclusions are heavily vetted by US lawyers before being brought to the negotiating table. As a result, there were those in the EU who saw the US' approach as overly legalistic, while there were those from the US viewed the EU's approach as imprecise.

Moreover, the EU was willing to negotiate CETA on a negative list basis, so there is precedent for the EU engaging in negative list trade negotiations— so it was frustrating not to see the EU offer in this format for tactical reasons, as we knew they could move to this approach.

Matt Ashworth (MA): Let's dive in to the investment side. From our perspective, we're in the process of developing our approach to UK trade and investment policy. We have agreed with Ministers that we'll take a more objectives and outcomes-focussed approach to these discussions. We're a liberal economy in terms of FDI and that's our perspective. Where investment goes trade follows, so we're very interested in what we can do to encourage investment flows. We're looking at typical protections e.g. against unfair treatment, due process and compensation for expropriation; as well as reaffirming the government's right to regulate in the public interest. So we're keen to understand the US perspective on what you hope to get out of an agreement on investment.

LF: We've also keen to hear more about how the ongoing NAFTA talks are progressing and in particular about the US proposals on ISDS.

LM: As far as investor-state dispute settlement (ISDS), that's guided by Congress, which sets very specific rules in TPA. We are always guided by TPA and that has never changed. Associated with the right to regulate are concerns within the US about sovereignty, as you'll have heard yesterday

Department for
International Trade

in USTR Lighthizer's testimony. We're ensuring that US sovereignty is not eroded, and that's a very significant priority for us. We're protecting investors overseas and promoting investment overseas, but as a government we don't want to create undue market incentives which encourage jobs to be moved overseas. Some of the questions we're grappling with are: what is the sovereign risk? Are we creating an imbalance of incentives for companies to invest locally? However, many of our conversations on NAFTA are very specific to our experience with NAFTA and shouldn't necessarily be read outside of that context.

LF: It's well-known the US is approaching an opt-in approach on ISDS with NAFTA, but the TPA language is very particular to pursue meaningful measures to ensuring investors have access to dispute settlement. How do you square these positions with the language being taken in NAFTA?

LM: We are not thinking of pursuing an approach of opt-in to ISDS with the UK, which is to say that these decisions have simply not been made here at USTR. We can't say anything specific about this yet, in the event that we negotiate an FTA. We have two very strong economies that uphold the rule of law and we each have very strong legal systems. We view this as an opportunity to create a platform for high standards that we encourage other parties to adopt in the future. One example is technology localisation, meaning that you can't require an investor, as a condition of investing, to use local technology. This proposal comes from lots of US business feedback about US businesses struggling under these requirements. We view these kinds of cutting-edge practices as something we could pursue with the UK if we decide to pursue the FTA route.

Matthew Jaffe (MJ): To clarify, we're not legally bound to follow TPA, but if we want its benefits we should follow it.

LM: We have a complex annex that explains the difference between legitimate regulation and expropriation. The question is really whether it destroys the value of the investment, so legally determining the threshold of "destruction." For example, there was a $90 million Californian company whose value was reduced to $15m, but that was still not considered as having met the threshold of "destruction" and therefore the company earned no compensation from the ISDS panel. Expropriation cannot apply to pre-establishment. But a lot of the questions that the EU has raised about the cost and ethics of arbitrators, transparency, and possible duplication of cases across jurisdictions are issues we in the US have been looking at seriously for a long time.

LF: Some would argue that CETA seems to have begun to address some of these issues.

LM: And to be fair, we do think that some of these concerns are valid. But I would say that they are probably less open than we were.

LF: this is also an issue that is being discussed at the multilateral level in UNCITRAL. It would be useful to consider how we can work together on this.

TF: Our sense is that each of these U.S-UK conversations is getting more detailed, and this certainly seems to be a big leap from where we were in the fall. In the short and medium term, we can start telling you what our text will look like, and we'll start talking about specific sectors and reservations. We're also very conscious that financial services and digital trade are going to have to be a big focus of our future work and that those conversations are very different in many regards

Robert Tanner (RT): We'll need some serious discussions on telecoms in the future as well.

RF-L: This is significantly more depth than we've been in ever before in our discussions.

Department for
International Trade

TF: We very much agree and are happy for the UK to guide us about the speed of these talks. Quarterly meetings may possibly be too frequent, although there are those who disagree with us. If we're actually hoping to have text pretty much laid out by 2019 then we will need more, longer conversations and we'll be happy with that—we'll even encourage it.

RF-L: Which are the most useful areas for us to start discussion early? Let's get to the point of having a more in-depth conversation on digital early, ideally at the next working group. On the broader services side, we're at the point of trying to build our thinking, and we're having conversations across Government and with business about our approach. We have advanced the conversation significantly and hope to have a more detailed discussion on services in the fall.

JC: We also look forward to having more detailed discussions on financial services ideally at the next working group.

TF: Yes, it has been good to have our US Treasury colleagues here and we should have a focused discussion on financial services in the not to distance future. There are also wider financial services issues being discussed outside of our USTR space.

TF: From our perspective, we're largely in your hands. We've been deliberately holding ourselves back conscious that you are restrained until you sort things out with Brexit. But what that means is that normally we would have been far more advanced at this point. So if you become comfortable with specific areas of text, such as comparing and contrasting reservations you might need with reservations the EU took on your behalf or as a whole, then let's talk about it. We can also discuss past reservations the US has made in previous FTAs. At some point we'll need to look to our lawyers and say "when do we need to notify Congress?" We understand that you're not entirely at liberty to have negotiations, but you're a special and important trading partner with whom we have a deep shared history. As there are developments with your departure from the EU, we have lots of investors who are interested in these ramifications for their businesses, so we will necessarily have more to talk about.

RF-L: We appreciate your patience as we move forward with these discussions. Are you also talking to the EU about what Brexit means for US investors?

TF: Yes, but these conversations are less in-depth because we don't have the same forum because TTIP is on ice. We're going to have to ramp those conversations up as it becomes more and more clear what the picture is. Up until December, it was unclear what the picture was, so over the past three months we've seen a lot of movement. We're aware there are still a number of ongoing issues to resolve. For example, the Northern Ireland question hasn't been addressed, so we'll be raising it and they're certainly aware of it. We'd be more than happy to discuss any more of this with you all further, and look forward to continuing these conversations in the weeks and months ahead. Thank you all again for coming.

Action Items

1. DIT to follow up with DExEU on how US investors may be impacted by the outcomes of the withdrawal agreement – Rebecca Fisher Lamb
2. DIT Digital Team to follow up with Rob Tanner to agree approach to next working group – Rebecca Fisher Lamb/ Chris Woodward
3. DIT and HMT to agree approach to proposing a focused FS discussion at next working group to USTR and UST – Rebecca Fisher Lamb/ Jaya Choraria

Department for
International Trade

4. DIT Services Team to agree with Tom Finn the sequence of future services discussions, including engagement on GATS – Rebecca Fisher Lamb

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

The atmosphere was good, with a number of staff having long standing relationships with the US team from TTIP and TiSA negotiations. The dynamics on the US side where interesting to watch, with USTR firmly in the lead, multiple departments in the room but clearly did not have a speaking role, which was limited to the Services lead, the Investment lead and their legal advisor.

The UK side had been pushing for a discussion on investment, as services had been the main focus of the last working group and no substantive discussions have yet taken place on investment. The US side used the focus on investment to present their approach to listing, given the significant cross over between the two issues. This allowed them to focus on their priorities, discuss issues on which they know the UK is yet to form a position and avoid a more difficult discussion for them on investment. This demonstrated the importance of agreeing the agenda well in advance of the meeting as well as the challenge of controlling the discussion when the other country is hosting.

The US was in lobbying mode, pushing their approach to listing and taking a strong position that the UK would have to follow their model. Clear that for the US the priority is securing guaranteed market access for US firms into the UK market and ensuring the services and investment rules that protect this access are as strong as possible, including capturing any future liberalisation. While valuable this means it will be a steep ask to secure any new economically meaningful access to the US on priority UK services asks. Further work is needed to consider how we can get into some of the key services interest with the US particularly:

- State level: where the push back will be that UK firms have the same access that any US firm wanting to operate in a different state faces. We are scoping what might be possible on agreements with specific states.
- Federal level barriers: where some progress on very specific issues if we can build the evidence, base might be possible.
- If the UK can use discussions on listing tactically to drive outcomes, including strengthening out questioning of the US approach given its significant weaknesses
- Further consideration of the overall package on services and how we want to sequence the discussion to help drive outcomes. On investment further work will be needed to understand the investor/customer journey and US priorities on investment liberalisation & performance requirements

Department for
International Trade

Title of Meeting: **State-Owned Enterprises**

Date: **(originally scheduled for 21 March, cancelled due to weather and held on 10 April 2018 via VTC)**

Time: **16:00 – 17:00 (GMT)**

Participants

Name	**Department/Directorate**
Julian Farrel	DIT – Regulatory Environment
Lola Fadina	DIT – Investment
Rebecca Fisher-Lamb	DIT – Services
Andrew Pickering	DIT – Regulatory Environment
James Manning	DIT – Investment
George Radice	DIT – UK/US Trade Policy
Josh Carr	DIT – Services
Thomas Roberts	DIT – Investment
Emma Stubbs	DIT – Regulatory Environment
Lottie Free	DIT – Regulatory Environment
Roy Malmrose	USTR - Director of Industrial Subsidy Policy
Adam Boltic	US Department of Commerce
Neil Beck	USTR - Director for WTO and Multilateral Affairs
Sylvia Savich	USTR - Europe and Middle East Office
[Inaudible] Chang	US Treasury

Key Points to Note

- Positive, open but high level discussion in which USTR provided answers to a number of questions raised by DIT
- USTR spoke a reasonable amount about CPTPP and its provisions, confirming that they see it as a model
- Clear that subsidisation is a major concern, and that state capitalism is a significant and growing priority for US trade policy
- USTR probed UK position on our 'health insurance' system

Report of Discussions and Outcomes

Introductions

DIT explained that the UK is keen to understand how the US deals with SOE chapters, what kinds of concepts they use, and to start to identify the areas of common ground between our countries.

Department for
International Trade

USTR (Malmrose) gave a brief overview of US priorities for an SOE chapter, specifically highlighting TPP and NAFTA as examples.

TPP – USTR overview

1. Provisions on non-discriminatory treatment and commercial considerations
   - TPP is very different in this respect to Article 17 of GATS, where the US believe the above principles are conflated

2. 'Public bodies' in the WTO and the definition of an SOE
   - The US expressed their disapproval of the WTO appellate body ruling on the definition of public entities (*Canadian Wheat Board*)
   - The US argued that a public body should be any corporation majority owned by a government, however the WTO ruled that to qualify as a public body, a corporation must be 'vested with governmental authority'. The US felt this set the bar far too high and left a lot of enterprises out of scope.
   - US feel that a weak point of TPP is the definition of an SOE itself
   - Under TPP an SOE is essentially a corporation that is majority owned by a government, but they feel this does not go far enough as a government could take control of an SOE without being the majority owner.

3. Subsidies to SOEs
   - In TPP the US were trying to distance themselves from the 'public body' WTO ruling, to ensure that for example. Provisions in TPP refer to subsidies from one SOE to another and do not reference public entities/bodies

US aim with TPP is to set a separate track from the WTO in terms of subsidy disciplines

NAFTA – US overview

US pointed to their NAFTA renegotiation mandate. There are 3 areas which they would like to build and improve upon from TPP:

1. Definition of an SOE – would like this to cover minority government ownership
2. Strengthen subsidy disciplines – potentially to reflect Article 6 of the WTO ASCM on "dark amber" types of subsidies
3. Improve transparency – would like NAFTA to go further than TPP's "question and response" style provisions whereby one party can request information from another about how a particular SOE is governed, the subsidies it receives.

Discussion points/Q&A

1. **What are the US objectives in having an SOE chapter?**

   DIT: Is the US looking more at raising standards and improving general rule of law or do you have specific aims?

   USTR: Historically the US position has been 'progressive' with respect to international subsidy rules. The US tends to be more aggressive in trying to discipline other nations' subsidy programmes. The US business community became interested in SOEs a few years ago, which drove this position further. The US stated that SOEs are particularly positioned to potentially disrupt trade flows, and so are keen to have tougher rules for SOEs than for private business. USTR acknowledged they are looking at China and hope to use NAFTA

Department for
International Trade

to set a precedent and establish a set of rules and standards which they hope will be applied to China in the future. Acknowledged criticism received from the business community on how far TPP went, especially from steel producing sector.

2. **Definition of an SOE**

   DIT: USTR suggested that they would look to expand coverage from majority ownership to include minority ownership in some circumstances. Would they also look at forms of control or influence aside from actual ownership? Should the SOE definition be expanded to cover this?

   USTR: US do look at control, the TPP definition was tied to an ownership interest, e.g. the ability to appoint board of directors or not. The US are cautious on including other definitions of control, because too strict a definition could lead to an overly broad scope, for example regulated industries being interpreted as under state control.

3. **What does the US understand 'commercial activities' to mean in this context?**

   USTR: See TPP for a definition - while this has been watered down from the US ideal, it is pretty close to what they'd like to see. The US think that all SOEs' commercial activities should be examined, regardless of whether or not this is their primary focus, so as to capture all potentially distortive commercial activities.

4. **What does 'commercial considerations' mean in practice? There is a presumption that private enterprises are being used as a benchmark, but that a comparison could be difficult to do in practice.**

   USTR: acknowledged difficulty of defining this, though noted a similar exercise is carried out in subsidies disputes and remedies cases. USTR suggested the key concept used in this respect is what did the government do vs. what would have happened in the private sector. The key test is to compare the SOE's behaviours to that of privately owned enterprises.

5. **De minimis –** What is the US view on the de minimis threshold in SOE chapters?

   USTR: In terms of a turnover de minimis, the US were unsure there was a principled way of setting this figure and explained that the TPP threshold (200 million SDR) was a negotiated outcome which is higher than they would ideally like.

6. **Subsidies (aka non-commercial assistance) to SOEs** – some FTAs do not have stand-alone chapters on subsidies but do include provisions on subsidies to SOEs. What is the rationale behind this?

   USTR: US FTAs do not usually include general subsidy provisions (Israel being an exception), largely due to concerns about the agricultural sector, but there could be appetite to include a subsidies chapter in the future.

   DIT: What do you see non-commercial assistance provisions in TPP doing in practice?

   USTR: There are some interagency concerns about how the WTO ASCM might interplay with an FTA with subsidy rules in it. There was some thinking that different wording should be used in order to avoid the two colliding, - the TPP chapter does not use the phrase

Department for
International Trade

subsidies and does not cite Articles 1 and 2 of the WTO ASCM, but uses similar wording. The definition of non-commercial assistance in TPP combines the ASCM subsidy concept with the specificity concept (which was a negotiated outcome). Part A (defining financial contributions and benefits) and B of TPP pick up WTO ASCM language, including Article 6.1 of ASCM on “dark amber” subsidies, in which the burden is on the subsidiser to prove the subsidy does not have a serious impact on the market (Note Article 6.1 is no longer in force in the ASCM).

7. **What transparency provisions does the US tend to seek in relations to SOEs? Suggestion NAFTA may go further? What would this actually entail?**

   USTR: Unable to comment too specifically but = Article 25 of WTO ASCM gives a good view of the various types of information that can be provided. However, reviewing various countries’ notifications suggests it may be beneficial to find further ways of asking for more information, for example information on the benefit provided, to increase transparency. There have been some disputes about whether certain legal measures constitute a subsidy or not. The WTO has tended to leave this to Member States to decide for themselves but the US seem keen to explore in more detail why certain legal measures are not being notified or identified as a subsidy.

8. **USTR asked about the UK portfolio of SOEs (understood that it was small) and if the UK had concerns about their “health insurance system”**

   DIT: Wouldn’t want to go down avenue of talking about specific entities but the UK has an advanced competition law regime and strong corporate governance rules, and we believe we are compliant with international best practice. Wouldn’t want to discuss particular health care entities at this time, you’ll be aware of certain statements saying we need to protect our needs; this would be something to discuss further down the line when we come to consider what entities would count as 'enterprises'.

Closing/wrap-up

The US are keen to work with the UK to develop a ‘gold standard’ SOE chapter, that both Parties could then use offensively in the future. UK invited USTR to continue this discussion at the next WG, tentatively agreed for July in London.

Action Items

- No immediate actions, though UK offer (accepted by the US) for further discussions at next TIWG in London should be followed up by US team in due course.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- The atmosphere was open and positive and in keeping with what we would expect from an initial high-level discussion. DIT noted shared incentives with US on these issues beyond our bilateral trade relationship (i.e. global trade policy).

- The discussion was mostly one-way traffic – DIT asking questions of USTR. We will need to be able to have more of a dialogue next time and DIT will need to be better placed to

speak about specific entities and to have more established views on key policy questions. Useful intelligence was gained, for example potential US openness to including a stand-alone subsidies chapter, which we had not expected. On DIT queries about concepts used in TPP, USTR did not expand much beyond the definitions used in the text.

- The query about 'health insurance' was likely a fishing expedition to check the tone of our response. We do not currently believe the US has a major offensive interest in this space – not through the SOE chapter at least. Our response dealt with this for now, but we will need to be able to go into more detail about the functioning of the NHS and our views on whether or not it is engaged in commercial activities, including through consultation with the Public Services team in TPD.

Department for
International Trade

Title of Meeting: **Rules of Origin**

Date: **22 March 2018**

Time: **9:00 -11:30 (EDT)**

Participants

Name	Department/Directorate
Neil Feinson	DIT - Goods
Tim Ward	DIT - Goods
Adam Fenn	DIT – Goods
Kent Shigetomi	USTR

Key Points to Note

Following a good opening session, a commitment to continue a technical dialogue, e.g. on RVC valuation options and origin verification.

Report of Discussions and Outcome

Kent Shigetomi, USTR presented a power point covering the architectural differences between the US and EU models of ROO including:

- claims and verification of origin
- structure of product specific rules of origin
- regional value content

Claims and Verification of Origin
The EU has a system of claims that flow through approved exporters who then become the focus of subsequent verification. Under the US system, importers make the claims for preferential treatment based on a written or electronic application. And the Customs authority of the importer issues the determination.

Structure of the Product Specific Rules Annex
US FTAs use the "telephone book" approach and its annex includes rules for goods in Chapters 1-97. The difference between the US approach (telephone book) and the EU approach (general rule which is not as well defined) was a fundamental "stumbling block" in TTIP. The US could be open to greater flexibility/simplicity in its approach but historically follows the same model in its FTAs. The US also has exceptions for certain goods, for example, textiles, agriculture and autos receive different treatment due to strong interest from the industry. Industry is also vocal about the different requirements in different FTAs and ask why they aren't all harmonized.

The US finds their approach easier to use when trying to determine where a good falls, e.g. the ITC has a searchable database to help find matches and the Department of Commerce has a 1-800 number which provides advice for completing required documents. USTR also provides a 3-4 page guide covering the basics of classification.

Regional Value Content

Department for
International Trade

US FTAs typically require minimum non-originating content and has three methods to calculate the values:

1) net cost (only used for autos) = (net cost-value of non-originating material)/net cost
2) build down = (adjusted value-value of non-originating inputs)/adjusted value
3) build up = value of non-originating material/adjusted value

The EU determines the regional value content by dividing the amount of the non-originating material by the ex works (price paid to the producer at the place where the last production was carried out).

The result can be different depending on which method is followed since the US build down approach allows 49% to qualify while the EU ex works approach has a 51% rate to qualify. The US also allows for full bilateral cumulation whereas the EU requires sufficient processing in order to cumulate. USTR cited whiskey as an example: under US rules, if the UK exports high alcohol content whiskey to the US and the US dilutes it and exports it back to the UK, the US would include all processing in its value calculations of input. The EU would not include processing as an input.

Under TTIP, the EU and US were unable to agree on an approach so a compromise would likely entail the development of a new method of calculation.

Stakeholder Input
Industry/stakeholder input can provide evidence to modify ROO. The FTA consultation process allows for a range of views to be submitted. Advisory committees, whose members are companies as well as trade association representatives, also provide specific input.

During negotiations with FTA partners, the US tends to have a more general debate about how a company can meet the RVC but tend to have detailed talks when it comes to autos. The US will maximize benefits to the parties by looking at how the good was produced, what the policy goal is, as well as factors in industry input.

Approaches in US FTAs
TPP reflects an evolution of the US approach to ROO and was used to inform the ROO conversation in TTIP. However, it is not clear at this juncture if the US will follow the TPP approach in future FTAs. It is also unclear what the US's current position is on duty drawbacks as well as transshipment.

UK Challenges
The UK set out some of the challenges it faces as it leaves the EU. ROO is a policy area that is receiving a great deal of attention. Currently the UK has three work streams on ROO:

1) continuity agreements where ROO might need to be changed.
2) New FTAs- the UK is developing its position and is looking for industry input
3) EU piece being led by DExEU

The UK is keen for industry input as it sorts out the business-friendly policy goals it wants to achieve as well as what economic activities it would like to encourage and discourage.

The US explained that it always includes a provision in its FTAs to modify ROO through administrative procedures after an FTA is implemented. A change to ROO is typically initiated by industry and usually reflects a change in production. NAFTA saw three changes to ROO and Chile one change.

Department for
International Trade

Next Steps
USTR offered to send DIT a copy of its ROO power point which will supplement these notes. The UK said it would like to dig into evaluation methodologies more in their next meeting with a focus on specific sectors, e.g. autos. The US said that it might also be useful to walk through the US approach to verification as it is the opposite of the EU approach. The UK was also interested in learning more about how ROO was addressed in the current NAFTA talks.

The US and the UK agreed to further discussions (could be via VTC or at the next TIWG) and USTR flagged that USTR (Kent S) would be in Geneva 18-19 April which might be a near-term opportunity to continue the conversation. UK agreed to consider the offer to meet up in Geneva.

Action Items

- UK suggestion: More of a detailed look at the development of particular sector positions, including a look at element such as valuation methodologies.
- US suggestion: walking through verification (including HMRC experiences of exporter based schemes)
- UK suggestion: updates on NAFTA - thinking behind and progress achieved
- Meet in Geneva at committee on ROO - April 18/19 - Ken will attend. Opportunity to meet with DIT informally.
- US to share the ppt presented.

Department for
International Trade

Title of Meeting: **Industrial MRAs**

Date: **22 March 2018**

Time: **9:00 – 12:00 (EDT)**

Participants

Name	**Department/Directorate**
Julian Farrel	DIT – Regulatory Environment
Meg Trainor	DExEU
Sophie Brice	DIT – UK-US Trade Policy Team
Henry Alexander	DIT (VTC from London)
Cynthia Morgan	DIT legal (VTC from London)
Motsabi Rooper	DIT (VTC from London)
Richard Thompson	DfT (VTC from London)
Jon Elliot	BEIS, OPS&S (VTC from London
Rhidian Roberts	BEIS, OPS&S (VTC from London)
Mark Birse	MHRA (VTC from London)
Lea Reynolds	VMD (VTC from London)
John Millward	VMD (VTC from London)
Mark Abdul	US Food and Drug Administration (FDA)
Joseph Khawan	US Department of State
Ashley Miller	USTR
Jim Sanford	USTR
Sam Rizzo	USTR
Bill Hurst	US Federal Communications Commission
Natalie McKinney	US Pharmacopeia
Brandy Baldwin	US Coast Guard
Ramona Sarr	US National Institute of Standards and Technology (NIST)

Key Points to Note

1. DExEU explained that the UK will leave the EU on 29 March 2019 and the Implementation Period will last until 20 December, 2020. During this period the UK will be able to sign and ratify international agreements that will then take effect following the Implementation Period.
2. The US are keen to identify and address implementation and operational issues that will arise in transitioning the EU-US MRA into a UK-US MRA. Initial ‘regulator to regulator’ discussions have identified some issues, for example for GMP the UK needs to confirm whether it will continue to use EudraGMP database. Next steps should include further ‘regulator to regulator’ discussions to continue to flush out these operational issues.

Department for
International Trade

3. The US highlighted Article 21 and Article 19 of the GMP annex, in addition to the UKs list of issues identified, as something that both sides need to address before a UK/US MRA is agreed.

Report of Discussions and Outcome

Discussion of Continuity Agreements and Short Term Outcomes
DExEU update on EU Exit and UK Approach to Continuity:

- On Monday 19 March, David Davis and Michel Barnier announced that the UK and the EU had agreed the legal text on the terms of the implementation period. This forms part of the Withdrawal Agreement codifying the UK's exit. Next, the implementation period text will be submitted to this week's European Council.
- The UK will leave the EU on 29 March, 2019 and the implementation period will last until 31 December, 2020.
- The UK and EU's shared aim is for international agreements - to which the UK is a party by virtue of EU membership - to continue to apply to the UK as now during the implementation period. This provides further confidence that there won't be disruption.
- The EU will send notifications to 3rd countries to explain that the UK will be treated as a Member State for the purposes of international agreements during the implementation period.
- During the implementation period, the UK will be able to sign and ratify international agreements that take effect following the implementation period. So work on transitioning bilateral agreements should continue.
- We want to work with the US to make sure that this approach works with you.

US reactions to UK position
Jim (USTR) asked if the Implementation Period deadline is 31 December, 2020.

- The UK explained that the end of the Implementation Period is 31 December, 2020 marks the end of the formal, Transition Period. The UK can negotiate, sign, and ratify agreements during this Transition Period so that the UK can be ready come 1 January, 2021.

Ashley from USTR asked whether the UK would have a decision-making role in EU bodies during the Transition Period:

- UK response: While in certain situations, the UK has legal authority to participate, the UK will sit outside of the decision-making structures during the Transition Period. It should still be noted that changes by the EU will apply to the UK as all other member states during the Transition Period.

<u>Update following TTE & EMC regulator-to-regulator discussions:</u>

- Ashley:
  - Following regulator-to-regulator discussions, it would be helpful to look at the operational issues for each agreement, as they are different.
- Bill Hurst:
  - We want to make sure the transition happens smoothly. It's important to work out the operational aspects. We want to identify the right people taking over in the UK, so that we can help with their implementation (test labs, etc., continuing to operate).
  - We need to identify what changes need to be made to improve things? With regard to joint committee decisions, we don't necessarily think that's necessary. What can we do to improve the process in order to cut out unnecessary steps?
- Ramona:
  - The National Institute of Standards and Technology (NIST) promotes U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our quality of life.

Department for International Trade

  - Our biggest interest is understanding what those notified bodies will be once the transition occurs.
  - Then we'd track from there any change in regulations that would apply to those bodies for products being shipped to the UK.
- Jon Elliot:
  - Agreed that the conversation was productive. From a UK side, did not forsee any major hurdles, mainly administrative issues, which should be further discussed.
- Ashley:
  - Follow-up discussion is required on the designation offices and persons on the UK side, as well as the role of the counterpart regulator to the FCC on the UK side.
- Julian:
  - Keen to ensure discussions continue to discuss operational issues that could be improved. However the general principle we're trying to follow for all of these continuity agreements is to replicate what already exists in the EU/US MRA. In the long-term, we have as much interest as you in improving and making these agreements better, including whether we can be more ambitious in scope.
- Jim:
  - While the UK is going to continue applying EU rules, we want to make sure we get a good understanding of how the system works to make a smooth transition.
  - Further bilateral calls should take place between regulators within the next month – around mid-April – regarding operational issues.
  - As and when there are changes to the regulation that would apply to notification bodies (as it relates to certification bodies and labs during the Transition Period), we will need to communicate properly regarding this.

Update following GMP Regulator to Regulator discussion:

- Mark Birse (MHRA):
  - The GMP Annex only came into force in 2017.
  - Preapproval inspections are not yet covered by the MRA.
  - UK was clear that it would like to continue with the MRA. Otherwise, we'd have to establish our own system of publishing notices.
  - With regards to entry into force provisions coming on stream in 2019, it is important that we account for these measures in any MRA moving forward.

- John Millward (VMD)
  - If the GMP annex becomes operational for veterinary products before EU exit, then the UK would like to roll straight over after EU exit.

- Mark Abdul (FDA): inspections are solely a member state competency, so this is helpful.
  - The extent to which EU regulations and guidance will still apply is important, so continuity after the UK leaves the EU will be helpful.
  - Also, questions regarding EMA and questions regarding what happens if regulation lapses both need to be answered.
  - Going forward, we will have to figure out reassessment and a streamlined reassessment since there won't be a joint auto programme.
  - Regarding products other than human or vet. drugs, discussion of scope of the new MRA is appropriate, but internal discussions at FDA still need to take place.

Department for
International Trade

<u>On 10 generic issues identified going through the MRA that would need to be addressed:</u>

Issue 1 - Legal form:

- Henry:
  - In November 2017, we were looking at options on how to bring the document across: cross out EU and insert UK throughout the entire document *or* do it by an exchange of letters?
  - We've now concluded we want to take a short form, simple approach using an exchange of letters.
- Cynthia:
  - An exchange of letters could provide an appropriate legal vehicle to transition the agreement; a drafting technique we'll be employing in many FTAs. Applying this approach to the MRA process, we could exchange letters, to transition the existing MRA to apply to the UK and the US; this would significantly reduce the volume of text that would need to be finalised. If there's a transitional period or other aspects that are important for policy reasons, we could have additional clarifying clauses set out on how things should be read into the treaties.
- Jim:
  - The lawyers had a meeting yesterday. My baseline is that we have to do parallel agreements with the EU due to the nature of a multi-party agreement (*e.g.*, discreet issues that need improvements and modifications, subject to instructions from our legal team).
- Julian:
  - It would be useful to engage once you have that readout through your legal team to emphasize an approach that is simplest for all of us and that covers us legally "what was EU-US, now applies to UK-US, subject to these modifications," hopefully creates less work but still provides the necessary legal certainty.

Issue 2 – Inactive Sectors:

- Henry:
  - UK approach has not changed since November. UK has noted US' previously expressed position.
- Jim:
  - From our perspective, we don't see purpose in transitioning non-operational annexes. It seems rather awkward that we'd transition things that we don't plan to make operational.

Issue 3 - References to EU MFN:

- Cynthia:
  - We will convert EU law to UK domestic law. All references to EU laws, directions, and directives will be preserved in the UK legal framework.
- Joseph Khawan:
  - Does the European Court of Justice (ECJ) have jurisdiction over the UK during the Implementation Period?
  - Answered by Cynthia: The UK is to be treated as a member state, thus, ECJ jurisdiction would continue to apply. However, DExEU would be better placed to address in detail.

Issue 4 - on entering into force issues and the Transition Period:

- Henry:
  - Important to ensure a seamless transition. For transition periods in EMC and TTE, it is important that we do not accidently re-establish implementation periods. For GMP, we

want to bring across timelines as currently set out, this would be particularly relevant for veterinary and biological scope.

- Jim:
  - I certainly understand the interest in seamless transition and not imposing a new transition period. Regarding 24 months on telecomm, we took a joint decision to shorten that. We didn't have 24-month transition periods in the annexes either, so unless an unforeseen circumstance arises, we won't need 24 months.

Issue 5 - on conformity assessment bodies:

- Henry:
  - The first element: making sure that both will be able to access a list of each other's conformity assessment bodies (CAB). The second element: making sure that the CAB currently recognized in the agreement doesn't need to go through any reassessment or re-designation process.
  - UK was exploring whether there was a need to add a clarifying clause in the agreement that there will be no reassessment process.
- Jim:
  - We agree with the objective regarding not requiring another reassessment process.

Issue 6 on updating the relevant designating authorities:

- Henry: For the UK, that's changing of names and Departments.

Issue 7 on establishment of the joint committee:

- Henry:
  - No issues. However, how it would work operationally?
- Jim:
  - We may want to take a look at revisiting the joint committee rules and procedure as a vehicle to incorporate perspectives of regulators.
- Julian:
  - We can probably operate joint committees more efficiently bilaterally.
- Jim:
  - Happy to share the rules of the EU/US Committee with UK.
  - These date back to c. 2000 - happy to consider whether they may be able to better reflect operational realities.

Issue 8 on removing the need to translate the text:

- Henry: We agreed to this at the last TIWG meeting – only required in English.

Issue 9 - on removing references to EU:

- Henry: Already talked through.

Issue 10 – on the GMP annex:

- Henry:
  - Regulators are talking to each other on both sides.
- Jim:
  - On Issue 10, Article 21 and Article 19 of the GMP annex, as well as the appendices are all things we need to take a look at and need some changes. That's not everything, but these are just obvious changes we would want to make in a US-UK agreement. Haven't looked closely at marine equipment, but there is work underway on product scope.

Department for
International Trade

On issues for discussion in the Marine Equipment MRA:

- Brandy:
  - Important to note that the EU-US agreement is currently going through the final stages of being updated. The substantive work of updating the MRA is done. However, we are still working on formalizing other questions.
  - One issue that came up in the discussion with UK was UK-EU relationship. We don't want to have competing MRAs.
  - Question - will the UK still have a seat at EMSA?
  - Answered by Julian: The bodies which the UK will continue to be allowed to attend not yet definitively agreed upon. The working presumption is that in the majority of the cases, the UK will *not* be present from the end of March 2019. During the 21 month Implementation Period the UK will be covered by EU law on a dynamic basis, but not in the room in the majority of cases. There may be exceptions, we can't speculate yet.

- Brandy:
  - How would we, then, communicate that back through our process?
  - Answered by Richard (DfT): We focused on the practicality of moving forward on the existing MRA and to make sure that we maintain momentum between our two organizations, maintaining a degree of currency in terms of existing MRA so that we don't create two competing and confused documents. Two other areas we discussed: market surveillance and communication; we will meet with you again within the month (no date set) but looking at the middle of April.

UK's participation in EU regulatory agencies and international regulatory bodies

- Jim:
  - Given that in GMP there was a role in that negotiation that EMA was playing, in terms of product scope, it's a key question for continuity MRAs. Our interest is in understanding how you'd proceed in the future regarding your relationship with these EU and international bodies.
- Ashley:
  - We need to continue this dialogue on a regulator-to-regulator level - e.g. regarding the UK's participation in the EMA. This is an issue we will need to continue to work on.
- Bill Hurst:
  - Today, a joint meeting between the US, EU, and Canada on market surveillance has convened. The thought is that the UK could participate in this group. Looking forward, we'd want to cooperate on market surveillance.
- Ramona:
  - Regarding decisions on technical guidance notes on directives (covered by the radio equipment directive): we'd hope that these technical guidance notes would be accepted so that they would be both applied in the UK and EU.
  - Look at what's in the RND and what's in the AMC guide.
- Julian:
  - Highlighted that the UK does all of its market surveillance now anyway and this will continue following EU exit. This is something that can be expanded upon in the next teleconference.
- Mark Birse:
  - On EMA, this was set out by the PM in her Mansion House speech. Looking at the specific technical aspects for the MRA, UK is a member of PICs anyway. Regarding IMDRF – UK is still considering internally and will have to come back to this.

Department for
International Trade

Greater Regulatory Compatibility

E-labelling

- Jim:
  - E-labelling is a concept that other countries are adopting. The time is now, while there may be latitude on where the industry is going and what the stakeholders are doing.
- Bill:
  - Regarding E-labelling, something our industry has pushed for.
  - For example, if your computer or phone has a display, you can rely on the information on the display. The US amended our Communication Act to allow this on communication products.
- Ashley:
  - These approaches on E-labeling globally started voluntarily, whether that's South Africa or Malaysia. It started alongside the regulation. In the R&D directive, there's a provision that allows us to study and take up a project in terms of E-labeling.
  - The question we have is, is there some policy space there in the UK?
- Julian:
  - Thanks US for clarifying which products US were interested in e-labelling for. The UK will be bound by EU legislation during an IP, which includes labelling requirements. The question regarding CE marking is dependent upon the UK/EU negotiations.

Medical Devices – Single Audit

- Mark Abdul:
  - On single audit regarding medical device programs: the UK has engaged on behalf of its auditing bodies. We want to continue close engagement.
- Mark, London:
  - Let's table this discussion to the next Regulators' bilateral VTC/teleconference – UK will have expert colleague there on devices.

Any agreements/thoughts on items for discussion at the Next Trade Working Group

- This will be determined based on the meetings and calls set to take place within the next few months, per the action items below. Next TIWG likely to be in July.

Action Items

- Julian: This working group likely to meet again in early July in London, then again in DC later in the year, but want to continue progressing with technical issues in the meantime to keep up the momentum.
  - Jim and Julian to touch base in the next six weeks.

- On operational issues:
  - Ashley: Follow-up discussion are required on the designation offices and persons on the UK side, as well as the counterpart regulator of the FCC on the UK side and their role.
  - **Further bilateral regulator-to-regulator calls will take place within the next month or so on operational issues.**
  - **As and when there are changes to the regulation that would apply to notification bodies (as it relates to certification bodies and labs during the Transition Period), we will need to communicate properly regarding this.**

- On MRA:
  - Regulators are meeting within the month (planning for mid-April). Julian asked that they report back on their meeting.
  - Other MRA discussions are required. However, a date has not been set yet.

Department for
International Trade

- On Medical Devices single audit – further discussion to be scheduled.

- Issues identified through the 10-point issues on MRA need to be followed up on:
  - Issue 1: Jim (USTR) to engage with DIT once he has a readout of USTR legal discussions to look at an approach that is simplest for all of us, while providing the necessary legal certainty.
  - Issue 2:
    - Julian, "we'll park this for now," in response to Jim's argument that it is unnecessary to transition non-operational annexes.
  - Issue 3: No further action noted.
  - Issue 4: No further action noted.
  - Issue 5:
    - Jim (USTR) agrees that we do not need to go through a reassessment process for CABs.
  - Issue 6: No further action noted.
  - Issue 7:
    - UK had no issues. However, Jim suggested that "we may want to take a look at revisiting the joint committee rules and procedure as a vehicle to incorporate perspectives of regulators." US to send UK the current EU-US rules of procedure.
  - Issue 8: We agreed to this at the last TIWG meeting.
  - Issue 9: Already discussed.
  - Issue 10:
    - Jim: "On Issue 10, Article 21 and Article 19 of the GMP annex, as well as the appendices are all things we need to take a look at and need some changes. That's not everything but these are just obvious changes we would want to make in a US-UK agreement. Haven't looked closely at marine equipment but there is work underway on product scope."

- Regulators to continue, informally, having discussions, including the legal element that we will continue with our lawyers, GMP, marine equipment agreement, are all issues on the table to be addressed before July 2018.

- On greater regulatory compatibility:
  - Ashley: We need to continue this dialogue on a regulator-to-regulator period or are they regulatory bodies where participation will be able to continue? This is an issue we will need to continue to work on.
  - On single audit regarding medical device programs: this conversation was tabled to the next bilateral regulator-to-regulator VTC or teleconference.

Department for International Trade

Title of Meeting: **Regulatory Session**

Date: **22 March 2018**

Time: **14:00 (EDT)**

Participants

Name	Department/Directorate
Julian Farrel	DIT
Ben Rake	DIT
Kate Maxwell	DIT
Sophie Brice	DIT
Lizzie Chatterjee	DIT
Matt Ashworth	DIT
Meghan Ormerod	British Embassy Washington
Rachel Shub	USTR
Sam Rizzo	USTR
Marine Kendman	USTR
Wendy Lebrunte	USTR
Mark Abdul	US - FDA
Keith Mason	US - EPA
Matthew Jaffe	USTR
Greg Burn	US Embassy London
Ryan Barnes	US - Department of Commerce
Brian Woodward	US - Department of Commerce
Joanne Goode	US - ITC
Kim	US State Department
Jessica Simonoff	US State Department
Bryan O'Byrne	US Small Business Administration
Ashley Miller	USTR

Report of Discussions and Outcome

1. Rachel Shub (RS) opened by asking for any updates on regulation and Brexit. Julian Farrel (JF) explained that conversations were taking place in Brussels this week ahead of the March European Council. HMG expects agreement on a transition period until the end of 2020 during which the UK would remain subject to all existing EU obligations and rights, covered by single market rules and undertake a dynamic application of the EU acquis. JF explained that if EU law changes during that period it will apply in the UK until the end of 2020 and the working presumption is that the UK would be outside of the decision-making structures after the end of March 2019. There is an open-ended question on participation in

Department for
International Trade

some regulatory bodies and the UK will begin negotiations on future relationship after the March European Council on Friday 23 March. JF explained that the PM had expressed a wish that the UK continue to participate in the Medicines Agency, Chemicals Agency and Aerospace Safety Agency but it isn't possible to predict at this stage where this will end up.

2. Discussions earlier in the week had indicated that during the IP the UK would have the right to negotiate, sign and ratify international agreements that would come into force after the end of the IP. This would mean the UK could begin negotiations with non-EU countries from the end of March 2019 in the hope that agreements could be in place and brought into force from the start of 2021.

3. RS explained that the priority for the US is to understand what the regime might look like after 2020. SR explained that the discussion on TBT last year was largely focused on the approach to the conversations during TTIP. The notice to stakeholders paper caught USTR's eye as there is reference to conformity assessment localisation within it. This would have major implications for the 180 notified bodies in the UK and an interest for US stakeholder bodies too. SR asked about the UK's thinking in this area.

4. JF noted that the paper was drafted before the idea of an IP became a reality. He suggested that if an IP takes effect as expected until December 2020 this will include all of the operation of conformity assessment bodies. What happens after that is up for negotiation under the new economic partnership. The UK would aspire to negotiate an agreement with the EU that maintains as much of the status quo as possible, but it's too early to say how this would work in practice.

5. JF noted that the UK and EU start in a place of full regulatory alignment unlike any other trade negotiation. RS said that the US had been doing some thinking about this and about how best to communicate to the UK some of the flexibilities that might be available to it after exit – how to avoid the rigidities of the EU system. She suggested that they would talk through these with the UK at the next TIWG.

6. SR asked if there are models the UK is thinking of for how it will operate with the EU in this space. JF explained that there were not, but that we started from a point of full alignment. After 2020 the UK Parliament and HMG will have the ability to revise regulation and legislation as it thinks appropriate, but that no one is expecting this to happen in a rapid or radical way.

<u>Better Regulation:</u>

7. Kate Maxwell (KM) gave an overview of the UK Better Regulation framework. The framework sets out what government departments should do when they are bringing in new regulation. The changes are intended to make the process more streamlined and efficient. HMG is aiming to make the process more proportionate in view of the potential for a high level of new regulatory activity in the coming years. The system is designed to allow more flexibility, but retain the checks and balances for the measures that matter most to businesses. KM offered to put the US in touch with the Better Regulation Executive if they have questions on the detail of the new process.

8. RS asked if HMG is likely to refresh its BRE guidance again in the future. JF explained that HMG does so periodically and that a future update would not necessarily be linked to EU exit. Marine Kendman (MK) asked if there is likely to be an extension of the EU's rigidity on regulation setting. JF disagreed that this was rigidity.

Department for
International Trade

9. On conformity assessment, USTR said that their companies have an incredibly difficult time putting together a dossier and demonstrating conformity with EU standards. RS said that the US would like to talk more about this as the EU has not done a great job of demonstrating flexibility in the past.

10. JF said that the UK takes flexibility in this context seriously – the principle that EU standards are not the sole way to demonstrate compliance. He expects this to remain the UK position. MK conceded that US companies report having an easier time in the UK than in some other MS on this front.

<u>Regulator Presentations:</u>

11. RS introduced presentations by a number of regulators on their guidance and regulatory process and explained she wanted to talk through this because there seemed to be areas in the EU/UK system where this kind of guidance is missing.

    [US presenters largely spoke from their slides, which are available separately]

12. Erik Puskar (NIST) offered a presentation on how US agencies regulate. The inter-agency process plays an important role. A trade lead will read a draft regulation and, if they raise a flag in doing so USTR will discuss with the regulating agency any potential problems that could arise with the regulation. There is explicit guidance contained in OAB 118 stating that regulations cannot put up barriers to trade – giving a clear message to the private sector.

13. During the presentation, RS explained that “government unique standards” are what give the government a bad name. USG is keen not to reinvent the wheel – if the private sector has already produced standards that work well they want to help to build on that.

14. The US discussed the benefits of Voluntary Consensus Standards (VCS). The focus is on the process used to develop the standards – openness balance, due process, appeals process leading to consensus. They come with a lot of additional guidance. The US is obligated under the TBT Agreement to use relevant international standards, except where such standards would be an ineffective or inappropriate means to fulfil the legitimate objective pursued.

15. US guidance includes a specific section on Conformity Assessment. Agencies are required to consider:
    a) The level of confidence needed (in the safety of a product), the risks associated with non-compliance, and the costs of demonstrating conformity.
    b) Use of international conformity assessment systems and private sector conformity assessment mechanisms in lieu of or in conjunction with government conformity assessment procedures.
    c) Provides general criteria for selecting conformity assessment procedures including market considerations.
    d) Agencies should also consult with the USTR on relevant international obligations for conformity assessment.

16. Erik summarised the presentation: The Federal Government is an active player and user of the private sector led standards system in the US. The NTTAA and OMB circular A-119 provide a framework in which to operate. Across the Federal Government, standards are used in diverse ways to support agency missions. NIST’s standards co-ordination office

and www.standards.gov are available. Looking ahead, NIST is developing plans to update its conformity assessment guidance to complement the revised Circular.

17. JF said that an introduction to the US standards system and US conformity assessment system would be useful as HMG is trying to understand where the common ground lies between the EU and US. There appear to be some sectors in which the rules are stricter in the EU and others where they are stricter in the US. The US agreed to provide this.

18. JF asked how the US deals with instances of multiple standards and if there is incorporation by reference. Erik Puskar explained that agencies will incorporate multiple regulations by reference and that this is a good way to reduce the burden of regulation. If the private sector is already following certain standards, then they will include these in the new regulation – this is a reflection of avoiding "government unique" standards. Erik explained that standards are always voluntary in the US. In some situations, regulators will refer to an array of standards that could be used to comply, noting that none are the only way to comply.

19. Gail Rodriguez from the US Food and Drug Administration gave a presentation (USTR will send a copy to DIT). GR said that she would like to have a session with regulatory agencies in the UK. GR explained that as there is huge variety in the products FDA regulates so the FDA has to be flexible in the way that they regulate – she explained that this is one reason why they find standards very attractive. GR explained that FDA is trying to harmonise its approach with the rest of the world.

20. The FDA's typical approach is:
    a) Risk based
    b) Flexible – "least burdensome"
    c) Fee supported – a lot of activity depends upon industry fees. Industry gives the FDA a direction every 5 years on how it should spend the money.
    d) Transparency – everything should be open to notice and comment.
    e) Voluntary use of standards – companies are welcome to demonstrate their products are safe and effective in other ways.
    f) Preference for standards and guidance over regulations. Regulations are "really hard". It takes a generation to get a regulation passed through so the FDA tends to avoid this approach.

21. The FDA's classifies products into three classes:
    a) Class 1 products: simple products with a demonstrated safety. Subject to some general controls.
    b) Class 2 products: products where some wiggle room is desirable/possible. Pre-market notification approach.
    c) Class 3 products: premarket approval required.

22. The FDA issues a lot of guidance to tell companies what the thought process behind the standards is. Guidance can address anything related to information helpful to stakeholders and the FDA, for example: design production, labelling, promotion, manufacturing, testing of regulated products. There are two levels of guidance documents: Level 1 and Level 2 (simpler).

23. GR set out why standards are FDA's preferred way of operating:
    a) They improve time to market for safe and effective medical devices.

b) Levels the playing field, encouraging free trade, making competition easier for everyone.
c) Preferable in a field in which products are changing so quickly: standards can adjust more easily than regulations. The industry is far different to ten years ago and there have been many fast technological changes.

24. GR recommended that DIT look at the FDA Guidance website.

25. JF noted that there is a chapter in the EU-US conformity assessment MRA on medical devices and asked why, if the fundamental approach is basically similar there is not sufficient confidence to bring the agreement into force on medical devices. JF asked how we could create sufficient confidence to bring this type of MRA into force.

26. Mark Abdul said there had been lots of conversations on this and that they had uncovered wildly divergent conflict of interest rules in the US and other countries that meant they could not implement the MRA in this area. RS explained that when US agencies were looking at the EU generally they were usually very comfortable with the UK's regulatory approach, but this country by country approach could not work in the EU context. JF asked if he should take this as a hint that the UK and US might be in a better place to do something on mutual recognition of conformity. RS said that it was and that the US looked forward to seeing what might be possible.

27. JF said that DIT is interested in identifying product areas for regulatory co-operation in future trade agreements. He suggested it would be good to signal that it is something both parties are committed to working on. MK said there were many potential opportunities for UK and US regulators to work together.

28. Kevin Robinson (KR) from OSHA presented on the agency's work. KR explained that there are currently 36 NRTL sites in the US focused on safety in the workplace. They designate 37 broad categories of equipment. One method to achieve acceptability is to have a product certified in a nationally recognised testing laboratory.

29. The largest category that OSHA tests for safety is electrical equipment. KR set out OSHA's process for conformity assessment of product safety in this field (see US slides). JF commented that Electrical Products is another category that has an annex in the EU-US MRA but has not been brought into force. He asked if USTR had any thoughts on why this might be.

30. USTR suggested that this is because they allow people/companies from any country to apply to the US NRTL process. They are open to having NRTLs in any country that OSHA will review and keep under surveillance. NRTL tests a product and then conducts follow-up visits to make sure the product they tested continues to be the product produced.

31. SR said that where EU Directives exist on this issue there are some market surveillance risks. As close as some elements of the system might be in the EU and US SR suggested that there were also some important differences that had emerged in the last five years. RS suggested that they discuss this further in the margins, and that this be the topic of further discussion at the next TIWG.

32. Keith Mason at the EPA set out the agency's regulatory approach. He explained that the EPA writes a lot of regulations and produces a lot of standards. He offered examples of Voluntary Consensus Standards including on facilitating clean energy source compliance, a

programme for office equipment and a compliance guide for composite wood products relating to formaldehyde emissions.

Federal/State Split:

33. JF asked to what extent the federal government is able to regulate US wide and to what extent states are allowed to regulate in a way that diverges from this, asking what this means for trade. Keith Mason suggested that there were two categories: autos and everything else. Generally, there are nationwide standards but the Clean Air Act introduced two systems as California had already acted to regulate emissions when the federal government acted. JF asked what this would mean in practice for a UK exporter trying to sell a car. Keith Mason said that realistically exporters needed to meet the California rule then they could access the whole market. Matthew Jaffe (MF) said it was unlikely there could be anything in an FTA on this. If it were in an FTA, you would need to change the US law that gives California the ability to regulate differently to the federal government: this was not going to happen.

34. RS said that the group could discuss the state/federal divide in further detail next time. MJ said he was happy to but indicated that he had spoken about it in previous sessions. He said that the EU always brought up the car as an issue, but he challenged the UK to let the US know if it is really a problem, saying the EU/UK usually liked the higher Californian environmental standards so it was unclear what the problem was.

Future FTA:

35. JF explained that he was interested in exploring the scope of what might find its way into a UK-US FTA. DIT is looking at best examples of good regulatory practice chapters and is interested in hearing from the US what they think good looks like. KM asked how the US defines GRPs. RS said the concept of GRPs grew out of work in the WTO TBT committee. Certain principles and approaches in the regulatory environment increased the changes for more auto implementation of decisions made in Geneva. The main principle is around transparency, and a need to notify your trading partners in advance of planned action. It is easier to get concerns in advance than to try to unpick decisions or co-ordinate later.

36. The US started a programme in Geneva on good regulatory practice – not best regulatory practice. RS explained that the US tends not to focus on the entire ambit of regulation, but to focus on those areas with the most benefit to trade – cherry picking from the WTO: co-ordination, evidence based decision making and transparency.

37. RS talked through US priorities in a regulatory chapter:

a) Dispute Settlement
The TPP chapter on regulatory coherence was not subject to dispute settlement. USTR thinks this needs to be taken seriously however and that the chapter should be subject to dispute settlement. This is important for reinforcing the whole of government approach. It doesn't mean that a case should always be brought if, for example, a government agency doesn't publicise a proposed regulation when it said it would, but it does mean there is an avenue to raise these issues if something is going wrong.

RS asked about the role of different government departments and the role of the Cabinet Office in ensuring good regulatory practices. JF explained that the CO is a department that co-ordinates policy rather than good regulatory practice per se.

Department for
International Trade

b) Information Quality
This stems from a desire not to overly burden companies with lots of surveys.

c) Transparency
This does not just relate to the publication of draft measures. If regulatory agencies are going to rely on an Impact Assessment or other type of assessment they should make information publicly available for comment. This might also include agreements on the minimum length of time for consultation or publication for comment.

d) Provisions for expert advisory rules
Relatively recently the US has started to include provisions for expert advisory rules in a few trade agreements, taking the form of a standing group of advisory experts.

e) Retrospective reviews of regulations
These provide an opportunity for private citizens to petition the government. If a regulation is burdensome, or it has outlasted the technology. It also presents an opportunity to suggest that a different standard should be considered, and a pathway to petition the government.

JF explained that on almost everything the team had mentioned in this section the UK has a good story to tell. The last time the OECD did a regulatory policy outlook the UK came out at the top against a range of indicators. JF asked if DIT should look to TTIP for the best idea of the US approach to regulation in an FTA. RS said this was a good start, and that the new NAFTA text once released would be the most up to date.

GRPs:

38. RS said that the US would be interested talking about GRPs within the UK government purview and explore if there is something the UK and US could come to an early agreement on in this space. JF asked RS to bring ideas on this to the next TIWG, there are sensitivities on this issue but JF agreed that this is an area of national competence.

Regulatory co-operation:

39. RS turned to regulatory co-operation and explained that the US had been asked to partake in regulatory co-operation committees as part of previous FTAs (they have one with Canada). USTR's general feeling is that if they are interested in regulatory compatibility they want to do it in a concrete way, involving regulators. The discussion cannot be really general as USG needs to use regulators' time carefully. USTR is keen to talk more in a specific context with the UK on the guidance US regulators provide and how this might relate to UK regulators' areas.

40. Ashley Miller (USTR, joined the meeting late) set out that the US prefers to talk about greater regulatory compatibility rather than co-operation. In the context of NAFTA they are looking at chemicals, auto safety, cosmetics, pharma and medical devices. These are the sectors in which there is key commercial interests on all sides. We should be thinking about similar areas for the UK-US context, where there could be cost savings for both industries. USTR said that industry would like to tell government to accept all approvals given in country X and acknowledge them in country Y but that would clearly get in the way of regulatory sovereignty.

Department for
International Trade

41. Ashley thought there was scope for the UK and US to lay down global best practices on regulation. UK and US regulators have some of the best standards in the world and both countries should look for ways to capitalise on this. RS said that the regulatory co-operation chapter in TTIP was overly burdensome, and the US wanted any such chapter to be outcome focused rather than focused on a high level political get together.

42. RS said she would send JF a 2009 paper presented to the TBT Committee at the WTO by the US, Canada and Mexico on regulatory practice.

43. Ashley said that one of the challenges USTR had in the context of TTIP on Regulation was that there was not a 1:1 conversation between the US regulators and regulators from the MS – instead it was with the EU Commission who hand over Directives and Regulations to MS to be enforced/supervised. She thought there could be scope for further dialogue between the UK and US on this because there could be that 1:1 discussion.

44. JF asked about the different levels of regulatory compatibility. After regulatory alignment/harmonisation there was regulatory equivalence, then mutual recognition of conformity assessment – if the two countries were looking for relatively rapid progress what is the scope for more Mutual Recognition Agreements on conformity assessment?

45. Ashley thought there would be scope. There is an existing medical devices single audit programme and a framework that already exists for this. The UK participates as part of the EU but with its own competency. JF asked if the existence of existing international activity was a pre-requisite for movement in this space, or if it was something that the UK and US could move on bilaterally. Ashley said that while the countries should look to leverage existing frameworks existing activity was not a pre-requisite. JF asked USTR to let DIT know if particular sectors start raising desire for MRAs/closer regulatory compatibility with the US.

46. RS talked through the action points:

- US to provide ideas on GRPs and what could be achieved in the short term for the next TWIG
- US to provide information on US standards and the US conformity assessment system.
- US to send over presentations.
- US to send through information on where the US thinks it could move forward with the UK on issues/areas that proved challenging in TTIP.
- US to send through information on challenges the US has experienced with the EU on electrical safety.
- US to provide information on accreditation bodies.
- UK to keep US updated on developments in the Brexit negotiations.
- Next meeting of the TIWG to take place in London, potentially in early July. MK suggested that it would be a good idea to “shepherd” some of their regulators to the UK for this for some more in-depth discussions with UK regulators.

Department for International Trade

Title of Meeting: **Agriculture**

Date: **22 March 2018**

Time: **13:30-15:30 (EDT)**

Participants

Name	Department/Directorate
Ceri Morgan	DEFRA - Global Trade
Katie Waring	DIT - UK-US Trade Policy Team
Russell Stokes	DEFRA - Legal
James Dunn	DEFRA - US Lead
Neil Feinson	DIT - Goods
Jack Moreton Burt	DIT - Goods
Rhys Bowen	DExEU
Julie Callahan	USTR
Roger Wentzel	USTR
Mara Burr	US - FDA
Anne Kirchner	US - FDA
Jay Mitchell	USDA/APHIS
Lori Tortora	USDA/FAS
Mary Stanley	USDA/FSIS
Chris Thompson	USDA/AMS
Donald Willar	USDA/FAS

Report of Discussions and Outcome

1) Defra presented on the Future of Farming consultation and the 25 Year Environment Plan. The presentation highlighted how this is the largest domestic reform since World War II, and the exciting opportunities this will bring. The US welcomed the presentation, asking probing questions on some of the policy aims. They indicated that they would be responding to the Future of Farming consultation document.

2) Veterinary Equivalence Agreement

   - USTR sought clarity regarding which agriculture-related regulations are subject to the lift and shift, if there is an obligation to maintain EU harmonized standards, and where gaps exist in regulation during the transition period.
   - DEFRA indicated that there will be a general lift and shift for continuity for the applicable areas. It is difficult for the UK to provide an exhaustive list now. Continuity is the overarching principle in the implementation period.

- USTR asked if US needs a continuity agreement signed by 2019 or by the end of implementation period. They also questioned whether EU or UK rules will apply in a market access issue.
- DEFRA said that the UK will be able to negotiate and ratify agreements in the implementation period. Also stated that the UK will continue to be a part of the EU agreements but no longer participating in the political institutions. However, some input will be allowed on a case-by-case basis on issues that affect the UK.
- USTR asked about border operations guidance and if the UK would continue to reference the EU facility list. US expressed concern about lead time needed for formal rulemaking process if a new list is needed by the UK.
- DEFRA stated the intention was the same and said timelines and examples would be helpful.
- USTR asked about the possible acceptance of certificates without additional list.
- DEFRA agreed to look into the issue, but warned that there was not necessarily going to be a rapid answer.

3) Organics

- USTR stated that the National Organics Program has the funds allocated for the evaluation and is eager to get started but will wait on the UK's lead. They believe it should be straightforward exchange of letters for the US. They do need documentation for procedures.
- DEFRA is still assessing the potential impacts of such an inspection on other international agreements.
- US technical experts are eager to talk to UK technical experts. USTR asked if the US organics office can communicate directly with the UK organics office. Also offered to review language whilst the technical work proceeds.
- USTR inquired about the possibility of a working group, currently in the arrangement but as part of a transition discussion. DEFRA mentioned likelihood of active TIWG opportunities around organics.

4) Spirits

- DEFRA acknowledged cross-border issue with Irish Whisky but highlighted new legal phrasing to resolve concerns.
- USTR has not had a chance to do a legal analysis on explanatory note. They have a better understanding after discussion but still need to do a complete internal review. They will get back to DEFRA with questions but "feel that we are getting to a good place."

5) Wine

- DEFRA sent the US an explanatory document the previous week. The document contains an explanation of technical amendments draft text and overarching provisions with reference to EU law. DEFRA asked if USTR had an opportunity to analyse the text or was more time needed.
- USTR said they needed time to do some analysis. The conversation will likely be similar from a US perspective.
- DEFRA said that there are fundamental questions around timing, but they recognise the challenges of the EU approach and are trying to understand the priorities of UK trading partners.

Department for International Trade

- USTR responded that an agreement is needed by March 2019, but time and process constraints mean they won't end up with the product they want.
- USTR and DEFRA did a run-through of the articles in the wine agreement. The US desires mutual recognition of practice. They also pointed out a few areas of concern: annex with Article 7 ("administrative hassle"), Article 9 certification ("don't have a need"), Article 10 ("if language is kept, make sure it is specific to the objective—tailor it to the bilateral"), and Article 11 ("very proscriptive").

Action Items

- USTR to provide information on formal rulemaking timetables regarding new list of facilities.
- DEFRA suggested another VTC on Annex 5.
- DEFRA and USTR will have a presentation exchange around the command paper.
- USTR waiting for DEFRA on organics. Interested in a working group on organics during implementation period. Will reach out to DEFRA to set up a call.
- USTR will get back with questions on explanatory note on spirits.
- DEFRA conveyed that the next steps can be done on spirits by correspondence. USTR will get back to DEFRA within 2-3 weeks.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments

- We had met with Roger Wentzel before the meeting to prepare him for our suggestions on Wine and Spirits. On Spirits, we are cautiously optimistic that our proposal on Irish Whiskey will be accepted but we have not yet heard further. On Wine, there will need to be constant management around what counts as continuity vs a new agreement. US will continue to push against the current text right up to the wire, given the well documented differences in approach to wine regulation in US v EU. The trade flows speak to a need for the US to resolve continuity with the UK.

- The VEA is going to require further regulator to regulator dialogue following this working group. Negotiators are in a similar position on the text – it is archaic, but a continuity version will probably carry us through. Regulators are not as convinced on both sides.

- On Organics, the US are prepared to wait for the UK to spend more time on operational discussions before agreeing what should be a straightforward text.

Department for
International Trade

Title of Meeting: Closing Plenary

Date: 22 March 2018

Time: 16:00

Participants
Whole delegation on each side.

Report of Discussions and Outcome

Dan Mullaney (DM) and Oliver Griffiths (OG) both reflected on the week's discussions.

1. DM commented that:
    i. the meetings had gone very well and that all the readouts he had received reflected **very good, substantive discussions**. New issues had come up that had not been discussed before, and this was a positive thing. It meant that conversations were detailed enough to mean that both parties were uncovering things they were not aware of before.
    ii. Clear enthusiasm on US side - over 100 people had participated in the talks despite the weather.
    iii. The **regulatory issues** thrown up by the conversations were particularly important, and (given the timing of UK/EU talks) important to highlight as early as possible.
    iv. The message received the week before from SoS Fox and USTR Lighthizer about focusing on what can be done now had been in evidence throughout the sessions. There had been good progress on some of the **short-term outcomes.** This would ultimately be very helpful in showing markers of progress. In particular there will be a joint economic analysis on Intellectual Property taking place before the next Working Group.
    v. The **continuity agreement discussions** had been particularly rich. Some aspects had arisen in the discussions that had not been covered previously – a number of different considerations that the US needs to focus on. DM thanked Rhys for this input on explaining the developments in the Brexit negotiations and implications of the Implementation Period.
    vi. On the legal side **the recent agreement on the transition** would have implications for the continuity agreement work and also for the WTO discussion – particularly with respect to the GPA. USTR legal (Alexandra) noted that it would be helpful to have a further conversation between legal teams on both sides once the US had had some further time to consider internally.
    vii. On **services** the discussions were identifying a number of things that needed addressing. The conversation this time didn't focus on telecoms or digital and he welcomed the plan to do more on digital services side and telecoms next time.
    viii. **It had been an event week in the US on trade:** DM hoped that the issues the US has with China are something on which the UK and US can work together.
    ix. DM concluded his remarks by saying it had been **a "great set of meetings".**

2. Oliver Griffiths offered remarks from HMG.
    i. OG thanked the US for their work in co-ordinating the meetings.
    ii. The **timing** had been interesting with so much activity in both the US and the March European Council.
    iii. On **Continuity Agreements** there had been good conversations. It would always be tempting to think about how the agreements could be improved, but the UK has

Department for
International Trade

a very full agenda at the moment so OG said that it would be good to keep the conversation a technical one. OG reflected that the parties were closest on the spirits agreement.

iv. The parties had made great progress on **Short Term Outcomes**, but important that we continued to push this strand of work to deliver. OG agreed with DM on the need to bring the business voice in more.

v. The **SME dialogue** had been a success, and the UK is looking forward to the next iteration of that. Would be good to think more about how we sequence these with the working groups going forward.

vi. OG looked ahead to a time when the UK and US would be neighbours in the **WTO** and commented that the UK is an emerging voice in the organisation. OG is keen that the UK and US think about this as a progressive partnership and how we can make that partnership work.

vii. On the working group sessions themselves, OG welcomed the **full discussions on new topics** – for example on mutual recognition of professional qualifications. The UK had also very much enjoyed the ROO session earlier in the day.

viii. He welcomed the fact that the group discussions were in lots of different policy areas moving away from a quarterly programme to something that feels more like a continuum – for example through regular VTCs. Policy leads were thinking about how best to use successive TIWGs but not just relying on that.

ix. OG spoke to the actions coming out of the talks, noting that there are many. Among them, a series of papers on trade secrets/standards and conformity assessment; joint work on a joint economic study. OG reflected that we should do more of this detailed information exchange as we go forward, and that there will be a plethora of follow-up meetings.

Rhys Bowen (RB) noted that he had had a very useful discussion on continuity agreements at the White House. Lots of the issues that were discussed were the same as those that had arisen in the context of discussions with the Commission. RB noted that HMG is very aware of the legal consideration of the plans for transition still on-going on the US side. RB noted that HMG is grateful for this, and that there would need to be further legal-to-legal discussions around issues including multilaterals. RB committed to keeping the US updated on developments in the Brexit negotiations.

Department for
International Trade

UK-US Trade & Investment Working Group

10 – 11 July 2018

Full Readout

Department for
International Trade

FINAL AGENDA & TABLE OF CONTENTS

Tuesday 10 July		Page
9.30 - 11.00	**Opening plenary session**	**3**
11.00 - 16.00	**Small & Medium-sized Enterprises**	**7**
11.00 - 13.00	**Goods: Rules of Origin**	**15**
11.00 - 13.00	**Services: Digital**	**18**
12.00 - 13.00	**Agriculture**	**25**
14:00 - 16:00	**Regulation: Technical Barriers to Trade**	**28**
14:00 - 16:00	**Services: Professional Business Services**	**35**
14:00 - 16:00	**Intellectual Property: Overview and Enforcement**	**40**
16:00 - 18:00	**Regulation: Good Regulatory Practice**	**56**
16:00 - 18:00	**Legal Group**	**64**
16:00 - 18:00	**Economic Group**	**76**

Wednesday 11 July		Page
9.00 - 12.00	**Goods**	**82**
9.00 - 16.00	**Investment**	**92**
10.00 - 12.00	**Services: Telecoms**	**99**
13.00 - 16.00	**Agriculture VTC**	**106**
13.00 - 16.00	**Regulation: MRAs**	**111**
13.00 - 16.00	**Intellectual Property: Patents and Pharmaceuticals**	**119**
13.00 - 16.00	**Services: Financial Services**	**133**
17.00 - 18.00	**Closing plenary session**	**142**

Department for
International Trade

OPENING PLENARY SESSION

Date: 10 July 2018

Time: 09:30-11:30

Participants:

Name	Department/Directorate
Oliver Griffiths	Plenary Chair - DIT- UK-US Trade Policy
Dan Mullaney	Plenary Chair - USTR
All participants from UK and US delegations present.	

Report of Discussions and Outcome:

1. Opening Context

Oliver Griffiths UK DIT (OG) opened the plenary by setting out the UK context. In particular, the Chequers Cabinet agreement and details of the UK's Future Economic Partnership (FEP) with the EU would be material to many aspects of the working group discussions. In her statement to Parliament, the Prime Minister was clear that the UK's ability to exercise its independent trade policy and enter into FTAs (US was top of list) would be key to the FEP. The Future Framework White Paper would issue later this week. OG encouraged the US delegation to raise questions and concerns about the Chequers package.

OG then went on to say that the UK was disappointed that the US had imposed tariffs on steel and aluminium against allies, including the EU. We would look to seek a permanent resolution and de-escalation. On autos UK Ministers would be making strong representations – we estimated that the EU car industry supported half a million jobs in US. UK auto imports were not a threat to US national security.

Dan Mullaney US USTR (DM) set out the US context. The US was very interested in deepening the current relationship with the UK now. It was also important to continue the work to lay the foundations for a future FTA – it was very much a priority for the current Administration to enter into a comprehensive FTA with the UK.

The US was also very disappointed that no resolution had been reached on S.232 – the Administration understood that the UK was not a national security threat. The US wanted to engage with allies on overcapacity issues, they had been hopeful that talks between Commissioner Malmström and Secretary Ross would result in a solution and were disappointed this had not happened. The S.232 investigation showed the need for allies to work together with respect to China: this was a joint problem and whilst the US and EU response might differ, there was a strong incentive to work together.

On the wider contact in the US: NAFTA – 7 formal negotiating rounds had taken place. There was currently a pause for the Mexican elections, but the intention was to move forward on a trilateral basis. Trade Promotion Authority had been rolled-over until 1 July 2021 – as long as negotiations on FTAs were completed before the expiration of TPA, a vote in Congress could be held under the current TPA authority. The Administration was still very focussed on the challenges presented by China – specifically regarding non-market economy status, overcapacity issues and IP theft and

Department for
International Trade

forced technology transfer. The US wanted to continue discussing these common concerns with the UK and in the trilateral (US-EU-Japan) format – the recent trilateral statement at the OECD Paris meeting had been encouraging. The Administration was still committed to an FTA with UK and was looking at FTAs with Africa (no specifics yet).

DM and OG both hailed the success of the 2nd SME dialogue that had taken place the day before the working group. It would be useful to find ways of getting more info out to SMEs, so they could get past the "fear factor" of entering another market.

Christina Sevilla (US – USTR) and Kate Maxwell (UK – DIT) fed back on the 2nd SME dialogue. Both were very pleased with turn-out. US SMEs from California, Texas and the Mid-West had travelled to London to participate. There had also been strong interest from IP organisations, small patent and trade mark firms, as well as long established manufacturers from the UK and brand-new start-ups. There had been a good discussion about the importance of public/private partnerships. There was also an emerging idea to look at cooperation over clusters (e.g. Wave and ocean technologies in specific regions) and to reduce the duplication of standards and unnecessary bureaucracy. There would likely be another (3rd) SME dialogue towards the end of the year.

2. 4th TIWG Objectives

OG said he was conscious there would not be many TIWGs left before the UK left the EU. In terms of the objectives for this 4th meeting: **i)** Preparing for an ambitious FTA – it was important that the UK and US understood each other's systems. We should also look for opportunities to be trail-blazers in Chapters of any future FTA. Negotiations with the EU were ongoing, and it was therefore important that the US made the UK aware of any concerns (this was important for UK policy making). **ii)** The working group needed to think about where next with STOs. This working group would be relatively low key in terms of announcements. It was however encouraging to see new ideas gaining pace (SME session on blue economy, joint task force on emerging technologies, joint economic study on IP protection). We needed to think broadly and if other ideas came out of discussions we should progress. **iii)** Continuity Agreements. The UK would welcome an update from the US side on the approach to international agreements agreed at March European Council, including what more the UK could do to provide assistance to US inter-agency processes. Progress was also needed on individual agreements. It would be particularly good to work towards getting the spirits agreement agreed in principle during this working group.

DM. Agree with the overall objectives for the working group. The teams had done a very impressive job in a dynamic environment so far. Discussions on an FTA should be pushing for maximum ambition. The UK and US had a huge amount in common and push together to set global best practice. UK-EU negotiations were part of the dynamic and shifting environment. The US was watching where UK-EU negotiations were going and what the future relationship would look like as this would have implications for a UK-US FTA. The US were keen for a UK-US FTA to be ambitious and remove as many regulatory barriers as possible: goods, agriculture, TBT etc. The US were very interested in the detail behind the Chequers statement and in particular the Common Rulebook. On STOs, we needed to remain attentive to ways to strengthen the UK-US trade and investment relationship now. On Continuity Agreements, UK-US legal teams were discussing the proposed continuity approach, including at this working group – US recognised that the ball was in the US' court.

Department for
International Trade

3. UK-EU: Chequers Statement

Rhys Bowen UK, DEXEU (RB) briefed the plenary on the status of negotiations between the UK and EU, and the UK Cabinet agreement reached at Chequers on the UK's future economic partnership with the EU.

Brexit update. The March European Council (MEC) delivered the UK's objectives on the Implementation period. The June European Council (JEC) on the other hand had always been intended to be lower key – there were no decision points and the objective was to demonstrate progress as a milestone to the October European Council (OEC). At the October Council, the UK was hoping to have a political statement on the future framework for the UK-EU relationship post Brexit (both economic and security). As HMG takes the Withdrawal Agreement through Parliament, we will need to give MPs a strong sense of what the future relationship looks like. On the Withdrawal Agreement, the UK and EU Commission put out a joint statement before JEC: most text has now turned "green" but there are still a small number of outstanding issues. On Northern Ireland, all parties remained committed to no hard border and there were three scenarios: Plan A no hard border; Plan B agreement to some changes with the consent of all parties; and Plan C a "backstop period" to provide extra time to be able to deliver on the commitment of no hard border. The next step was to go through the Chequers package with the EU, with the aim of completing the Withdrawal Agreement before OEC.

Chequers package. RB updated on the Chequers agreement. The UK Cabinet had met to discuss the UK's future relationship with the EU. The subsequent statement was a recognition by the Cabinet that the UK position needed to evolve, including the detail on a Future Economic Partnership. The Future Framework White Paper would add some detail – it could not however include every detail as this was down to negotiation with the EU. The core proposition included: i) a Free Trade Area for goods (including agri-food products) between the UK and EU; a Common Rulebook to enable frictionless trade between the EU and UK for (i) above; and iii) a Facilitated Customs Arrangement. On the Free Trade Area for goods, there were two key objectives: a direct economic objective – frictionless trade between the UK and EU was very important and there were deeply integrated supply chains, which the UK needed to maintain and develop (a message received from business); and Northern Ireland, where there remained an absolute commitment to ensure no hard border and that frictionless trade was preserved on that border (this would secure economic and broader political and security objectives). On the Common Rulebook, we were conscious of the implications for wider trade policy. As such, the proposition was for the rulebook to encompass only those elements needed for frictionless trade at the border – this would require discussions with the EU on how to differentiate from behind the border regulations. The rulebook would however still provide for flexibility on conformity assessment. Parliament would also have the power to decide whether or not the UK should harmonise with future EU rules – taking into account the economic impacts. The Facilitated Customs Arrangement was a new and untested model, which sought to remove customs checks and would see the implementation of UK trade policy/ tariffs for goods staying in UK and EU policy/ tariffs for goods gong to the EU. In summary, HMG felt this was the right package to achieve the UK's economic, Northern Ireland, EU and wider trade policy objectives.

On services, RB explained that the UK choosing between the single market for services and WTO status was too stark a distinction. In her Mansion House speech, the PM had been clear that to be part of passporting, the UK would need to sign up to the single market financial services rulebook, which was not feasible. However, the Chancellor had indicated that he thought it possible to have a deal or close relationship with the EU on financial services. Conversations with the EU have developed, with HMG arguments on importance of London hitting home and EU Member States recognising the difficulty in moving this onto the continent. The UK was not looking to current Single Market arrangements on services, but we did want a close relationship.

Department for
International Trade

RB touched on International Agreements (IAs) stating that there was still a strong commitment from HMG to deliver a smooth Brexit, but we recognised that 3rd countries would want to take a view on the agreement reached at MEC. Here, we were keen to understand US views. UK felt that the MEC agreement offered a robust mechanism for delivering IAs through the Implementation Period. Following discussions, the EU Commission was willing to accept responses from 3rd countries. DEXEU and FCO Legal Advisers had visited Washington recently and we were now keen – through the TIWG and VVIP visit – to get a sense of the US position. Andrew Lorenz US – National Economic Council responded stating that the US Administration, through an inter-agency process, was studying a draft list of agreements subject to the MEC agreement. The hope was to have this work finished shortly and then take steps on policy side to respond to the EU. Cathy Adams – UK, DEXEU reassured that the MEC agreement was not intended as a unilateral agreement – rather, it was intended to involve 3rd countries.

Key Actions and Next Steps:

OG and DM agreed that there would be two further working group meetings in the current format before potentially moving onto the “next stage of talks” in April next year. Given the need to de-link working groups from European Councils, it was agreed that the 5th TIWG would be held in November 2018 (exact dates tbc).

Department for International Trade

SMALL & MEDIUM-SIZED ENTERPRISES

Date: 10 July 2018

Time: 11:00–16:00

Participants:

Name	Department/Directorate
Kate Maxwell (KM)	DIT- Trade Policy
Julian Farrel (JF)	DIT- Trade Policy
Chris Woodward (CW)	DIT- Trade Policy
Sophie Brice (SB)	DIT- UK-US Trade Policy
Jack Kennedy (JK)	DIT- UK-US Trade Policy
Angelina Cannizzaro (AC)	BEIS
Deborah Matthews (DM)	BEIS
Lewis Barton (LB)	BEIS
Tim Wedding (TW)	USTR
Rosalyn Steward (RS)	US Small Business Administration
Lori Cooper (LC)	US Dept. of Commerce
Christina Sevilla (CS)	USTR
Raimonds Pavlovskis (RP)	USTR
Diane Steinour (DS)	US Dept. of Commerce
Christine Peterson (CP)	USTR
Kim Tuminaro (KT)	US State Department
Sarah Bonner (SB)	US Small Business Administration
Pat Kirwan (PK)	US Dept. of Commerce
Rob Tanner (RT)	USTR

Key Points to Note:

- We agreed that the 2nd SME Dialogue went well, and to hold a third US-UK Dialogue focussed on digital trade opportunities for SMEs in the US before the end of the year.
- We agreed to collaborate on production of a joint UK/US e-commerce resource for launch at the next Dialogue. (DIT to coordinate)
- The United States and the Organization of American States extended the invitation to the United Kingdom to attend the 10th Americas Competitiveness Exchange (ACE) 21-28 October to explore potential public-private sector partnerships.
- The SME working group agreed to raise awareness of the close regional connections between the US and UK in the ocean and marine technology sector (i.e. Blue Economy) and explore pilot opportunities for US-UK trade promotion and trade show collaboration in 2019.

Department for
International Trade

Report of Discussions and Outcome:

Reflections on the 2nd UK-US SME Dialogue and Next Steps

1. The SME Working Group reflected on the 2nd UK-US SME Dialogue on 9 July. Both Christina Sevilla (CS) and Kate Maxwell (KM) agreed that the event had been a success and had been well attended by a diversity of SME stakeholders from a variety of sectors across the UK and US (including from as far afield as California, Texas and the Mid-West), providing for compelling discussion of opportunities and challenges of UK-US trade. The event built productively on the first Dialogue, offering a varied but sufficiently focussed range of sessions that effectively prioritised audience engagement through integrated Q&A sessions – a 'best-practice' that we should seek to replicate.

2. Reflecting on stakeholder input at the Dialogue, the Group agreed that we should take forward discussions on how to support SME cooperation and information sharing – including through deepening public-private partnerships and relationships with trade associations, developing regional connections, and promoting SME involvement in trade fairs, shows and business-to-businesses opportunities. CS noted that the US consider work on regions and clusters as a potentially productive vein of activity – a way of accessing communities of businesses and creating connections between them. While governments may facilitate this process, the emphasis should be on inspiring private-sector leadership. The Blue Economy (see below), may be a good place to start.

3. In a trade policy context, several SMEs at the Dialogue expressed interest in how regulatory and conformity assessment processes might be eased to enable greater market penetration by SMEs – including looking to mutual recognition where possible.

4. A number of stakeholders reported that they considered the event to be a good use of their time.

5. The SME working group agreed to hold an 'unprecedented' third US-UK Dialogue focussed on digital trade opportunities for SMEs in the US [potentially New York] before the end of the year [possibly early November]. The third Dialogue would involve a half-day event comprising policy discussion alongside more practical 'how-to' sessions/tutorials led by a relevant private sector partner (e.g. PayPal, eBay) to ensure optimal value for stakeholders. We will work to reach a wider variety of stakeholders – including very small businesses or entrepreneurs – and seek to engage a range of trade associations (including British American Business /Federation for Small Businesses). CS proposed a joint UK/US e-commerce product for launch at the third Dialogue [a working draft had been circulated ahead of the meeting], and profile this alongside existing resources (an updated version of the Doing Business brochure; Intellectual Property toolkits). After the third Dialogue we agreed that we would switch to an annual basis, alternating between the UK and US at the regional level.

Actions

- UK and US to collaborate on delivering the third SME Dialogue by the end of the year in the US
- The UK to supply comments on US e-commerce product by the first week of September. (DIT to coordinate)
- The Working Group (UK and US) to consider updates to the Doing Business brochure by first week of September. Agree new content by the end of September to leave October for production.

A dedicated SME Chapter and SME-friendly Provisions in a Prospective FTA

Department for
International Trade

1. KM pressed US colleagues on their preferences regarding a dedicated SME chapter and SME-friendly provisions within a prospective future FTA.

2. CS said she would expect a dedicated SME chapter to contain articles on information sharing and a committee/SME points of contact, as well as language encouraging cooperation on SME-friendly provisions threaded throughout the FTA text. The chapter would not be subject to dispute.

3. CS agreed with the need for ambitious information sharing requirements, she was clear however that while these should specify the types of information parties will be required to provide, they **should not be prescriptive of how** information should be shared (e.g. they should not specify a dedicated web-platform with required characteristics). Any resource should be flexible to nimbly respond to any changes in the regulatory environment.

4. CS clarified how they see the role of FTA SME 'Committees', framing these as a formalisation of existing bilateral SME policy officials and stakeholder fora (e.g. the SME Dialogue). As a joint institution the Committee (and Dialogue) enables SMEs to 'have a voice at the table' and may liaise with other committees (e.g. IP) to raise issues relevant to SMEs. The relationship between committees is not intended to be hierarchical.

5. CS noted that it is expected that a dedicated chapter will include language that lends profile and significance to and encourages parties to cooperate on SME-relevant provisions contained throughout FTA chapters (e.g. provisions on common data entry, automated forms, advance customs rulings in GRP/Procurement/IP chapters) These may be summarised and cross-referenced in the SME chapter.

6. Other chapter leads will assume responsibility for SME-friendly provisions within a given chapter. Kim Tuminaro (KT) noted that SME policy leads should work closely with chapter leads as texts develop to ensure that they continue to reflect SME priorities. CS emphasised that SME leads would not see it their place to negotiate with chapter leads over what their respective chapters should include.

7. The UK agreed that it is vital (for SMEs, as well as politically and for recommending the agreement) to be able to demonstrate how the agreement delivers tangible benefits for SMEs and other stakeholders. CS explained that the US produce plain-language fact-sheets that profile the benefits of an agreement in general and, where relevant, on a sector-by-sector basis.

8. CS stressed that SME-friendly provisions do not however imply special or preferential treatment for SMEs – or any special derogations; she emphasised that the presiding intention is that SME requirements are collaborative rather than prescriptive.

9. CS continued to explain that the chapter – through the 'committee' provision – allows for formalising the SME Working Group and Dialogue as mechanisms for ensuring continued regard for SME needs and interests and providing stakeholders a space to voice concerns and be heard by policymakers. The US has a constellation of advisory committees under the 1974 Trade Act, and an open domestic consultation process is required for a huge amount. The Dialogue offers the opportunity for us to listen to them together. The Chapter elevates this process through codification as a legal text (albeit one not subject to dispute).

10. KM pressed the US on further details on NAFTA. While unable to provide full details, CS described the agreement as 'TPP+', highlighting an SME Cooperation section containing language on cooperation on trade promotion/match-making/clusters and pilot programmes. The

Department for International Trade

agreement will contain language on (online) information sharing – again specifying what types of information parties will commit to providing but retaining flexibility on how this is provided.

UK Invitation to the Americas Competitiveness Exchange (ACE)

1. Pat Kirwan (PK) provided an overview of the 10th Americas Competitiveness Exchange (ACE), that will take place 21-28 October 2018, showcasing key Northern California destinations that are helping to move the success that is Silicon Valley's Innovation and Entrepreneurial Ecosystem across the Golden State. The website will go live on Monday 16 July.

2. The US and the Organisation of American States (OAS) extended the invitation to the UK to attend the 10th Americas Competitiveness Exchange (ACE).

3. PK advised that attendance is expected to be at Assistant-Secretary or Director-General (i.e. an appropriate decision-making) level. Attendees will visit each of six sites (San Francisco and Silicon Valley; Monterey Bay Area; Santa Cruz; Salinas Valley; Fresno; and Sacramento) with the objective of providing an opportunity to extend potential partnerships and cluster to cluster collaboration. The US advised that an example aim may be to attend with view to securing a partnership (the US agreed to send details of past examples).

4. KM and Angelina Cannizzaro (AC) advised US colleagues that the invitation should be forwarded in the first instance to Department of International Trade (DIT) Permanent Secretary Antonia Romeo and Department for Business, Energy and Industrial Strategy (BEIS) Permanent Secretary Alex Chisholm.

Actions

- US to issue invitation to ACE to DIT Permanent Secretary Romeo and BEIS Permanent Secretary Chisholm by the end of the week; UK to respond;
- US to provide example details of partnerships created through the ACE process.

Digital Trade and the Third UK-US SME Dialogue

1. DIT Services Team (Chris Woodward (CW)) and Robert Tanner (USTR (RT)) joined the Working Group for a discussion on digital trade and the prospect of a digital trade focussed SME Dialogue in late 2018.

2. The US emphasised the importance of digital trade (e-commerce) for SMEs, noting that many SMEs are becoming involved as digital exporters (either by accident or design), due to the strong opportunities it offers for allowing small businesses to export more easily and in greater volume. While SMEs engaged in exporting will usually export a single good to a single market overseas, those exporting through e-commerce platforms will export to 19 or 20 different markets. The e-commerce market between the UK and the US is one of the most intensive.

3. CS noted that we are working to do more to support SMEs to export more – including by exploiting opportunities provided by e-commerce. We have produced resources – such as the *Doing Business in the US and UK* brochure and IP Toolkits – to inform SMEs of their options and available support and will be working together to produce an e-commerce resource (see above.

4. CS suggested a digital trade focussed third SME Dialogue to be held in the US later this year [Provisional title: *SME Exporters Taking Advantage of Digital Trade*]. She noted that this would involve a broader discussion of the role of digital trade as relevant to SMEs, as well as offering opportunity to launch the e-commerce resource – intended to raise awareness of the possibilities of e-commerce for promoting business. The event will marry discussion of policy areas first,

Department for
International Trade

followed by practical 'how to' elements to increase relevance and value for stakeholders and bring the relevance of policy into sharp relief.

5. CW agreed that the proposals sound very positive. The UK has a strong and vocal global role in the digital trade sector, which we consider an area of ambition. The idea of the third Dialogue integrating policy and 'how-to' sessions is particularly appealing and agreed with the US to start fleshing out a programme. CW noted that we would need to draw on support and expertise of ITI (including DIT teams and colleagues at Post in NYC), DCMS and BEIS. The initial draft of the resource is also helpful – and something the UK could provide input on.

6. We agreed to draw on lessons learned from the first and second Dialogues in organising the third. As with the first Dialogues, we will need to introduce the TIWG as laying the groundwork for a future FTA. We would then call on partners in the private sector to support delivery of practical 'how-to' sessions aimed at increasing stakeholder understanding and capacity of key issues. At all times we should optimise stakeholder participation in panels and opportunities for engagement – including encouraging stakeholders to raise concerns and discuss barriers to trade. The event would, however, be shorter and more focussed than the second Dialogue – likely half a day.

7. CP raised Privacy Shield as a potential topic, including a practical session on what it means, and how it may be applied. CW noted that this is something we are unable to comment on at present; but that we retain a watching brief. The US suggested that we might alternatively consider a session on data-flows and digital trade best practices more broadly. We agreed to take offline further discussions about how brief sections on GDPR and Privacy Shield may be helpfully included in forthcoming respective e-commerce resources.

8. We agreed that the highly relevant and important area of cyber security would be too broad to unpack in either the third Dialogue or the e-commerce resource, and that any consideration should be kept to essentials only. At the Dialogue we could approach the US Department for Homeland Security or the UK National Cyber Security Centre for materials to distribute. In the e-commerce resource we can signpost sources for cyber-security information or support.

9. We agreed that it will be important to reach out to different bodies and associations to capture new stakeholders and encourage maximum inclusivity – including approaching those that may not have yet considered exporting, such as entrepreneurs. From the UK-side, TECH UK and BAB may be able to assist; we could approach ITI on identifying stakeholders and trailing the event.

Actions

- UK to comment on US e-commerce publication by first week of September;
- US and UK version/additions to the e-commerce publication to be finalised and agreed by end of September 2018;
- UK and US to approach respective cyber-security departments/agencies to request links and material for use in e-commerce brochure and SME Dialogue;
- UK (CW; KM) to start putting together provisional agenda for third SME Dialogue.

UK-US Cooperation within the Marine Technology Sector (the Blue Economy)

1. KT repeated a compelling pitch for US-UK collaboration in the ocean and marine technology sector (i.e. the Blue Economy) [**N.B.** the US have suggested collaboration in this area before; while open we have always requested greater specificity about what any work might look like in practice].

Department for International Trade

2. KT highlighted 'significant' private sector interest on both sides of the Atlantic in the Blue Economy [which – as part of the 'clusters' model – involves development of dynamic regional, national and international linkages between commercial, research and public-sector stakeholders to promote sustainable use of ocean resources for economic growth, improved livelihoods and jobs, and ocean ecosystem health]. While KT explained that the US does not have a *national* Blue Economy strategy, there are several regional-level initiatives being pulled into the international space. The US Dept. of Commerce has secured a grant for trade cooperation with the Maritime Alliance of San Diego (a 'triple-helix cluster' involving SMEs, research institutions and universities, and government), a US Blue Tech industry association and co-founder – alongside a number of UK marine associations (Marine South-east; Cornwall marine Network; Mersey Maritime; Team Humber Marine Alliance) – of the Blue Tech Cluster Alliance.

3. Through active (international) collaboration and cooperation between the three (Public, Private and Research) sectors KT outlined the potential for joining up and commercialising the various elements of blue economy activity. This could also dovetail well with stated UK future sector priorities [**N.B.** these were outlined and shared with US colleagues by BEIS prior to the Working Group], including education, robotics (e.g. autonomous shipping), AI, digital and tech. We might also explore intersections with emerging technologies and avoiding regulatory barriers, data-protection and transfer issues, and how to prepare for careers in the sector.

4. KT set out that cooperation would take place within the framework of the Galway Trilateral Context (i.e. in the context of the Galway Statement (2013) between the EU, Canada and the United States of America). Primary concerns under this agenda at present include:
   - The sustainable use of ocean resources in the North Atlantic, and understanding of current and future stressors on ocean health (e.g. business, tourism, etc.);
   - How to harness ocean energy (e.g. wave technology) to further and support Blue Economy activities (e.g. shipping or aquaculture) – with a call for international cooperation in this space [N.B. the US stated that this has already started with Scotland].

5. AC noted that the proposal for collaboration sounds positive, but that the 'Blue Economy' remains a relatively new concept in the UK and engagement across government and with other stakeholders is needed. In the immediate term, a scaled-down pilot approach may be feasible – subject to agreement with DEFRA, the BEIS Climate team, and other relevant teams. KT suggested we could potentially join up with an existing trade show (e.g. *Ocean Business 19* in Southampton, April 2019), followed by a policy discussion in the margins as a first step with this work. CS noted how this may, in addition, provide a hook for UK-US synergies in UK priority future sectors, including artificial intelligence and robotics.

Actions
- UK and US to collaborate on delivering a Blue Economy theme to Ocean Business 19 Southampton Trade Fair – including an official-level meeting in the margins.

UK-US Cooperation on Future Sectors
1. Lewis Barton (LB) briefed the US on the UK's Future Sectors agenda – which focusses on areas where rapid technological development (e.g. AI or Blockchain) is disrupting sectors and transforming the economy. The UK has tended to be a little slow in adopting new technologies and needs to get on the front foot. The BEIS is working alongside other government departments to shape an ambitious policy framework which has, in turn, led to a sector-deal between

Department for
International Trade

government and academia and the formation of a new Artificial Intelligence (AI) team. Next generation robotics is our next priority; we have started to develop clusters of scientists throughout the UK (e.g. in Edinburgh, Cambridge). We acknowledge that the US is a world leader in robotics. We would like to understand more on how the US supports the industry and identify potential opportunities for collaboration on shared priorities (e.g. the Plymouth-Plymouth autonomous ship voyage).

2. PK noted that smart fabrics are for an emerging priority for the US, and this is driving a lot of cluster work in certain areas (i.e. health, and general apparel). There is also a great deal of interest in drone-technology, with a lot of University-level activity and an inter-regional competition focussed on different aspects of drone use and different forms of drone-technology application (e.g. agriculture; how drones interact with local airspace). There may be good opportunities for collaborating on drone technology, although it is less certain where we might collaborate on the robotics side given this is not a Silicon Valley cluster focus.

3. KT asked whether we were looking for immediate or longer-term collaboration on robotics. LB noted that there may be opportunities for both. We suggested that it would be helpful to create a banner to raise the profile and raise the visibility of these work-streams – as with the 'Blue Economy' – to help identify and make progress towards longer-term objectives. CS suggested that we could join some of this work up within the Blue Economy piece and look to introduce some robotics stakeholders in the proposed April 2019 Southampton Trade Show event. The event could serve as a small pilot that may lead to bigger things; and we agreed that we could use it to announce the Plymouth-to-Plymouth autonomous shipping voyage.

4. KT sounded a cautionary note, underscoring public sensitivities over the perceived risks to livelihoods posed by these technologies. We may want to look at profiling transformative sectors that are perceived as having a less ambiguous socio-economic impact, such as e-health (where a lot of work is being done). While we accepted this risk, CS noted that there is operationally no reason that we should not invite the robotics cluster to participate at the April 2019 event; we can then decide on appropriate framing and messaging to ensure that this does not generate concerns over job-losses. UK agreed and noted that as part of our collaborative efforts within the sector we expect there to be a wider piece of work focussed on the ethics of innovation, dovetailing into policy work on robotics standards and regulation (e.g. regulation for driverless vehicles, data-storage, etc.). We agreed that it is vital for policy makers to prioritise close consultation with innovators and businesses in order to keep a finger on the pulse of new developments and their associated risks and opportunities.

Actions

- UK and US to invite robotics stakeholders to Ocean Business 19 Southampton Trade Fair as a first step towards deeper cooperation within the next-generation robotics and Blue Economy spaces.

Key Actions and Next Steps:

- UK and US to collaborate on delivering the third SME Dialogue by the end of the year in the US
- The UK to supply comments on US ecommerce product by the first week of September. (DIT to coordinate)
- The Working Group (UK & US) to consider updates to the Doing Business brochure by first week of September. Agree new content by the end of September to leave October for production.

Department for
International Trade

- US to issue invitation to ACE to DIT Permanent Secretary Romeo and BEIS Permanent Secretary Chisholm by the end of the week; UK to respond;
- US to provide example details of partnerships created through the ACE process.
- UK to comment on US e-commerce publication by first week of September;
- US and UK version/additions to the e-commerce publication to be finalised and agreed by end of September 2018;
- UK and US to approach respective cyber-security departments/agencies to request links and material for use in e-commerce brochure and SME Dialogue;
- UK to start putting together provisional agenda for third SME Dialogue.
- UK and US to collaborate on delivering a Blue Economy theme to Southampton Trade Fair – including an official-level meeting in the margins.
- UK and US to invite robotics stakeholders to Southampton Trade Fair as a first step towards deeper cooperation within the next-generation robotics and Blue Economy spaces.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

Very positive and friendly atmosphere. Very constructive first discussions on structure of an SME chapter. US happy to provide feedback on NAFTA 2.0 discussions.

Will start looking at principles of an SME chapter and SME-friendly provisions throughout a future UK-US FTA in next working group. US happy to do so.

Department for
International Trade

RULES OF ORIGIN

Date: 10 July 2018

Time: 11:00-13:00

Participants:

Name	Department/Directorate
Adam Fenn	DIT- Trade Policy
Neil Feinson	DIT- Trade Policy
Richard Salt	DIT- UK-US Trade Policy
Tim Ward	DIT- Trade Policy
Stuart Gibbons	DEFRA
Rhys Isaac	BEIS
Mojgan Ahmad	DIT- Trade Policy
Daniel Owusu Acheampong	DIT- Trade Policy
Kent Shigetomi	USTR
Brian Woodward	US Dept. of Commerce
Sarah Bonner	US Small Business Administration
Ian Sheridan	US State Department
Kelly Milton	USTR - Geneva - Europe
Sam Rizzo	USTR - Europe

Key Points to Note:

- This was a useful session in which the UK was able to further understand the US approach to Rules of Origin, and the ways in which the US approach both converges and diverges from EU Rules of Origin precedents.
- The UK was able to outline DIT's Trade Agreement Continuity work-stream, and how Rules of Origin will be addressed within this context. The UK also provided a high-level overview of its ongoing Rules of Origin policy development for future trade agreements.
- Officials for the US and the UK agreed on the ongoing value of these meetings and that further meetings, focused on particular elements of existing agreements would be a useful next step. US officials also agreed to share the presentation that they used in the meeting, and other relevant documents which compare US and EU Rules of Origin precedents.

Report of Discussions and Outcome:

1. Recap of last meeting and current state of play (30 Mins)

Introduction (UK): Adam Fenn (AF) opened the meeting with a recap of the previous UK-US Trade Investment Working Group. AF outlined three areas where DIT have been working on Rules of Origin (RoO):

Department for
International Trade

1. Trade Agreement Continuity – DIT are in the process of transitioning around 40 agreements that UK is currently party to via the EU into UK law. RoO are a specific issue in this context, as UK origin will need to be distinctly defined apart from EU origin;
2. New FTAs – DIT are establishing links with domestic industry and undertaking analysis to prepare for new FTA discussions;
3. UK-EU Future Economic partnership discussion – The Department for Exiting the European Union are leading on RoO in the context of Brexit, with the support of DIT and other Government departments.

AF highlighted that UK business currently has a knowledge gap in RoO which needs to be bridged by education and knowledge development. UK also has a large data gathering exercise ahead, especially in areas such as understanding the levels of EU integration in UK supply chains. With these tasks outstanding, there are still some broad objective observations that can be made about the landscape in which a RoO agreement would be reached. This would include: a need to reflect the integrated nature of supply chains; the geographical proximity of the UK and the US, and the likely trade routes this leads to; and the fact that the exact end-state of the UK's future customs regime and associated administrative processes have not been finalised.

2. US Presentation – Comparison between US and EU based RoO (1 hr)

Presentation (US): Kent Shigetomi (KS) presented on the main areas of convergence and divergence between the US and the EU's historic approach to RoO. This included coverage of:

- Differing use of Insufficient working/processing provisions, and provisions that relate to the slaughter of foreign animals in the US to confer US originating status;
- Differing levels of prevalence of value added rules in US and EU agreements;
- Examples of cumulation provisions, such as CETA, which permit third parties to participate in cumulation, subject to conditions;
- How EU and US agreements differ in terms of burden of proof (KS flagged that this was a contentious area in T-TIP negotiations)
- Historic stances on wholly obtained rules.

3. Stakeholder engagement (30 mins)

Interaction and Comments: AF asked for an explanation of the US approach to stakeholder engagement in the context of live negotiations. KS stated that automotive stakeholders from both the US and the EU collaborated to reach agreements among themselves in the context of T-TIP discussions. Sam Rizzo (SR) flagged that the US has established sectoral committees which meet to discuss trade policy matters and create public written reports which feed into US negotiating positions.

Key Actions and Next Steps:

Officials for the US and the UK agreed on the ongoing value of these meetings and that further meetings, focused on particular elements of existing agreements would be a useful next step.

- The US agreed to share the presentation that they used in the meeting;
- The US also agreed to share their comparison between US and EU Rules of Origin precedents.

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

Overall a positive atmosphere in the room.As per the last TIWG, US counterparts quite focused on process and existing precedent and it was quite difficult to draw them on underlying policy positions. Moving future meetings to focusing more on specific elements of existing text may help with this.

US counter parts seemed quite worried that the approach set out in the WP was seeking to preserve the UK's existing trade flows, rather than providing greater opportunity for US exporters. The UK approach to TAC seemed to reinforce this perception. This links however to broader messaging on future UK trade policy.

Overall this meeting felt like another positive step towards a negotiation beginning. We were able to learn more about the way in which the US develops it positions and the strength of precedent in the way they work. We were also able to sight them on some high-level objective facts about the UK's view of the negotiation space in front of us.

Personal relationships also moved forward, reinforced by a less formal discussion after the session.

Department for International Trade

SERVICES: DIGITAL

Date: 10 July 2018

Time: 11.00-14.00

Participants:

Name	Department/Directorate
Rebecca Fisher Lamb (RFL)	DIT- Trade Policy
Chris Woodward (CW)	DIT- Trade Policy
Matthew Cartwright	DIT- Trade Policy
George Radice (GR)	DIT- UK-US Trade Policy
Graham Floater (GF)	DCMS
Harry Lee (HL)	DCMS
Paul Gaskell (PG	DCMS
Jonny Martin	DCMS
Robert Tanner (RT)	USTR
Thomas Fine (TF)	USTR
Jessica Mazone (JM)	Dept. of State
Diane Steinour (DS)	NTIA/DOC
Krysten Jenci (KJ)	Dept. of Commerce
Emily Kilcrease (EK)	USTR
Kate Kalutkiewicz (KK)	USTR
Ellen House (EH)	Dept. of Commerce
Matt Jaffe (MJ)	USTR
Silvia Savich (SS)	USTR

Key Points to Note:

- The digital session was a productive session in which the UK was able to outline its objectives in the digital trade space for the first time. The objectives were well received by the US, who recognised this was a step forward for the UK, and broadly aligned with their vision for a digital trade package.
- There was an agenda item on data that gave the UK an opportunity to update the US on its discussions with the EU and on its priorities for a future UK-EU data sharing relationship. All parties agreed that engagement between governments on both data in trade and data protection was positive and that we should ensure these conversations are joined up.
- Outside of data, the session did not get into detailed policy discussions given time constraints, however there were discussions on certain areas of mutual interest. This included cybersecurity; WTO e-commerce discussions; emerging technologies; intellectual property and consumer rights.
    - Linked to these focus areas, both sides discussed principles for future work over the coming months. This included mapping core trade areas and peripheral areas of interest;

Department for
International Trade

fleshing out areas of agreement and potential challenge; and further deep dives on specific issues (in particular to increase understanding of legal and regulatory frameworks).

Report of Discussions and Outcome:

1. Introductions

The session began with roundtable introductions.

RFL welcomed the US delegation and explained how a lot of work had happened since the last WG to develop our approach to digital trade. The UK is happy to answer questions on the Chequers agreement, though it is very fresh, and follow-up may be required. RFL stressed that the Chequers statement emphasised that the UK would have freedom to make trade agreements and to have flexibility in the services area. This recognises that there is not a single market in services in the EU. Digital trade is a large part of our services offer and an area of mutual interest between the US and UK.

2. Overview of UK digital trade policy themes (including EU update)

GF gave an overview of recent developments, explaining that the White Paper was due out shortly and that there had been a number of recent Cabinet changes, including the appointment of a new DCMS Secretary of State - Jeremy Wright.

GF explained that DCMS leads digital discussions with the EU in areas for which it is responsible. This includes digital trade, e-commerce, telecoms, data and AV. DCMS and DIT work together jointly on trade with the rest of the world. On the EU side, there are negotiations on EU withdrawal, the implementation period and the future economic and security relationship. Chequers saw collective agreement on the UK's objectives which would be expanded upon in the White Paper.

On the digital trade agenda, GF explained that the UK is ambitious and interested in a global free market where that makes sense. This will be a central pillar of international policy as we leave the EU. We do not want to just go back to existing trade texts, no matter how ambitious (e.g. CPTPP) – we want to go beyond. Similarly, we want to break new ground in the WTO and other international fora. The UK has a very strong services economy, including in the digital and creative sectors. Other services areas, such as our strong financial services sector, open up opportunities across the economy. The UK is at the forefront of many future tech efforts and we want to stay there.

On UK engagement in the international debate, CW reiterated the importance of being ambitious in an area of common interest and flagged that this was a priority across Whitehall. He explained that this session should be open and exploratory with a view to diving into more detail in the coming months. Both parties agreed that identifying specific areas of interest/challenge would be a beneficial way to run the session.

GF referred to previous sessions where the UK highlighted its digital ambitions and thanked RT for running through US priorities. The UK has moved on since then – but still believes our objectives are shared.

RT thanked GF and agreed that the UK should run through its objectives and then US could ask questions.

Department for
International Trade

3. Presentation of the UK approach to digital trade policy

Theme 1: Supporting Economic Growth, Jobs and Prosperity

HL outlined the economic importance of digital economy to UK services (70-75% of services digitally delivered) and highlighted the position of the UK and US as global leaders. UK priorities under this theme include:

- Digital value chains – The UK is the base for a large number of digital companies doing business in the EU. The sector attracted 3bn of investment in 2017, more than France, Germany and Ireland combined.
- Trade facilitation – a keen interest of the UK, which is investing significantly to fully implement the Trade Facilitation Agreement.
- Data flows – vitally important to the modern economy and need to be underpinned by the appropriate protections.
- Regulation of emerging tech – DCMS is establishing an Office for AI and a Centre for Data Ethics.
- Development – Africa and ME responsible for 2% of e-commerce despite being a huge market. Development provides opportunities for both developed and developing countries.

RT thanked officials for the presentation and welcomed the UK approach, noting the large number of shared interests. He described the objectives under theme 1 as really core to the US trade agenda and stressed this was their key area of focus. Emphasised that non-discrimination had long been at the forefront of US digital trade policy.

RT explained keenness to facilitate discussions on these issues but urged caution on labelling as 'trade discussions' for domestic reasons. This is not just a digital issue – but services generally. RFL stated UK was happy to be pragmatic, welcoming the opportunity to have these pre-talks and agreeing to refer conversations to other fora as necessary. GF explained that these principles show what we want to do, not a direct FTA text. We have work to do to tease apart non-trade and trade issues.

RT stated that the US has taken a strong position on defining digital products, arguing it helps clarity in this area which has been lacking in the multilateral system. He questioned whether the UK had concerns with this approach given that the EU saw cultural problems (which the US were never convinced prevented the EU from moving forward). RFL explained how the UK had always seen EU-US negotiations from the EU side and are keen to hear US side directly. GF explained he was aware of the dynamics and highlighted that Chequers provides good signals, but EU conversations are ongoing, so we cannot go into details.

RT asked the UK what they viewed as differences between digital value chains and other investment value chains. GF explained that this was a question of investment more broadly, and that there was not necessarily anything specific to focus on from a digital perspective. We do however recognise that digital value chains are different from other value chains.

RT explained he was interested in the concept of bringing development into this space but was keen to hear our thoughts on specifics. He highlighted that measures that helped developing countries also helped developed countries, leading to accusations of broadening digital divide. RT used Indonesia as an example of good practice leading to digital development. CW explained the UK position that trade discussions need to keep development agenda firmly in mind. We should be asking how provisions we could put in a place consider the global perspective. RT asked about the UK role in the Joint Statement Initiative. CW and RFL explained that DIT and DCMS send out officials

Department for International Trade

from capital and push the EU to be as ambitious as possible. RT and CW agreed that the discussions were positive, and the key question was how to turn this work into action.

On future tech, RT explained how non-discrimination of digital products had been a moderate focus of US priorities in the past, but as cloud computing came to the fore this was increasingly becoming a key priority as non-discrimination was required to keep this sector supported. DS then questioned UK approach to emerging technologies in trade – whether we are looking to act or seeing what happens and what the UK position was on discrimination based on technology. HL explained we are at the start of the journey here, but this question links to the STO we would like to discuss. GF explained that this is less about a current problem and more about a potential future problem. RT Emphasised that the US was engaged in work going on in OECD and that they were interested in discussing joint work through the STO, though details needed to be fleshed out.

RT explained US and UK both clearly want to encourage entrepreneurship but recognise that this can clash with rule-making and we need to consider how to take a balancing approach.

DS explained the need to link up between agencies and connect with OSTP, saying they were happy to have inter-agency discussions at home and come back to the UK to look at collaboration.

ACTION: UK agreed to send through information about data ethics centre and work on AI.

RT stated that other than digital taxation, EU states and US were aligned.

Theme 2: Protecting Our Citizens, Businesses and Society

HL outlined theme 2 – The importance of international collaboration on protection. Underlying objectives include:

- Collaborating on cyber security – both UK and US at cutting edge of market in this area.
- Internet safety and security – UK has recently developed a domestic strategy and wants to build on this internationally. This can be done through empowerment, guaranteeing online/offline parity, working with service providers, etc.
- Intellectual Property – highlighted the particular importance to the digital economy.

RT explained that the US has a strong IP interest, but did not treat it as a separate digital issue with a separate digital agenda. They were keen on a constructive dialogue but argued this should be through an IP lens. RT stated that outside of the US framework, the e-commerce directive was the clearest around. He argued that platforms are an example of bigger interactions between IP and digital - an appropriate balance is required between protections and liabilities. HL welcomed positive comments on the e-commerce directive and explained that this baseline was present in the UK system.

RT was broadly positive on Cybersecurity and felt there was a role for such provisions in trade – the US has been tackling these questions in NAFTA renegotiations – focusing on cooperation and best practice. If you have this, it provides greater certainty. This could be an area where we could go further than before. HL referenced ongoing dialogue on Cyber (with a particular focus on SMEs) between DCMS and DHS. RT welcomed this engagement and suggested that, given broad definition of cybersecurity, DCMS and Commerce should also set up a dialogue.

RT stated that safety and consumer rights was an area where there was a lot to discuss due to differences between systems. EU and US had differences on civil law vs common law, but the US wasn't sure this difference was as strong between the UK and US. The US was keen for further

Department for
International Trade

discussions on regulatory and legal frameworks. CW agreed with need to understand comparative regulatory and legal systems. In terms of specific measures under this banner, we are approaching this openly.

Theme 3: Developing Global Governance Frameworks

HL outlined UK priorities on promoting international global governance standards for digital trade. The internet is global and were it its own economy, it would be 5th largest in the world in terms of GVA.

- Priorities include open industry led standards in areas such as tech neutrality and interoperability.

RT explained he was open to the ideas expressed. On the open internet question, it was felt that we have traditionally been on the same side – the US has historically been sceptical of digital sovereignty arguments.

CW explained that this principle was in part about international cooperation outside of bilateral discussions. HL expanded on this point, making clear the importance of ensuring multilateral discussions have a plurality of voices – not just government to government.

RT mentioned that there were a couple of areas the UK had not specifically mentioned but that were of interest to the US. On measures preventing the forced transfer of source code, we should look to include consideration of algorithms and trade secrets. Again, there is a balance issue between justified enforcement and barriers, but it is important to avoid wholesale demands to provide source code. On promoting access to government data, we should consider what we can do to improve processes, such as by making it available to academics and others to use in a machine-readable format.

4. Data: UK's overarching data protection regime, and Free Flow of Data

PG gave an overview of the UK data protection system and the areas under discussion with the EU. Free flow is fundamental to the future UK-EU relationship on both trade and security. As such, the UK is looking for bespoke deal with adequacy as a starting point that underpins the existing relationship. Adequacy is a useful starting point but maintaining regulatory cooperation would also be mutually beneficial given the leading role the ICO has played in Europe. Procedures could be simplified for EU and UK businesses under a designated lead regulator arrangement, similar to the One Stop Shop. The Data Protection Act has brought GDPR into force in the UK, with a separate instrument for intelligence. Discussions will also consider our international data transfers regime.

PG updated US on progress with issues directly affecting them. On Privacy Shield, the UK interpretation is that this would continue to apply during the IP under the proposed arrangement and this would give parties time to agree future arrangements. Yasmin Brookes in DCMS is discussing this with Shannon Coe in Dept. of Commerce.

GF linked these comments to direct trade issues, stating that nothing outlined necessarily prohibits an agreement on free flow of data with US. There are countries that have adequacy decisions from the EU that have signed up to free flow provisions.

RT explained that obtaining commitments on the free flow of data is a top priority and the US wants to be as constructive and positive as possible on this issue given its importance to the UK/US future relationship. US conclusions on discussions with EU are that there is no legal reason why you can't commit to free flow and have adequate data protection – such as through GDPR.

Department for
International Trade

RT also explained that the US has had some specific concerns with how GDPR is being implemented. The EU has acknowledged GDPR has a global impact and other countries are going to have opinions.

RT stated that the US will want to engage with the UK on the best approach around its future international transfers model, but understands there are still internal discussions in the UK on this. The US are proponents of APEC-CBPR model which is based around individual companies rather than whole legal systems. Adequacy is a flawed system that cannot become a global standard and is very difficult for developing countries in particular to adopt. The UK and US could work together on an inclusive system. KJ explained that the US has been working with Japan, who are seeking adequacy and operate the APEC-CBPR system. A mapping exercise took place mapping CBPR against the EU corporate rules system, and it was discovered that while there were differences, they were not as extensive as one would presume. Some countries have used the same set of information to get both approvals under both systems. PG reiterated that discussions were ongoing in HMG on international transfers and that, across data as a whole, there were two work plans – data protection and data in trade. RFL flagged that HMG approach was joined up, even though the conversations were separate. Continuity is the priority right now and securing this would give us time to discuss future relationship.

KJ welcomed that data flows were a UK priority. They put a lot of stock in Privacy Shield and look forward to continuing to speak with us about ensuring confidence in Privacy Shield remains.

DS asked whether, following EU statements on non-personal data, the UK had a position on 'hybrid data'. It would be useful to understand the impact on companies of unintended consequences of bringing GDPR in to play on hybrid data. PG explained that the UK was not fully across this question but would be happy to take away.

5. Next Steps

RFL thanked officials for the productive discussion and stated that we have a starting list which US colleagues can take away. It would be useful going forward to consider where conversations are directly trade related and where we can usefully facilitate other relevant discussions. We look forward to discussing these themes in more depth in the November session when both countries have considered further.

RT stated that the US has a model for what they want in an FTA and this can be seen in their agreements. They also understand EU positions from TTIP and are interested in finding out more about UK positions so that we can understand areas of agreement and challenge. They are also keen to facilitate discussions outside trade, as useful.

CW welcomed the conversation and that there were no surprises on areas of interest. The WG is a useful forum for developing a shared understanding of regulatory and legal systems. DS and RT agreed on importance of this work and happy to answer questions on their own frameworks when useful.

RFL, CW, RT and TF agreed to consider the outline of next steps for the closing plenary.

Key Actions and Next Steps:

- The UK and US agreed to further discussions to aid further understanding of each other's priorities in specific areas. This is to include identification of shared interests and potentially challenges. Proposed areas of discussion are:

Department for
International Trade

- Cybersecurity – focussing on the commercial impact
- Legal and regulatory frameworks on consumer rights
- Emerging technologies (also discussed at informal session later in July Working Group).

- The UK is to send information to US colleagues on the work of the Office for AI and the Data Ethics Centre.
- The UK is to consider its approach to hybrid data and the impact of applying GDPR to this data.
- US to consider cross-agency, the plausibility of UK-US collaboration on emerging technology.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

This was a very positive session, and the first chance for the UK to outline and discuss our digital trade priorities in any international forum. We were able to emphasise to US counterparts that we had chosen to share them with the US first. While both sides recognised that the positions we set out were high-level and relatively preliminary, there was recognition on the US side that this was the product of a lot of cross-Whitehall work and would serve well as the basis to continue more technical discussions building towards negotiations. The deep dive on data was useful – a high priority area for the US and they were grateful for the chance to focus on it.

The challenge will be in seeing what is possible in the possible FTA, getting into the detail, and where we need to develop discussions across the right elements of the US and UK administrations. At times DCMS went beyond the agreed lines or cleared position, which was manageable but shows the need for further preparation, set policy positions and clarification on roles.

In the margins, USTR leads flagged they were going to push for their model on digital trade – 'TPP plus' – as they were doing in NAFTA. They were keen to discuss specific provisions as soon as possible and to get a sense of what was going to be difficult for the UK – they name-checked a number of areas they felt would be likely. We pushed back on getting into text at this stage but agreed that discussing the areas of common interest would be productive. A series of deep dives have been agreed, which should set up further trade discussions well at the next TIWG.

Department for
International Trade

AGRICULTURE

Date: 10 July 2017

Time: 12:00-13:00

Participants:

Name	Department/Directorate
Ceri Morgan	Defra–Global Trade Negotiations
Sinjini Mukherjee	Defra
Russell Stokes	Defra-Legal
Emma McCarthy	Defra
James Dunn	Defra
Mojgan Ahmad	DIT- Trade Policy
Neil Feinson	DIT- Trade Policy
Sophie Brice	DIT- UK-US Trade Policy
Katie Waring	DIT- UK-US Trade Policy
Julie Callahan	USTR
Roger Wentzel	USTR
Kelly Milton	USTR Geneva
Dana Du Bovis	TTB
Lori Tortora	USDA
Anne Kirchner	USDA
Rachel Shue	USTR
Joe Babb	USDA
Joe Weresynski	USDA
Mary Stanley	USDA
Mari Kirrane	USDA

Key Points to Note:

- The US are very concerned at the contents of the Chequers statement. They were “deflated” and see harmonisation with the EU SPS regime as the “worst-case scenario” for a UK-US FTA.
- The US see SPS as the biggest ‘sticking point’ on risk (what they see as the ‘global norm’) vs the EU’s hazard-based approach on mainly pesticides, veterinary drugs and pathogen reduction treatments.
- On transparency and equivalence the UK not remaining in the EU but subject to the EU rules will be more of an issue for the US than the UK just being in the EU, as we can no longer be a back door for US products and no longer influence EU rules. An example the US shared would be if they (the US) lodged a complaint against the UK under the terms of the FTA, the UK would not have the autonomy to address the said complaint under the Chequers proposal.

Department for
International Trade

- The US are interested in areas such as GI's and where there might be some room for negotiation, what they can tell their stakeholders, and on operational areas where we can co-operate (such as certification).

Report of Discussions and Outcome:

Introduction and Discussion of US – Relationship post Chequers

The US (Julie Callahan - JC) opened by noting that they still hoped that a UK-US FTA could be a potential trailblazer agreement.

JC outlined that Chequers and the UK's decision to attempt to align with the EU on Agri-food and SPS is the "worst-case scenario" for a UK-US FTA. For transparency, and equivalence, this would create more of an issue than if the UK remains in the EU, because the UK cannot be relied upon as a critical voice within the EU Parliament.

JC then asked if 100% harmonisation is likely to be the EU negotiation position. The UK (Ceri Morgan - CM) anticipates that this will be the case but stressed that the UK will only be harmonising on the rules that ensure frictionless trade.

Discussion of Continuity Agreements (mainly SPS)

The VEA dominated most of the discussion as a way for the US to probe the UK on SPS issues.

CM asked the US to provide their headline concerns.

The US outlined the concerns as:

a) Risk-based system is the global standard, but the EU move to a hazard-based system has taken countries by surprise. The recent WTO SPS committee was raised, and the US used the example of African countries and Latin American countries now being restricted in supplying products to the EU. The US suggested that this has created food security concerns, which is one problem area the UK would "inherit". The US think that there are other ways that regulators can approach SPS (in a risk-based way).
b) Specific examples were given on the EU approach to pesticide legislation.
c) The recent EU restriction on anti-microbial usage in third country exporters was raised as a significant concern.
d) The US raised, further to their November presentation, that the un-scientific approach the EU maintains towards Pathogen Reduction Treatments is not appropriate.

JC also asked where the UK will be able to diverge from the EU under our proposals, and how stakeholders were reacting. CM responded that these are challenging areas to immediately respond to, but that we would do so in due course. Stakeholder reaction depended entirely on industry and areas of interest.

The US asked whether Northern Ireland had a flexible SPS policy compared to the rest of the UK. The UK responded that this was not the case, but that Defra would provide further information the following day.

Department for
International Trade

Stakeholders

The Roger Wentzel (RW) asked what the UK's stakeholders were saying on the US, specifically if our importers and exporters are seeing any opportunities in Brexit.

CM said that stakeholder reactions have been mixed and often polarized. Most want continuity so that existing trade can continue, and some want new markets. The Neil Feinson (NF) echoed this, adding that it entirely depended on what industries the stakeholders were in.

The RW pushed on importers again, asking what their goal is (do they want products from the US to then ship to the EU), and would the UK still play a "gateway" role?

CM responded with the example of wine. We import a lot more wine than we export, so continuing imports is important. CM continued with the example of supermarkets, and that there can be different ideas from different stakeholders, so it isn't a simple picture.

What can be done to foster collaboration (regulator to regulator discussions)

Lori Tortora (LT) gave an example of the challenges regulators and exporters face with the EU's certification. Specifically, that the EU site can be out of date and burdensome and can cause issues. A specific case of an exporter who used mollusc shells in their products was raised, with their products stopped at the border because the certificates were too complicated. CM responded that this is an area of operational need, and it is something the UK and US may be able to consider as Chequers develops.

CM finished the session by raising that we have published White Papers and consultations on fisheries, the environment and future farming as well as the recent Chequers proposal.

Key Actions and Next Steps:

We will continue to inform the US of our developing position with the EU and look to identify areas where we can work together (certification as an example).

We took away a couple of questions for the session the following day:

- Stakeholder's engagement and what do our stakeholders want on the import and export side
- What flexibility's do we have on SPS so they can tell their stakeholders?
- The status of Northern Ireland's SPS flexibility compared to the UK.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

This was a challenging and difficult meeting, because the status of Chequers makes movement on SPS unlikely. The US were clear that this was deflating, and full EU alignment on SPS was the worst-case scenario. We anticipate this being fed into the POTUS visit briefing.

Department for International Trade

REGULATION: TECHNICAL BARRIERS TO TRADE

Date: 10 July 2018

Time: 14:00

Participants:

Name	Department/Directorate
Julia Farrel	DIT – Trade Policy
Henry Alexander	DIT – Trade Policy
Kashan Ali	DIT – Trade Policy
Sisi Omu	DIT – Trade Policy
Alex Rattee	DIT – Trade Policy
Ben Shotnes	DIT – Trade Policy
Ali Kelly	DIT – Trade Policy
Rebecca Schneider	DIT- UK-US Trade Policy
Verity Threlfell	DIT – Trade Policy
Tim Harris	DIT – Trade Policy
Oliver Griffiths	DIT- UK-US Trade Policy
Katie Waring	DIT- UK-US Trade Policy
Ned Mazhar	DIT – Trade Policy
Tim Collier	BEIS
Huw Parker	BEIS
Sinjini Mukherjee	DEFRA
Sarah Clegg	British Embassy, Washington
Silvia Savic	USTR
Cara Lofaro	US Dept. of Commerce
Sam Rizzo	USTR
Christine Brown	USTR
Rachel Shub	USTR
Eric Puskar	NIST
Jessica Simonoff	US State Department
Kelly Milton	USTR
Lori Cooper	US Dept. of Commerce
Anne Kirchner	FDA
Julie Callahan	USTR
Mary Stanley	USDA
Richard Sock	N/A

Department for
International Trade

Key Points to Note:

- The US, whilst recognising that the state of play regarding Chequers and Brexit is still developing, had a number of questions around harmonisation under the common rulebook for Goods, "frictionless trade" and behind the border measures. The US registered a particular interest in EU industrial and agricultural goods that are covered under the New Approach. More specifically, the US also asked what kind of flexibility can be offered under the position set out under the Chequers Statement, and market access for conformity assessment bodies.
- The UK was able to offer some background on some of the products that need to be checked at the EU external frontier, based off a slide produced by the European Commission's Article 50 Taskforce. The White Paper may provide further information on this.
- The UK posed a string of questions to the US on accreditation bodies. The US informed the UK that UK companies could set themselves up as accreditation bodies for the US market, as accreditation bodies are private enterprises in the US. The US mentioned that if a third country conformity assessment body incorrectly assessed a product, it would be open for litigation and may be delisted from the relevant agency administrative list.
- The UK provided a short presentation on how TBT functions in the UK, which was well received by the US. The US raised that their view is that, even if the UK were taking EU legislation and adopting it into the UK after EU Exit, the UK would still have to notify that measure separately to the TBT Committee. The US stated that this is the same point they make to EEA countries and countries that have signed FTAs with the EU.
- The US gave a presentation on their latest thinking on seven key TBT principles in FTA chapters. Much of their approach is either a reaffirmation of the WTO TBT Agreement or, in some cases, builds upon the obligations of the TBT Agreement. On the issue of standards, there was agreement that the principles set out by the US were not too dissimilar with the UK's current arrangement on standards, with the exception of "incorporation by reference" and the use of multiple standards.

Report of Discussions and Outcome:

1. Update on Brexit

"Frictionless Trade" and "Behind the Border Measures"

The US had several questions around the Chequers statement and its implications for trade in goods. Areas of particular interest were: clarity on what is covered to provide for "frictionless trade" and what would be considered as "behind the border" measures. The US were particularly interested in industrial (New Approach) and agricultural goods, and whether they would be considered as being subject to behind the border measures. More broadly, the US asserted that harmonisation under a common rulebook for goods would have wider implications for the UK's trade policy and asked for the UK's thinking at this stage.

Julian Farrell (JF) (UK) caveated from the outset that it was beyond our ability at the official level to interpret the Chequers statement, but that there were some pointers that the UK could give the US. The UK informed the US of a slide produced by the Commission's Article 50 Taskforce, which indicates some of the issues, most of which are agri-food or Sanitary and Phytosanitary (SPS) measures, that the Commission believes need to be checked at the EU's external frontier. The UK stated that checks are extremely rare at the external frontier for most manufactured goods, and that routine checking is done instead on the market.

Department for
International Trade

Conformity Assessment

The US also had considerable interest in conformity assessment, raising several questions around: how the UK is thinking of maintaining access for its notified bodies and flexibility on conformity assessment, particularly for testing bodies outside of the EU.

The UK responded to the US questions on conformity assessment in broad terms. On the issue of maintaining access for notified bodies, the UK noted that the EU Withdrawal Bill rolls over all EU legislation and puts it onto the UK statute book so that there is continuity and no cliff edge at the end of the Implementation Period. The UK explained that as part of the Future Economic Partnership (FEP), it will be seeking to negotiate a situation where UK bodies can continue assessing conformity with EU legislation and vice versa. Whilst the White Paper may say a little more about what the UK is seeking in conformity assessment for both EU and third countries, what the UK was able to say with certainty was that our approach to Trade Agreement Continuity would roll over the conformity assessment agreements the EU has with third countries, including the US, allowing firms to operate as they currently do. The UK expressed interest in exploring expanding the coverage of existing Mutual Recognition Agreements (MRAs) to covering sectors not currently covered by the EU and also deepening areas that are covered, citing pharma as a good example where Good Manufacturing Practices (GMP) and other issues have developed at an international level. The UK stated that continuity is the top priority, after which the UK would be very interested in ideas for improving the operation of agreements with regards to flexibilities, efficiencies and modernisations.

The US countered that their line of questioning was more around general approaches to conformity assessment rather than specific MRAs. The US asked whether, unlike in the EU, there will be scope to accept non-governmental testing bodies. The US further stated that it had particular concerns around localisation requirements. The UK explained that almost all conformity assessment bodies (CABs) in the UK are non-governmental by virtue of being private sector organisations. On the issue of localisation requirements, the UK clarified that the MRA approach means there is no localisation obligations for US test houses which are designated bodies under the US MRA. The UK also contended that there may also be other ways to address the issues raised by the US, including extending MRAs to cover more sectors. Tim Collier (TC) (UK) reiterated that it is important to not speculate too much on what kind of scope the UK has, as it is at the start of a negotiation with the EU. Whilst respecting this, the US made clear they had received instruction by their leadership to press on this point because of what they consider “frank discrimination” in the EU system.

The UK responded to the US line of inquiry with questions of its own on accreditation and conformity assessment. The US caveated their answers by saying that the answers depended on the agency and the programme. On the whole, if a foreign testing house is approved for testing, it would then be able to issue certification in accordance with US law. The US said the best product in this scenario would be toys. Rachel Shub (RS) (US) asserted that the US is looking for the China and India to recognise testing in US territory, rather than just their own. Eric Puskar (EP) (US) further clarified by saying that it is not always the regulator that will accredit, but, given the multiple private sector bodies in the US, private non-governmental bodies will accredit instead.

Though there is no definitive list of US accreditation bodies/systems, the US said that regulators would be able to point prospective foreign testing houses in the right direction.

The US were less clear on how a foreign company could become an accreditation body, only stating that it is possible and that the ones that the US government would use are those that are signatories to the International Laboratory Accreditation Cooperation (ILAC), which would entail a process of peer review and joint levels of assurances.

Department for
International Trade

In the event of a CAB incorrectly assessing a product, the US explained that litigation may be one way in which the matter is pursued. The US also contended that under the most progressive programme, the Consumer Product Safety Commission (CPSC), the CPSC has full authority to delist CABs. The same applies for the Federal Communications Commission and the National Institute of Standards and Technology (NIST). In addition, some programmes have formal five-year renewal processes, but delisting does not have to wait that long in the event of serious breaches. The US were less open on whether this is irrespective of where in the world the breach takes place. RS (US) indicated that some CABs are in good relations with the export promotion arm of their government; those will have a strong awareness of exactly what is happening in accreditation laboratories. SR (US) noted that the large majority of CABs in South America, specifically, are part of well-known international global testing houses, such as Intertek. A representative from the Food and Drug Administration (FDA) explained that processes are slightly different for agriculture; the recent Food Safety Modernisation Act gave the FDA ultimate responsibility for accreditation. As the Act is so new, the US were unable to provide any real-world examples.

2. Recap of March Discussions

Both sides agreed that the above discussions had covered this agenda item.

3. UK Government Organisation of TBT Matters

UK Presentation

As promised in March, JF (UK) gave a brief presentation on how TBT functions in the UK.

Responsibility for TBT policy, including the inward and outward responsibilities of the WTO TBT Committee, lies in JF's team. The UK explained that DIT's Policy Directorate is organised by the chapters of a typical FTA and as such, JF's Regulatory Environment Team's portfolio contains a collection of regulatory chapters, such as TBT, GRP, Regulatory Cooperation, Small and Medium Enterprises, Competition, Subsidies, and State-Owned-Enterprises. The UK highlighted that a broad range of government departments "own" domestic regulations which fall under the remit of the TBT Committee. It distributed a slide that provided a non-exhaustive breakdown of sectors covered in EU agreements and their respective lead departments within HMG. The UK reiterated that DIT will lead on trade negotiations outside of the EU, whilst negotiations with the EU are led by the Department for Exiting the European Union (DExEU).

US Questions and Views

The US' main question to the UK was what kind of regulations those departments on the slide issue that fall under the EU's New Approach legislation. The UK reminded the US that UK does not have the ability to currently notify the WTO TBT Committee if legislation falls within the scope of the single market directive. The UK pointed out that areas where it has notified are those where the EU has not regulated, such as the most recent notification on microbeads. Following this, the US asserted that post-exit, if the UK adopted EU legislation, it was of the view that the UK would have to notify such measures to the WTO TBT Committee, in addition to any EU notification, making sure to include a commentary period and to take those comments into account. The US stressed that this is the same point they make to other "European partners" such as the European Economic Area countries, and countries that have signed FTAs with the EU. The UK said the issue is something it is considering.

4. US Presentation on "Approach to Content of FTA TBT Chapters – Key TBT Principles

Department for
International Trade

The US gave a presentation on what they consider 7 key aspects of TBT chapters in FTAs, which reflect their latest thinking. The US stated that many of the elements in their presentation are built into negotiations for the North American Free Trade Agreement (NAFTA) TBT chapter with Mexico and Canada. The US did say that the presentation as a standalone is not comprehensive but could be considered so if read in conjunction with the US-Korea Free Trade Agreement. Below is a breakdown of the 7 principles the US presented.

Use of International Standards

The US recalled Articles 2.4 and 5 of the WTO TBT Agreement, which encourage the use of international standards as the basis for technical regulations and conformity assessment procedures. The US highlighted that, due to its broad scope, the TBT Agreement does not have a list of international standard-setting bodies, with the TBT Committee instead agreeing six principles of what makes an international standard. The US reflects these six principles (openness, transparency, impartiality and consensus, effectiveness and relevance, coherence and the development dimension) in their guidance to regulators, when they are developing technical regulations. The US underscored a focus on promoting the principles of the TBT Committee's decision and not using additional criteria such as where a standards development organisation is based or whether the organisation is a governmental body. The US claimed one of the issues they find problematic with the EU system is that the EU promotes local and regional standards over international ones. Concluding this section, the US reiterated that they have found that regulators which rely on standards developed in accordance with the TBT Committee's decision are more effective at regulating and facilitate a full and balanced consideration of international experts, therefore making their standards more responsive to market needs

In response to a question by JF (UK) the US said they generally seek to affirm or reaffirm commitments to the WTO in their trade agreements, rather than rewriting the relevant sections of the TBT Agreement.

Avoiding Government Unique Standards

This section concerned making regulators consider existing standards, before creating new ones, recognising that government is not always the most efficient at responding quickly to the market. When regulators do create new government standards they have to report on an annual basis declaring why, as there is a legal preference for voluntary consensus standards. The US explained voluntary consensus standards are voluntary until the standard is enacted and made mandatory; voluntary consensus refers to the process of developing the standard. After incorporation, the standard is "incorporated by reference". JF (UK) noted that the concept of "incorporation by reference" was not used in the UK, where standards were generally voluntary.

Use of Multiple Standards

The US stated government should adopt flexible procedures that allow multiple standards to meet regulatory requirements and that this is a new element in their FTAs. In the US, government is encouraged to consider additional standards that would be effective in meeting the stated objective throughout the regulatory cycle of which there are two main elements. First, stakeholders will be alerted when a draft standard is published and are able to suggest other existing standards that meet the objective. Second, after the regulation has come into effect, stakeholders can request a petitioner review process and suggest additional standards through that process. Under both processes, regulators are required to decide whether the suggested standard(s) meet the measure's objective. The US explained that both processes are also transparent ways of allowing for different ways of showing conformity with particular regulatory requirements. The US highlighted the differences

Department for
International Trade

between their approach and the EU's on the issue, citing how in the EU one standard gives a presumption of conformity. The US claimed that though the EU system does allow for alternative means to demonstrate conformity, they were not aware of any having ever been granted.

Conformity Assessment Bodies (CABs)

Given the discussions of CABs under item one, the US did not dwell too much on this slide. The US reiterated that the core of the issue for them, which they have spent considerable time raising at the TBT Committee, is requirements for in-country testing. The US cited the EU's system as particularly problematic for this, as requirements mandate testing within the EU. The US noted that they were not speaking of MRAs, pointing to countries such as India and Indonesia which have accepted conformity assessments without the need for government-to-government agreement.

Non-Discriminatory Participation

The US stated this principle is "pretty consistent" in their FTAs, and partly comes from their experience with the EU system. The US complained of the difficulties faced by their government experts and private sector in efforts to participate in European standardisation organisations. The US stressed the need to not add criteria to the TBT Committee's Decision and underscored that having more experts participating in the development of standards results in better standards.

Transparency and Timely Notifications

The US inclusion of this principle in its FTAs is a reaffirmation of the TBT agreement, impressing the need to provide 60-90 days to comment on measures notified to the TBT Committee and to allow no less than six months between the measure's publication and its entry into force. The US further underscored the need to notify draft technical regulations and conformity assessment procedures at an appropriate stage when comments can really be considered, highlighting how they have found that if a country waits too long to notify, at a time when legislation is being approved by parliament for instance, there is less chance for comments to have an effect.

The UK stated it has a two-stage domestic process: consultations on draft legislation, after which the government publishes the responses received and its comments to those responses. Upon questioning from the US, Sisi Omu (UK) stated that for the English microbeads notification, the UK notified the measure to the Committee at the same time as the consultation.

Third Countries

The US explained the cornerstone of this principle is to avoid raising de facto barriers with third countries whilst facilitating trade in a bilateral setting. The US stated they have found this to be a problem with some EU FTAs and wider outreach the EU engages in, citing how some EU FTAs, particularly association agreements such as the one with Moldova, require countries to withdraw conflicting standards, effectively forcing partner countries to adopt EN standards, which the US considers to be regional, even if the standard being withdrawn is an international one. To counter this, the US seeks to include a provision in FTAs that does not allow for discrimination against international standards wherever they are created. JF (UK), in response, said it was hard to conceive of a situation where the UK would seek the removal of an international standard.

Department for
International Trade

5. AOB

Max.gov

The US referred to the max.gov file-sharing portal. The presentation that the US gave has already been uploaded to max.gov.

Participation in Standards-Making Discussions

In response to TC (UK) stating that BSI's system does allow companies to take part in standards-making discussions, the US made clear its greatest concern was with the European Committee for Standardization, the European Committee for Electrotechnical Standardization (CEN/CENELEC) and the wider EN system, where to be able to have a vote on standards one must be a national member of one of 33 European states.

Transparency – Where to Find Relevant Standards

The UK queried the US on how to gain a better understanding of the US standards' system, if for instance they needed to pass along information to UK companies. The US informed the UK that there were several places a company could find information on what standards need to be met to import any product. RS (US) stated, that most US regulations can be found in the Federal Register or Code of Federal Regulations. Information can also be obtained from the US WTO notifications, the national gazette, and the American National Standardization Institute (particularly for International Organization for Standardization and International Electrotechnical Commission standards) and NIST, which has a standards information centre. The US also has a list of "incorporated by reference" standards.

6. Closing Remarks

Both sides agreed that discussions were constructive and built upon those held in March. The US said they would be "happy to meet" (e.g. by Video Teleconference) before November, when the next Working Group is to be held.

Key Actions and Next Steps:

- There were no key actions or next steps

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

Overall a good atmosphere with a helpful discussion in further understanding the US position for TBT, notably on Standards and Conformity Assessment. However, the US made clear that they had strong interest in what had been published in the Chequers agreement and were keen to understand what the proposed common rulebook for goods would have on the UK-US trade negotiations. Going forward we will need to carefully communicate what the White Paper means for the TBT space.

Department for
International Trade

SERVICES: PROFESSIONAL BUSINESS SERVICES

Date: 10/7/2018

Time: 1300 – 1600

Participants:

Name	Department/Directorate
Rebecca Fisher-Lamb	DIT – Trade Policy
Johanna Michael	DIT – Trade Policy
Elizabeth Mackie	DIT – Trade Policy
Sukhmani Khatkar	DIT – Trade Policy
George Radice	DIT- UK-US Trade Policy
Elizabeth Sutton	DIT – Legal
Paul Smith	BEIS
Gavin Baylis	BEIS
Alexandra Foerster	BEIS
John Carroll	MoJ
Tom Fine	USTR

Key Points to Note:

- The UK introduced its MRPQ non-paper as a basis for starting to think about issues collectively and in reaction to a lot of stakeholder engagement that has been done. The US welcome the UK's non-paper as a basis for making a forward plan. After a good discussion, the UK will amend the non-paper and use it as basis for forward plan.
- The US and UK affirmed commitment to establishing a programme of stakeholder engagement going forwards. There was agreement on a proposal to convene regulators and professional qualification bodies in November on legal services and communicate this to stakeholders early to ensure their attendance.
- The US discussed the range of interest, sensitivities and options available per subsector and where there could be future discussions with the UK.
- There was agreement to join up with the SME dialogue to look at how MRPQs can support SMEs.

Report of Discussions and Outcomes:

1. The UK reiterated messaging from the plenary on taking questions, with a lot of thinking coming out of the White Paper and the UK will be able to answer questions, where possible.

2. The UK outlined that this was the third discussion between the UK and the US on PBS. The UK has considered the US five-chapter model and approach to NCMs, but is not yet in a position to respond on its approach. PBS is an area where we both have an interest but there is a challenge in how this will work in practise. On the US side there is the issue of the state-federal split. We are interested in exploring the potential here and the options to convene our stakeholders. We would like to put together a programme of activity and take this forward. Hopefully we can come out of this with a sense of what is possible in this space.

Department for International Trade

3. The UK introduced its MRPQ non-paper as a basis for starting to think about issues collectively and in reaction to a lot of stakeholder engagement that has been done. Businesses are keen to be engaged, have a strong degree of interconnectedness already and value high standards. The sectors we have highlighted in the paper are the three/four areas where there are already conversations going on between regulators and business organisations. We would like to use the momentum of these discussions to deepen relationships on both sides and see what is possible. We are struck by how close some of the professions already are. In terms of the Scottish accountancy MRA there is already a pipeline of businesses wanting to utilise this.

4. The UK reaffirmed that this is not about lowering standards, and that we are very clear on where responsibility sits regulators. How can we help businesses do what they are already doing but assist them in streamlining some of their processes? The England and Wales accountancy bodies are trying to do the same thing that was done by the Scottish bodies. It would be useful to be able to support this more widely. We have highlighted legal services as an are of key interest. The UK Law Society is very active, and it is the same for many US bar associations. There are several areas where we channel this support. The built environment sector is also very positive and there is exploratory work being done between architects' associations. Similarly, with the engineering sector there is a single state in Idaho with which there is a mutual recognition agreement.

5. The US thanked the UK for the non-paper and providing this overview. The US has been really encouraged by the work on accountancy and there is a lot of good work going on in England/Wales and in places like Jersey. Regulators want to ensure that licenses are given to those qualified to hold them. They are keen to look at the education on the other side to ensure there is a prescribed level of accomplishment. We are looking at programmes to build skills to ensure professionals are of the right skill level.

6. The US noted that in the US there are no national treatment barriers, and that this is likely to be the case in the UK. This is not necessarily true throughout Europe. Law is the profession that is the most difficult, it is an area where there are geographically based restrictions and laws change from time to time. This could be an area in which to convene with stakeholders on a more regular basis, to begin exchanging information about what they do. The US legal system is highly complex and it varies from state to state, sometimes radically. Understanding how this works and what the different pathways are for states is not easy. We could have a useful exchange of information. It is an area that highlights facilitation of licensure. The US do not use the phrase MRA because they do not think there will be an MRA for legal, but lawyers need to be where their clients need to be. There are lots of techniques that US states have come up with and they will approach it in a very different way. States are beginning to experiment with different ways of providing legal services. Some states are drawing strict guidelines on this, with others experimenting on whether paralegals can provide certain services. The US can provide us with more in depth information on what our states are doing.

7. The UK commented that this was understood on the UK side and that potentially the US had a better sense of this on architecture. The US noted that where it has MRAs it is usually based on who knows who. The UK has a globally recognised standard on architecture. The US was interested in exploring the engineering sector as they had not been so forthcoming previously. The UK noted that improving cooperation in this area would in part be focused on SME businesses who really benefit from this flexibility.

8. The US outlined that there was an increased number of lawyers setting up as consultants which meant they did not have to be qualified as a lawyer under US law. This has probably been our

most successful area. There was a push for fly in, fly out. It made regulators a bit concerned in terms of being comfortable with lawyers advising clients using different types of practices. It could be useful to set up a session to discuss in more detail to discuss fly in fly out, including what states do and what and what the trends tend to be.

9. The UK asked about who should be around a table and how to move this forward. The US commented that they would need to think through who to include, the bar associations would be willing to get involved and it is easy to get access to them as the overarching bodies for state courts. The chief justice of each state supreme court is the chief licensing officer. The judge is essentially the regulator. The US has learnt the lesson of not pushing too far too fast and would be interested in looking at the umbrella organisations that brings together the states. The UK noted that the impression from legal advisors was that doing something with the bodies would be the best place to start. The US was keen to draw the link between what is being done here and what is being done on SMEs. Most SMEs are services not goods. The US suggested doing something with stakeholders in the new year.

10. The US noted that the profession where they are most advanced is audit. In terms of picking this up amongst states, this is an area where licensing quite easy. The UK commented that, in audit, there is a time element to this. Whilst we may have flexibility on services in the future, during the IP we will be bound by the directives of the EU. In terms of a roundtable on accounting it would make sense to have the England and Wales chartered accountants available, as well as the FRC, ACCA and the Northern Irish body. We can see where we are, with different bodies in different stages. The US agreed with this in setting up conversation on auditing in terms of what have we learned from ICAS and what have we now achieved with the ICAEW and positive interactions with the FRC. The FRC are really interested in this, particularly given the regulatory context in the UK and EU. It is increasingly in their interest to not have auditors in position too long, to ensure that the market remains competitive. There should be flow between jurisdictions on firms.

11. The UK highlighted that we would need an appropriate communications and handling strategy. The US stated that there was high level of interest but that we would need to understand where stakeholders are at. The US has MRAs with Australia and New Zealand and would see the UK as a logical next step.

12. The US has also been approached by the nursing profession. They are considering state to state movement of nurses without needing a new license and they are already closely integrated with Canada and Ireland. It is an area that is becoming globalised and used to be a localised profession. It is evolving very rapidly. It is an area where the US have an interest. Various studies show that we are seeing about developments there. There are recognised sensitivities, and the US would like to offer to its profession the opportunity to talk to the UK in a useful way.

13. The UK outlined that we could look at nursing, but this should be further down the list of sectors to review, as possibly will be linked to the Migration Advisory Committee's review that is due in the Autumn.

14. The UK noted that on areas and next steps, we want an agreed forward plan. Is it valuable turning this into a joint paper? The US responded by stating it was committed to doing a roundtable in the fall, in conjunction with the next TIWG at November. This could follow future WGs with architecture, accounting and engineering. These would be roundtable/information sharing sessions. We could try and put together a plan, respecting needs of regulators and where we would need to facilitate. HMG to send a starter for ten after exchange of materials.

Department for
International Trade

15. We will also need to consider what will be possible in a future FTA, with the US stating that TPP and TiSA include similar provisions and capture their preferred approach. They outlined that the possible UK-US agreement might be able to make more progress in areas like schedules or domestic regulation, or transparency. Doing an MRA in parallel to finalising the agreement should be our ambition.

16. The US asked a question about the Withdrawal Agreement. Anyone who is a UK/EU national has a family member/spouse would not fall out of the Withdrawal agreement. If you have qualified in the EU and come to the UK there are questions about how that is covered in future. We aren't looking to introduce residency requirements where they did not operate previously.

Key Actions and Next Steps:

- USTR/DIT agreed to facilitate workshops with professional bodies, regulators and stakeholders to work cooperatively to develop shared professional standards and pathways to facilitating licensing or qualification, where appropriate.
- USTR/DIT to organise a first legal roundtable in Autumn (alongside the November WG) with the aim for future discussions on accounting, engineering and architecture in the following working groups. These sessions will involve convening key stakeholders from legal firms and trade associations from both the US and UK.
- USTR/DIT to use DIT non-paper on PBS (shared with USTR before the WG) to co-author a timetable for forward-looking engagement with PBS stakeholders.

Forward look:

When	Action	Detail
TIWG 4, 10 July 2018	Present non-paper	Outline motivation behind developing the non-paper, offering opportunity for expanding into a joint paper.
TIWG 5, November 2018	Legal services roundtable	Facilitate discussion of UK and US legal services regulatory bodies to share information relevant to each legal jurisdiction on ability of foreign lawyers to provide services. We will consider how to take this forward with industry, including through links to the SME dialogue.
TIWG 6, early 2019	Audit/Accounting roundtable	Roundtable to discuss the experience of negotiating an MRA between ICAS and NASBA and AICPA, and, if an MRA has been completed, the negotiations involving ICEAW. The discussion can also take up possible next steps. Stakeholders in the room should include the appropriate regulatory and professional bodies, as well as industry.

Department for
International Trade

TBC	Architecture and Engineering roundtables	Details of facilitating these roundtables should be further established once both countries have had the chance to engage with industry and relevant bodies to gauge interest and capacity.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Comments:

This was a constructive discussion and it was positive that USTR was willing to take actions to push for progress on MRPQs outside the bounds of FTA discussions. It is important to use this momentum to continue to engage stakeholders in a timely and considered fashion, joining up UK and US sides, as appropriate. Resource constrains will make this challenging to deliver.

Focus for the next working group will also need to include a detailed review of FTA provisions related to professional services to scope out the scale of ambition that could be delivered before seeking a mandate for the US negotiation.

Department for
International Trade

INTELLECTUAL PROPERTY: OVERVIEW AND ENFORCEMENT

Date: 10 July 2018

Time: 14:00-18:00

Participants:

Name	Organisation
Maryam Teschke-Panah (MTP)	DIT- Trade Policy
Richard Price (RP)	DIT- Trade Policy
Jeremy Kempton (JK)	DIT- Trade Policy
Sophie Hale (SH)	DIT- Trade Policy
Mark Prince (MP)	DIT- Trade Policy
Sam Gibb (SG) – Scribe	DIT- Trade Policy
Sarah Mahfouz (SM)	DIT- Trade Policy
George Radice	DIT- UK-US Trade Policy
Cordelia Jonathan	DIT- UK-US Trade Policy
Adam Williams (AW)	Intellectual Property Office (IPO)
Tom Walkden (TW)	IPO
Megan Heap (MH)	IPO
Matt Cope (MC)	IPO
Elizabeth Jones (EJ)	IPO
Chloe Surowiec Allison	DCMS
Christine Peterson (CP)	USTR
Ed Gresser (EG – video conference, VC)	USTR
Bill Schpiece (BS)	USTR
Roger Wensell (RW)	USTR
Alex Whittaker (AW)	USTR
Fay Johnson (FJ)	USTR
Miriam DeChant (MD)	US Patent and Trademark Office (USPTO)
Linda M Quigley (LMQ)	USPTO
Charles Eloshway (CE)	USPTO
Susan Wilson (SW)	IP Attaché
Andy Toole (AT - VC)	USPTO
Jennifer Blank (JB – VC)	USPTO
Michael Shapiro (MS – VC)	USPTO
Mark Ye (MY – VC)	USTR
Shannon Nestor (SN – VC)	USTR
Caridad Berdut (CB – VC)	USPTO
JoEllen Urban (JU – VC)	USPTO
Karin Ferriter (KF – VC)	USPTO
Emily Bleimund (EB – VC)	Health and Human Services (HHS)
David Henry (DH – VC)	US - State Department
Steve Aitken (SA – VC)	Intellectual Property Enforcement Co-ordinator (IPEC)
Matthew Kohner (MK – VC)	IPEC
Joe Wereszynski (JW)	USDA

Department for
International Trade

Key Points to Note:

1. Overall positive and highly detailed discussion covering the work undertaken throughout the TIWG programme to date, STO updates and a session focusing on priority areas for the Enforcement section of the IP chapter in an FTA.
2. Short term outcomes
    - SME Dialogue - Positive feedback, agreed that IP panel provided useful stakeholder insight. Agreed that the next SME Dialogue will not feature a specific IP panel but could have IP speakers join other policy/sector specific panels such as Digital.
    - Joint Economic Study – Agreed to have a highly progressed draft by end of Summer 2018, with the aim to publish in Autumn 2018 (potentially in line with TIWG 5). Agreed to continue fortnightly working-level VCs with monthly steering-group VCs.
    - IP Toolkit – Agreed to collaborate on initiatives for distribution at trade shows, working with DIT USA based teams (ITI), USPTO and IPO attaches. IPO are also hosting a US roadshow in June 2019, we agreed to work with USPTO on this too.
    - USTR offered a visit to the US National IPR centre at TIWG 5 – we accepted.
    - US proposed a joint webinar to provide further education on IP rights – we agreed to explore further.
3. Enforcement
    - Online Infringement – UK presented, giving a clear overview of our world leading approach in this area. US particularly impressed with the relationships UK IPO have built with Google and Bing on website blocking. Scope for further collaboration here.
    - US presented a non-paper on fighting illegal online content. Focusing on the Digital Millennium Copyright Act (DMCA) – US pushing for Internet Service Provider (ISP) Safe Harbours, highlighting that DMCA has been a feature of their FTAs (varying levels of detail) and posed questions on UK stakeholder views on DMCA and the use of DMCA as a measure in UK Code of Practice on Copyright and Search.
    - UK set out approach to online IP enforcement and availability of access to justice for SMEs. Noted that access to justice was a key topic in SME Dialogue. Questions from US around history of the court, why it was set up and sought clarity about the various courts that are on offer for IP cases (small claims track, IPEC and High Court)
4. Trade Secrets
    - Short discussion on the implementation of the (EU) Trade Secrets Directive and what it meant for UK. US pushing Criminal enforcement, we clearly outlined that criminal prosecution can take place via other means (Fraud Act, National Secrets etc).

Report of Discussions and Outcome:

Sub session 1: Overview – TIWG progress to date and STOs

1. MTP (UK) provided an overview of the progress since TIWG 1 (July 2017) in Washington D.C. Since the initiation of the TIWG programme there has been a series of substantive IP discussions including:
    - TIWG 1 – First meeting, providing an overview of each other's systems, highlighting areas of mutual interest for US and UK in IP including SMEs and Enforcement and agreeing to work together on STOs.

Department for
International Trade

- TIWG 2 – Discussed Illicit Streaming Devices, which led to further bilateral conversations and work between UK IPO, USPTO and FBI. Discussed each countries' approach to Trade Secrets, GIs and Innovative Pharmaceutical protections. Agreed to work together on the Joint Economic Study, IP SME Toolkit and to setup an SME Dialogue.
- TIWG 3 – Further discussions on Trade Secrets, Innovative Pharmaceutical Protections, combating illicit IP content online and ongoing changes to Copyright legislation and future changes to UK and US IP systems. Launched the SME IP Toolkit at the inaugural SME dialogue.

2. It was agreed that Session 1 would review the work undertaken to date and the progress made during numerous VCs and calls in between the working groups. The main areas of focus for the first part of Session 1 were:
    - Recap of the SME Dialogue (9th July 2018)
    - Progress on the Joint Economic Study (JES)
    - Overview of the STO workplan, highlighting next steps for each workstream.
3. It was agreed that the second part of Session 1 would focus on continuing to develop a mutual understanding of each other's domestic IP policy and the corresponding implications for trade policy, focusing on:
    - Enforcement - online Infringement
    - Enforcement - a discussion about USTR's non-paper on fighting illegal online content
    - Enforcement - access to Justice.
    - Trade Secrets – an overview of the UK's implementation of the Trade Secrets Directive.

CP confirmed this was in line with US expectations.

4. **SME Dialogue** - MTP (UK) outlined that the UK found the IP session of SME Dialogue to be constructive and highlighted that there was positive audience engagement from businesses and industry organisations. MTP (UK) explained that UK is interested in gathering feedback and agreeing next steps for the dialogue. All agreed that the SME dialogue provided positive engagement, reaffirmed the demand for resources that both governments can offer and the importance to SMEs of being able to access all the resources available to them. All agreed that further thought should be given to how we can improve the toolkits to ensure that they are most beneficial to the target users and that there is a need for more education for SMEs in this area. SME views expressed at the dialogue included comments regarding the online/digital platforms and the opportunities and challenges for SMEs as trade becomes digital. There were several questions and comments around cost and access to justice issues, which supported the planned discussions for the IP session on Enforcement and Access to Justice.

5. CP (US) confirmed that the US recognised the same themes from the SME dialogue. CP explained that cost is not an easy question to answer and that this is an issue that US government is asked a lot. US surveys of SMEs have highlighted with respect to protecting IP their major problem is cost, however IP rights are private rights and although there is a wish that the US government would go to other countries and that US IP attachés would represent smaller companies in IP issues, this is not the case and is not something that is being proposed. CP highlighted that online databases and being able to protect IP rights online can reduce costs. International agreements also cut costs and allow companies to focus geographically on where they want to protect their rights.

Department for
International Trade

6. TW (UK) highlighted that the SME Dialogue showed that it is clear there is support for both US and UK IP systems and that internationally they are both highly respected. A future US-UK IP chapter has chance to set precedent at a high-level for other countries. TW (UK), MD (US) and RS (US) agreed that education is key, exchanging and making information clear/accessible for SMEs who do not have time to search out information is an area where we can add value. We agreed to discuss further how mutual business outreach schemes and each country's engagement strategy can be used to complement one another. We agreed to think further about how to protect companies who go abroad to countries other than UK and US.

7. MP (UK) explained that IP teams from both the US and UK have made a significant contribution to the SME Dialogue, holding panels at both SME Dialogue 1 and 2. We agreed not to host an IP panel at SME Dialogue 3, but to maintain involvement in the dialogue and contribute to other panels in the future (e.g. Digital). The date of the next SME Dialogue was to be confirmed by the US & UK SME teams (Expected Nov 18, NYC)

8. CP (US) proposed a joint webinar to reach companies remotely (not just London/Washington D.C.) which can be recorded and put online for others. UK agreed that this is a constructive idea. Building upon the SME dialogue which provides policy insight, the webinar could be used to provide more prescriptive information for SMEs on how to register and protect IP.

9. **Joint Economic Study** - RP (UK) highlighted that there have been several working-level and steering-group video conferences to discuss the Joint Economic Study (JES). The JES is being undertaken in collaboration between USTR, DIT, USPTO and UK IPO.

10. Section 1 of the study highlights the importance of IP to the UK and US economies. Section 2 will examine the threats to IP shared by both countries. The JES is designed to highlight current strengths and potential areas for improvement as IP continues to grow in economic and social importance. There has been good progress on Section 1 and all agreed to continue progress on the drafts of Section 2.

11. SH (UK) provided a snapshot of the project to date and next steps. Following TIWG 3, USTR gave an initial proposal as to how the JES could proceed which was largely agreed. DIT subsequently produced the Terms of Refence (ToRs) for the project, which were agreed and are held on the Max system. USTR drafted an overall introduction to the study, this has largely been agreed, there is scope for further refinement once the consolidated sections have been finalised. USTR are taking responsibility for combining the UK and US drafts into a consolidated Section 1.

12. Progress on Section 2 is less advanced, USTR have shared their draft and the UK draft of Section 2 is under internal review by DIT and IPO. The UK are taking responsibility for combining the UK and US drafts into a consolidated Section 2. It was proposed to have the introduction and both sections finalised by the end of summer 2018 which would include a conclusion (for which the UK is responsible).

13. It has been agreed between all 4 parties (USTR, DIT, USPTO & UK IPO) that Section1 will be centred on 5 themes:
    - Innovation and the IP system
    - IP intensive sectors; creative industries
    - IP intensive trade in goods
    - Trade in IP services
    - Investment in R&D, intangible assets and IP filings.

Department for
International Trade

14. EG (US) agreed with this summary and confirmed that USTR will combine the introduction with the consolidated Section 1 draft. USTR have shared their Section 2 on the MAX portal system. EG (US) stated that the JES is progressing well but recognised that there is still considerable work to be done to have a full draft finalised by end of summer 2018.

15. CP (US) provided an overview of the US support for JES. CP (US) stated that this work will be helpful for the US and UK as leading, innovative economies publicly stating the importance of IP for their individual economies, for the mutual trading relationship, and to send a message to stakeholders and other countries to incentivise them to improve their IP regimes.

16. Mark Ye (USTR) described some recent analysis undertaken by USTR on UK patent filings by US residents and vice versa, which found high levels of filing in each other jurisdictions. This supports the trade theory that the strong systems and rule of law in the US and UK facilitates increased investment in R&D in each country.

17. MTP (UK) agreed and added we want to be producing evidence-based policy making given that the UK will be developing trade policy for the first time in 40 years and having a sound analytical base is important. Another key point was to ensure that evidence and analysis remains the basis for long-term trade policy development and implementation.

18. MP (UK) commended the collaboration undertaken so far to produce the JES and reaffirmed the work plan: to continue the working-level and steering-group video conference calls until publication. MP (UK) proposed moving the provisional publication date to autumn/fall 2018. CP (US) agreed to the publication date and suggested that the first draft be prepared by the end of summer 2018. All agreed to proceed on this timeline.

19. CP (US) indicated the terms of reference would need updating to reflect the new timelines. She also explained a feature on the MAX system which allows users to co-edit documents which will streamline the drafting process. MTP (UK) highlighted that this economic study is the first of its kind and it is concentrating on issues that have been discussed at previous TIWG's and she thanked everyone who had been involved. CP(US) echoed MTP's comments and thanked the respective economic offices for their work in collaborating closely with policy colleagues.

20. **Other STOs** - MTP(UK) started the review and discussion of the remaining STOs that had been agreed at previous TIWGs. The IP toolkit has been one of the group's key deliverables and the next steps for the SME dialogue have been agreed. The JES item should be updated on the STO tracker.

21. MP (UK) DIT created a (A3) checklist to track the STO that have been agreed. It is a high-level overview and in some cases is short (for example IP Attaches sharing contact details and attending shared events). The STOs have encouraged collaboration and developed strong working relationships, for example through information sharing between IPO Enforcement team and the FBI. All agreed that it is important that this type of work continues.

22. CP (US) invited UK counterparts to visit the IPR Co-ordination Centre to coincide with TIWG 5 (this will require clearance with US agencies). MP (UK) accepted. AW (UK) said the IPO see USPTO colleagues at the WIPO general assembly and this is another chance to discuss issues. The IPO regularly meet with USPTO at WIPO, this will be added to STO checklist. MTP (UK) stated opportunities to enhance and deepen dialogue (e.g. WIPO/TRIPS) should be further examined and it is worth recording those opportunities for further bilateral engagement.

Department for
International Trade

23. RS (US) emphasised that both governments undertake significant stakeholder outreach and more conversations should be undertaken to discuss how we can collaborate and combine our promotional efforts. CP (US) suggested that IPO/DIT colleagues join the US roadshows, which have a session about protecting IP abroad and a presentation about the UK would be worthwhile. Ben Hardman (US) would be the best person to contact. AW (UK) raised that in July 2019, the IPO are doing a roadshow in the US with the Chartered Institute for Patent Attorneys and this is another opportunity to connect with US government colleagues. RS (US) thought this was a good idea and said that the full US roadshow agenda is online with dates and locations. (Action - RS to share the link with this group)

24. CP and RS (US) emphasised that there are export centres covering the US and they know the local industries/IP intensive industries so are worthwhile connecting with. The co-location of US agencies helps improve the knowledge on offer. MD (US) said distributing the brochures and access to resources directly to people at the export centres would improve distribution. This is all tied in to the Respect for IP STO workstream which is designed to promote sharing knowledge for IP. RS (US) pointed out that identifying outreach resources is not just about improving distribution but also ensuring our online material is tracked so we know what information is online and available for companies. MH (UK) said when advertising IP toolkits and other resources on these roadshows we should also test if the information being given is valuable to end users and we should seek feedback to see if there is anything further than can be added.

25. CP (US) raised that a key point from the SME dialogue was cost and how to control it when pursuing IP protection. The provision of resources which list the cost effective and Pro Bono help on offer from public, private and government would be a good starting point to tackle this issue.

26. MTP (UK) proposed that engagement and outreach be included in the STO checklist. Furthermore, it was agreed to explore the possibility of having the STO checklist online for review and comments (potential on the Max portal).

Sub session 2: Enforcement (Parts A, B & C)

27. **A) Online IP Enforcement -** MP (UK) introduced the sub session focusing on Enforcement and set out the agenda. MP (UK) confirmed that the slides would be circulated after the meeting. (Action – SG to put the slides on the Max system)

28. MC (UK) introduced the first topic which is online infringement and the UKs preferred approach, through legislation and voluntary actions. Online infringement is seen as a significant challenge for IP protection that needs to be tackled through a multi-pronged approach and we cannot rely on legislation without the tools to implement it.

29. The UK operates an integrated approach to enforcement combining: public education and attractive legal alternatives for consumers of content. The UK's tactic is referred to as the carrot and stick approach and a key objective is making the online world safe for businesses and consumers. For online IP infringement, Copyright is the most significant area, however there are also trademark/designs infringements (online vending) and websites selling counterfeits.

30. MC (UK) indicated progress has been made in delisting infringing websites. Nominet is the UK's online registry and their terms and conditions prohibit criminal activity of all sites using the .uk domain. US asked if this is a Nominet code of practice, MC (UK) clarified it is in their terms and conditions but not currently legislative. The target is to have 100% clean listing of sites on Nominet. MC (UK) described the process followed once an infringing website is detected by law enforcement who report it to Nominet, who in turn notify the registrant and work with the registrar

to get the site removed. In the last year, 16,000 domains have been suspended mainly via PIPCU referrals, but other agencies report sites – most have been removed for copyright/trademark infringement.

31. Operation Ashiko is a joint-initiative between PIPCU and Nominet and forms the bulk of takedown requests for trademark infringing websites. From 2013 – May 2018 51,283 websites were suspended, with criminal property seized valued at c.£13.6 billion.

32. MC (UK) highlighted these domain take-downs are done voluntarily by Nominet but there are also statutory provisions. This is commonly used when the site is outside the UK and when registrars do not respond to requests. Internet Service Providers (ISPs) are requested to block infringing websites and after initial consultation they have been co-operative, operating a streamlined process. It is an expensive procedure as a lot of evidence is required to progress through the courts. There are limitations to injunctions, as they can be circumvented via proxies or by changing addresses. Injunctions have evolved thanks to the Premier League who require quick injunctions. They have a standing order for the season and highlight infringing websites which are then quickly blocked. A new order has been granted to cover next season (2018/19). The Premier League have a weekly list which is updated throughout the season which blocks in real time. CP (US) asked if injunctions have had a deterrent effect. MC (UK) said that the greatest influence is on consumer behaviour. When a website drops off in first few minutes of a stream consumers need to find a new link which can be difficult, when this occurs repetitively consumers tend to move to a different source. There is a block notice on the page but currently no redirection to educational links (this is under consideration). It also does not provide links to a legal stream but provides a list of legal alternatives.

33. MC (UK) in the Cartier International case the courts blocked access to websites infringing trademarked goods. The court decided they had the power despite no existing statutory power and this was upheld all the way to the (UK) Supreme Court. The courts laid out the legal tests that had to be fulfilled before an order was granted i.e. the remedy must be effective, dissuasive and not unnecessarily costly. The Supreme Court revisited the issue of costs and decided ISPs would not have to bear the full cost of implementing a blocking order. It is too early to say what impact this will have, as it is specific to the trademark context. The US asked if this might help in the copyright context? MC (UK) said that the judge didn't think it will provide a direct precedent in the copyright context.

34. MC (UK) then presented the code of practice on copyright and search. Search result targets are set (based on DMCA notices) for search engines to encourage them to demote from search results those websites known to infringe. Rights holders provide a list of search queries which are tested on search engines to see which infringing sites are shown. Engines have a target to pass the test e.g. x number of sites on first page which both Google and Bing passed. Work is being done to see how users would search for copyright infringing sites as there is a disconnect between search engines who know how people search and rights users who would give search queries that are not used by people (but do return many infringing websites). The IPO are now working with other industries to feed into this process e.g. publishing and film.

35. Get It Right from a genuine site campaign is a UK industry initiative split into two parts:
    - They look to educate, featuring outreach that is jointly funded by Government and industry.
    - They operate a 3-strike approach where ISPs send warnings to those who infringe online. There is no escalation, but the process has been effective as people who realise they are

being monitored tend to change behaviour. The warnings also contain information to redirect them towards portals with legal access to services.

36. The Online Copyright Infringement tracker is a self-evaluation research piece into copyright infringement online that examines consumer behaviours. It found 15% of online material was infringing, this has been relatively consistent with the previous infringing levels, but they are seeing a drop as legitimate streaming is taken up. Poor access to content is often the second most cited reason as to why people infringe. However, 1 in 10 are 'hard-core' infringers who actively pursue infringing content.

37. **Online IP Enforcement questions -** US asked for further context around the Norwich PharmaCol order? Does it apply only in copyright proceedings? MC (UK) clarified that it can be used across all rights, but it is mostly in copyright. It comes from a patent infringement case where the court required manufacturers to release details of third parties involved. In the case of copyright, whilst the ISP can be considered an innocent party it can be ordered by the court to give up details of infringers e.g. which terminal used the IP address when the infringement happened.

38. CP (US) asked if this work in civil or criminal law. This is a contentious area as it has been used to obtain contact information to then send letters to addresses requesting they pay, otherwise court procedures will be brought against them (commonly used in the adult film industry). There hasn't been a scenario going to a criminal court and if you challenge these letters they normally stop.

39. CE (US) asked what the background on the process is for the UK search engine practice. It was a long process starting in 2014 with roundtables between Google, Bing, Yahoo and Alliance for IP who discussed how to tackle IP infringement and how to remove infringers from engines search results. The Digital Minister was involved and keen to ensure the process continued to move. There was other legislation going through to which this agenda could have been added to and the possibility of legislation meant parties were more focussed. It took time to work out what the problem was, research to see the prevalence of infringing sites and how people found these websites (e.g. autocomplete). Everyone agreed with the ambition of making these sites hard to find but the looming threat of legislation helped move it along.

40. The US asked if the threshold was 30% of sites on search results infringing? MC (UK) indicated there are a range of targets and the exact figures are not published but generally search engines were told there should be fewer than X% on their front page of search results with X being low percentage, usually equating to 1 result on front page. EG (US) highlighted that this is a unique opportunity given UK government's relationship with the ISPs to undertake studies to assess the thresholds and interventions which could change consumer behaviour. Randomised experiments where they make changes to one group and compare to control group to examine behavioural differences could provide valuable insight. EG (US) asked if the UK government could implement similar types of experimental studies to evaluate the different interventions and impact on behaviour as the US do not have such relationships. MC(UK) said such studies are being undertaken to examine behaviour, such as: simple searches or those that nobody clicks past first page. There is a group of consumers who use direct, targeted search terms to look for pirated material and this is the group to be investigated.

41. CP (US) asked if the search terms are examined purely from the repertoire of stakeholders or are technology tools used to produce terms also examined. MC (UK) said that currently it is just repertoires, but the inclusion of eBook software and circumvention technology is being examined.

Department for International Trade

42. CP (US) asked about the feedback from stakeholders. MC (UK) said the music industry is very pleased and they now understand what information needs to be sent to get an infringing site removed. The film industry is slightly less happy with the outcome: there was initial success but there is concern that regardless of the threshold targets for search engines the nature of film means some links do not get many DMCA notices so will not show up in search engine testing.

43. MP (UK) asked whether there have been similar calls from US stakeholders for this initiative. CP (US) stakeholders are positive about this programme. There have been several requests about how search engines can assist in demoting but less about experiences of The Code.

44. MP (UK) asked if there are any US agencies working with other search engines (not Google and Bing) to create similar initiatives. CP (US) thought there may have been an agreement with one search engine but nothing on the broad scale of the UK's agreement. There was not any pending legislation that could bring people together to discuss such an initiative. MC (UK) highlighted that the way Google and Bing algorithms work has enabled these search reviews to be rolled out worldwide so other countries do not need a similar agreement (Key point – UK system providing global benefits). These algorithms can consider cultural differences that result in different searches. CP (US) raised this is an interesting practice along with Get It Right.

45. **B) The ongoing fight against illegal content online – US experiences [Non-Paper]** DMCA legislates for direct infringement and secondary liability infringement. DMCA looks to address concerns regarding ISP's serving as deep pockets in online infringement cases and having to pay for user infringement. Congress' goals for enacting DMCA was to eliminate liability for ISPs who were behaving reasonably to remove infringing users, provide procedures to remove/block those infringing and identify those who infringe. Safe harbours limit liability for ISPs if they live up to a certain standard and there are other defences for copyright infringement.

46. Safe harbours provide monetary limitation on ISPs for users infringing activities. ISPs must meet general conditions and adopt, implement and inform subscribers of their policy to terminate users for whom they've received repeated notices of infringing. Users can qualify for such treatment even in they have not been judged to have infringed.

47. There are 4 infringing activities:
    - Transitory Communications
    - System Caching
    - Information residing on networks at direction of users
    - Information location tools

48. The EU eCommerce Directive covers the first 3 activities. The DMCA provides detailed guidance compared to the EU Directive about how safe harbours work. Transitory communications occur when there is transmission of material passing through the system/network where transmission is started by someone other than the ISP and recipient is not selected by ISP. The material is made available online not by the ISP and the ISP is a conduit for passing the information. Additionally, the content of information is not modified. Systems caching applies to the intermediate and temporary storage of material posted online which is auto stored on ISP system if storage is carried out on technical processes. There is a distinction between the first 2 activities: the former applies to the passing through and storage of information whilst the latter is temporary storage that speeds up access to the websites provided.

Department for
International Trade

49. The last two categories have the same conditions for ISPs to qualify for safe harbour limitations: that ISPs do not know that the material infringes, do not know where material came from and if they acquire such knowledge they are quick to act and remove/block access. The ISP cannot financially gain from the material and they must comply with notice and take down.

50. There are elements of a DMCA notice which must be met and be provided in writing to a designated agent, these include:
    - The physical/electronic signature of someone who can act on behalf of the owner
    - Identification of the copyrighted work that has been infringed
    - Identification of material that is infringing and that it is to be removed

51. The information provided must allow ISPs to identify the correct material. Basic contact information of complaining party is to be included and this party has good faith belief that they are being infringed. Once the notice is sent, the ISP blocks access to material if they want to avail themselves of safe harbour, a counter notice can also be sent.

52. When the ISP satisfies the needs for safe harbour protection they will not then be liable for infringing activities undertaken on their website. If they do not meet the needs, then costs will be determined under copyright law. The DMCA is 30 years old and there are debates about its need to be updated to consider developments in technology. There are some stakeholders who are dissatisfied with section 512 as the current size of the internet and number of take down notices received lends itself to a 'whack a mole' process and they want to see this provision overhauled. ISPs are satisfied with the DMCA but less so with volume of take down notices and some who abuse the take down notice system.

53. Kevin Amer (Copyright office) is studying the effectiveness of section 512 through written comments from the public and round tables for stakeholders. There have been 90,000 written comments, which highlights the level of interest. The issues that have been described include concern around content for technology/music communities as well as the volume of take down notices. Content providers have developed automatic detection tools to identify infringing materials on sites which automatically produce a takedown notice, this has resulted in erroneous/improper notices due to this automation and is seen as a big issue. The (US) Copyright office are producing a publicly available report, which will propose possible policy recommendations.

54. The US noticed that DMCA was mentioned in the IPOs work with search engines, and asked if is it used as a guide in the UK. MC (UK) said the work with search engines used DMCA, but there is no safe harbour qualifying process similar to DMCA process which is prescriptive. US asked if there will be changes to this process. Regarding entities such as entertainment websites, when does it count that they have knowledge of infringing content on their site? Does it need to be a person or does an automated measure to detect and filter content count? (Action - UK to take these questions away and respond via email/VC)

55. The US have been hearing from stakeholders about the UK's provision for the DMCA process. MC (UK) said it has been through parliament and sent back for amendments. It was broadly supported as rights holders feel this is the way to go. The technology side are content but there is a misunderstanding of what the provision is going to be and who will be affected. The UK were happy with the text that went to EU Commission.

Department for
International Trade

56. CP(US) then spoke about the DMCA in a US trade context as DMCA has been feature of US FTAs. USTR get their negotiating objectives from Congress and are asked to offer a standard level of IP protection like that in the US. This is not to say that this is consistent (e.g. a one size fits all approach) and FTAs have had various levels of details e.g. notice/counter notice provisions in side letters. There is room for discussion to make it work for everyone.

57. MP asked for some recent examples of different US FTAs that have worked. CP (US) said that TPP was an anomaly and was not supported by a large number of US stakeholders. There was criticism of the notice feature, which was grandfathered in from the Canadian system. There has been a shift in stakeholder views on ISP liability, initially rights holders supported the position but now ISPs support the current position.

58. MP (UK) asked if many of 90,000 (Section 512 consultation) comments are from consumers as the UK want to think about getting holistic stakeholder input including consumers. US stated that the vast number of respondents came from both producers and consumers of IP.

59. LMQ (US) presented on the seizure of website domain names, payment services advertising and marketing. There are other mechanisms through which the US can target infringers including: the seizure of website domain names, a project by the National IPR Co-ordination Centre led by Homeland Security Investigations (HIS) which targets entities who distribute counterfeit goods via the internet. By seizing domains, the point of sale for criminals is eliminated. The IOS seizure banners and public press events held to coincide with seizures serve as tools to educate the public about the perils of counterfeiting. This initiative has moved international by linking up with Europol.

60. There are voluntary initiatives that focus on payment services which are undertaken by the private sector e.g. Rogueblock. It is a collaborative effort between the International Anti-Counterfeiting Coalition (IACC) and payment industry to create a streamlined and simplified procedure enabling members to report online counterfeit sellers directly to credit and financial companies, targeting their ability to receive online payments. Portals provide information on how to access government agencies and credit card companies to remove illegal sellers receiving payments.

61. IACC also identifies high value targets for take down and removes duplication efforts (where other agencies may have the same targets). They have produced a simple report to target infringing accounts which if appropriate is sent to the credit card company for further action. The outcome of all submitted reports can be reviewed online.

62. Trustworthy Accountability Group (TAG) and its Certified Against Fraud programme which looks to rid the legitimate supply chain from malware, tackling advertising on fraudulent websites. Currently this software can place legitimate advertising on fraudulent websites. TAG encourages companies to abide by Certified Against Fraud guidelines to reduced invalid fraudulent traffic.

63. LMQ (US) presented on initiatives to combat counterfeit pharmaceuticals (this is a significant issue in the US, but further research is required to determine it prevalence in the UK. USTR are also keen to explore this in a further stage of the JES).

64. In January 2018, the US Department of Justice created the Joint Criminal Opioid Darknet Enforcement (J-CODE) team. The team coordinates various federal agencies to disrupt illegal online drug sales. The first major action of J-CODE was the launch of Operation Disarray, a four-day, nationwide effort to expose and arrest online traffickers and customers of illegal narcotics. The Operation also raised awareness of the dangers of these illegal marketplaces. Eight people

Department for
International Trade

were arrested, 160 interviews of online buyers and sellers were conducted, and nineteen overdose deaths of persons of interest were identified.

65. The National Association of Boards of Pharmacy (NABP) operates a verification system for the ".Pharmacy" top-level domain name. Only verified, legitimate pharmacies may use the .Pharmacy domain name, and must comply with NABP strict standards and policies. Combined with educational campaigns, the unique domain name assures consumers that the site from which they are purchasing their medication is safe and free from counterfeit and illicit drugs. EnCirca, a private domain-registrar based in Boston, Massachusetts, owns the .Pharmacy license from the Internet Corporation for Names and Numbers. NABP, however, vets and monitors. Pharmacy website registrants. EnCirca will grant. Pharmacy domains only to those who comply with and are authorized by NABP. The Centre for Safe Internet Pharmacies (CSIP) is a clearinghouse that provides consumers with an online pharmacy verification tool. Consumers can enter the pharmacy's website into CSIP's search engine, and CSIP will return a response on whether it is a legitimate pharmacy with trusted products.

66. MC (UK)asked if there is a similar system in the US to the Canadian's Project Charge Back for those who get money back spent unknowingly on counterfeit goods (which provides a strong incentive for consumers to report counterfeiting sites). The US team were not aware of anything, but they are keeping an interested eye on Charge Back.

67. MC (UK) explained the UK has a similar intervention to TAGs initiative (paragraph 55), the Infringing Websites List, but the complexity of the supply chain results in advert brokers not knowing where adverts will end up. MC asked if similar feedback has been seen by the US. Can brokers stop adverts cropping up as supply chain is so complex? LMQ (US) agreed that the problem is universal due to the way the supply chain works but the US targeting procedure is still a valuable tool even if it doesn't work 100%. CP (US) confirmed that it is something the US are hearing and there is concern as companies do not know where and when their own adverts appear on illegal websites.

68. MC (UK) asked how much of the payment service initiative was cross border. LMQ (US) responded that because of the nature of the internet it is cross border but in terms of bringing in companies across borders, this is less frequent. MC (UK) enquired about the seizure of domain names outside the US. Such an effort would require co-operation with overseas enforcement. LMQ (US) responded that many websites move along when contacted by law enforcement, but generally the US focus on US sites although there is close collaboration with Europol to expand their reach into other countries and this co-operation can further expand given the success that has been seen.

69. CP (US) provided background on the Stop Online Piracy Act which was a proposal to introduce site blocking. It drew a lot of criticism and resulted in an internet blackout. A similar proposal did not have the same backlash in the UK. CP (US) was interested in UK stakeholder views on site blocking. MC (UK) stated there is a small but loud free speech lobby group who campaigned against it especially the lack of transparency to challenge blocking orders, but the public were not as interested. There are smaller number of blocking orders mainly because these orders are expensive. However, the complaints of the lobby groups have been considered e.g. sunset clauses if sites change their behaviours.

70. RS (US) asked if there has been a proportionate increase in opposition to site blocking with an increase in the number of blocking orders. MC (UK) said that currently the total number is low so it is difficult to judge although there was a brief spike when the Premier League got a new style

of blocking order, but opposition was still muted, nothing on same level as Anti-Counterfeiting Trade Agreement (ACTA).

71. MP (UK) pointed out that the Premier League work might have carry over to working with NFL and NHL for future collaboration. EJ (UK) added that the case brought forward by the Premier League was support by European football leagues and other sports from across Europe e.g. cricket/rugby.

72. CP(US) asked if enforcement authorities can seize domain names. MC (UK) stated that they do but do not normally as Nominet removes them first. They do not want to have the responsibility of these sites remaining on their books.

73. **C) Access to Justice.** EJ (UK) described the UK's court system for hearing IP disputes. IPEC is the specialist IP court in England and Wales. Scotland and Ireland have a different court process but the same legislation. The Patent County Court did not do its intended job and costs did not originally come down, so changes were made to ensure affordable access to justice was provided in the UK. Such changes included: capped costs, with cases worth over £500,000 going to the High Court; time caps on hearings; and judges ensuring the process is as simple and streamlined as possible. A review of IPEC showed it was filling a gap and having a positive impact.

74. Small Claims Track (SCT) is set up to hear cases with a value of £10,000 or lower. SCT mainly deals with copyright disputes (e.g. photography case study that was presented). In all scenarios the courts encourage mediation rather than legal proceedings as this reduces costs and time even further. SCT case studies are relatively few but they often are copyright damages ranging from £50-£10,000. It is a small, low value process but it is effective. RS (US) asked if the case numbers are small because the SCT is not well known? EJ (UK) said it is well known especially through the Photographers Association. The courts have been asked for data to see if the SCT is acting as a deterrent as this is an area of IPO interest.

75. Alternative Dispute Resolution is another path that can be taken. There is guidance online to encourage this process e.g. in family disputes ask for family members to resolve. The IPO offer mediation, the average mediation length is 6 hours and costed accordingly. IPO mediators can travel or offer offices as appropriate, thereby ensuring that this service is not limited to major cities only.

76. IP Pro Bono has been set up as there are cases where individuals did not have the necessary legal background to represent themselves appropriately but cannot afford legal advice. This is a collection of leading IP organisations providing advice and legal IP support. There is online information on IP insurance including the products available and where they can find them. The introduction of fixed costs in IPEC have led to lower insurance premiums as insurers realise costs will not spiral. There is a section on the UK Government website about IP crime and enforcement for business which provides guidance.

77. CP (US) asked if the IPEC/Patent County Court was based on a court elsewhere. EJ (UK) responded that there are two levels of courts: High court and County court which is for lower level cases. The Patent County Court originally sat in the lower Court, however changes in 2010 meant it is now in the High Court so there were more remedies available for both high and low-level IP cases. The judges at the time were influential in pushing this through. The Jackson review examined whole justice system, highlighting that it was very costly for individuals/businesses. The recommendation was to construct a specialist listing for IP in lower courts. There is currently one judge who sits in court and some deputies, it is a small but effective court.

Department for
International Trade

78. CE (US) sought clarification around what disputes the IPEC handles i.e. only disputes that lie within the threshold. EJ (UK) said this was the case. CE (US) asked if these are the only remedies/damages that can be offered e.g. injunctive release available. EJ (UK) clarified that it is only the SCT where remedies are limited. There is a specialist patent court within the high court and the current IPEC judge has sat in High court to hear cases.

79. EJ (UK) stated that the dispute resolution process is staffed by the IPO and there are a small number of cases per year. The interest in the US is around ADR and patents. There is little appetite to use ADR vs litigation procedures and fair to say that there is similar appetite in UK although, UK judges suggest ADR where possible.

80. LMQ (US) asked if the judge helps limit scope of the case, and what was the procedure. EJ (UK) stated there are civil procedure rules set out which apply to IP cases, the judge will be strict in what has been submitted in case management and if it is not applicable he will not allow it to keep to the 1-2-day time limit and avoid arguments going off on a tangent.

81. CP asked if non-UK residents can use this system. EJ (UK) Yes and felt that this information could be included in the next toolkits.

Sub session 3: Trade Secrets

82. **Trade secrets.** MP (UK) proposed that we provide an update on our implementation and then go straight to questions. CP (US) asked for clarity around what the biggest changes to trade secrets are.

83. MC explained that when analysing the directive, it is very close to UK law and the changes are mainly procedural e.g. time limits and protections. There is little that touches on the definition of a trade secret or illegal behaviour. Stakeholder views when the implementation was proposed were that they did not think implementation was necessary, but the IPO disagreed as there could have been a breach due to the technical amendments made. There has been no feedback since the amendments have been made (June 2018).

84. CE (US) stated that the breach of confidence term is a core element to the theft of a trade secret and asked if this means that there has to be pre-existing relationship between possible defendant and plaintiff. The thinking here is in relation to a third party who knowingly receives information from the employee, and whether they are liable as well as they may not have an existing relationship with the employer from whom the secrets have been stolen. MC, EJ (UK) said that this would be best followed up offline. (Action – To be discussed further via VC)

85. CE (US) asked, having implemented the trade secret directive, whether the UK anticipated maintaining implementation in the UK after EU exit. MC (UK) responded that it is not possible to say categorically but there is no plan to change and there is not any desire to unpick once we leave.

86. CE (US) asked about the possibility that criminal action could be included in trade secrets. MC (UK) said this is not something that has been called for and we do not envision it being asked for in the future as UK stakeholders are satisfied operating under civil law in this area. There are some criminal provisions e.g. fraud or hacking which offer criminal sanctions but main matter is economic threat and the theft of a trade secret holds which is appropriately dealt with in the Civil court.

Department for International Trade

87. CP (US) asked how the regulations interact with case law. Can regulations override case law? EJ (UK) answered that regulations make some changes to statute but a lot of case law continues to apply unless it is significant different to the regulations. However, we do not think there is anything that applies here.

88. CE(US) asked what would happen should a sub-contractor working on a MOD project give confidential information to another country. MC (UK) responded that there are separate provisions which allow for prosecution and could be called up under the Official Secrets Act. Both trade secrets and national secrets would be used.

89. MP(UK) stated there are areas where criminal can override civil law, an example is the computer misuse act which was raised in Washington. CP(US) highlighted that in TPP there was trade secret amendment which would allow for cyber security updates. Stakeholders especially those in manufacturing wanted to include a specific criminal liability for trade secret theft.

90. CP (US) asked whether there are procedures to maintain the confidentiality of trade secrets during trial. MC (UK) answered that yes, these cover publication of judgements i.e. redactions in place.

91. MP (UK) – Action to set up VC to discuss trade secrets rather than wait for next TWIG.

<u>Key Actions and Next Steps:</u>

- **Short term outcomes:** the next SME Dialogue will not feature a specific IP panel but explore the possibility of IP speakers joining other sector specific panels such as Digital.
- **Joint Economic Study** – Agreed to have a good draft by end of Summer 2018, with the aim to publish in Autumn 2018 (potentially in line with TIWG 5). Agreed to continue fortnightly working-level VCs with monthly steering groups.
- **IP Toolkit** – Agreed to collaborate on initiatives for distribution at trade shows, working with DIT USA based teams (ITI), USPTO and IPO attaches. IPO are also hosting a US roadshow in June 2019, we agreed to work with USPTO on this too.
- **USTR** offered a visit to the US National IPR centre at TIWG 5 – We accepted.
- **US** proposed a joint webinar to provide further education on IP rights – We agreed to explore further.
- **Access to Justice**: When next reviewing IP toolkits, highlight the availability of the specialist IP courts to non-UK residents.
- **Trade Secrets:** A discussion to be had about the liability of third parties receiving information from the employee who stole trade secrets in relation to the third party's relationship with the employer who was stolen from.
- **A wider video conference** to discuss trade secrets.

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

- Constructive atmosphere and recognition that there is a well-established working relationship between the core IP teams at USTR and USPTO, and DIT and UK IPO. Particularly highlighted through the STO outputs: IP Toolkit, SME Dialogue and Joint Economic Study programme.
- This session presented the opportunity for the UK to set out our stall and really highlight the benefits of the UK Enforcement system and laying the groundwork for an ambitious Enforcement section of the possible future IP Chapter. The combined stakeholder input from the SME Dialogue played neatly into our agenda and enabled the UK to push strongly for support for SMEs and to push back against US offensive positions such as ISP Safe Harbours.
- We are now at the stage where we are on the verge of negotiations. There is room to have further discussions on areas of specific detail via VC and we will pursue this prior to TIWG 5.
- For TIWG 5, we do not recommend further discussion of the detailed areas already covered. We will use TIWG 5 as an opportunity to provide a first overview of a range of issues that have only received light touch attention such as Copyright and those which have not been addressed altogether including, Trademarks and Designs.
- Our focus now needs to be on policy development including for the US mandate in the autumn before we have further substantive discussions.
- Particularly commendable work was undertaken by the IPO Enforcement team and DIT Analysts to make this session a success.

Department for
International Trade

GOOD REGULATORY PRACTICE AND REGULATORY COOPERATION

Date: 10 July 2018

Time: 16:00–18:00

Participants:

Name	Department/Directorate
Kate Maxwell	DIT- Trade Policy
Julian Farrel	DIT- Trade Policy
Diana MacDowall (Scribe)	DIT- Trade Policy
James Connell	DIT- Trade Policy
Alison Kelly	DIT- Trade Policy
Kashan Ali	DIT- Trade Policy
Tim Harris	DIT- Trade Policy
Rebecca Schneider	DIT- UK-US Trade Policy
Kim Wager	BEIS
Rachel Shub	USTR
Christine Brown	USTR
Julie Callahan	USTR
Sam Rizzo	USTR
Silvia Savich	USTR
Cara Lofaro	US Dept. of Commerce
Erik Puskar	US National Institute of Standards and Technology
Anne Kirchner	US Food and Drug Administration
Lori Tortora	USDA
Mary Stanley	USDA
Kim Tuminaro	US State Department
Rosalyn Steward	US Small Business Association

Key Points to Note:

- A positive and productive session. The US ran through the GRP principles they would be seeking in a possible future UK-US FTA, in line with NAFTA 2.0 and TTIP in particular. We were able to reassure them that our Better Regulation disciplines would meet all of the principles that they raised.
- The working group agreed to discuss areas of more ambition in relation to the GRP chapter, at the next TIWG.
- The UK agreed to share HMT's Green Book: Appraisal and Evaluation in Central Government, which is the Treasury guidance on how to appraise and evaluate policies, projects and programmes.
- The US undertook to share its draft TTIP text on GRP, subject to legal consent.

Department for
International Trade

Report of Discussions and Outcome

Both Teams agreed that it had been a positive meeting in Washington in March. Rachel had agreed to make a presentation on US GRP issues at the July Working Group meeting in London:

1. The US indicated that the comments in the slide pack should be considered DRAFT rather than indicative of an official government position as the pack was prepared to aid discussions in the Working Group rather than being presented during formal discussions about a trade agreement with a partner. It highlights priorities the US has raised during discussions with potential partners over the last few years. Texts for agreement will be framed within the parameters of particular partnerships. The pack does give an indication of the US ambition for future agreements.

2. In terms of preferred texts, KORUS has transparency requirements, but TTIP wording (US text) is the best template against which to measure future ambition.

What GRP means

3. The US uses the term "Good Regulatory Practice" specifically within the trade arena which complements WTO provisions in the GATT/GATS/IP Agreement.

4. It is not limited to manufactured goods. The US believes that other countries are more likely to automatically implement obligations under agreements that include a GRP chapter setting out high-level principles.
   - A GRP Chapter sets the foundation for regulation across all sectors during the regulatory lifecycle. It links to good outcomes in national trade and creates a level playing field for exporters but does not dictate or expect any specific outcomes e.g. publishing information on the intranet instead of obscure hard-copy publications
   - GRP requirements complement OECD, on e.g. SPS or TBT

5. The US has been working on GRP in a variety of fora for over 20 years including APEC, the WTO TBT Committee (initial years), in the World Bank (which refers to GRP as good governance) and acknowledged the OECD's 2012 recommendations.
   - GRPs promote good economic growth and jobs. The US does not try to replicate principles and language of OECD documents but chooses the most important principles. A lot of organisations have produced work and thinking on GRPs.

6. In OIRA's view, the main elements of GRP comprise:
   - Evidence-based decision-making: including Regulatory Impact Assessments (RIAs), cost benefits analysis, risk assessment, retrospective review (PIRs)
   - Transparency: publication of key info, notice of changes, opportunities for participation and to allow outsiders to test government logic
   - Co-ordination: "whole of government" approach, produces predictability for businesses
   - Objectives are to produce efficient, effective regulation.

7. The US aims to foster GRPs, to avoid unnecessary restrictions on competition and prevent overlap or duplication between proposed existing regulations. This helps prevent creation of inconsistent regulatory requirements, and ensures regulators consider regulatory impacts including on SMEs as well as promoting compliance with international obligations (including standards). US government legal requirements mean that departments and agencies should avoid creating unnecessary blocks to trade.

Department for
International Trade

8. The US does not take a prescriptive approach as to where GRP sits in trade agreements but considers it important to have mechanisms in place to accomplish these objectives.

9. JF (UK) advised that the Better Regulation Framework (revised February 2018) addresses these principles in the UK.

10. He explained that the Regulatory Policy Committee (RPC) is the UK's independent Watchdog committee which validates all RIAs. Departments and Ministers cannot proceed with legislative proposals unless the RPC is satisfied that the RIA is robust. Policy decision-making responsibility remains with Ministers at all times, but the RPC can and does challenge the underlying evidence e.g. if the estimates of costs appear random, the RPC is likely to challenge the quality of the analysis. HMG makes collective decisions on legislative measures – no decision is taken in a silo. No Minister can independently propose legislation to Parliament – the proposal must have received Cabinet Committee approval before it proceeds. Proposals are circulated and agreed at Official level before coming to Ministers.

11. KM (UK) noted that we are alert to the need to identify and include effects on trade and other issues in future write-rounds for Cabinet Committee approval.

12. The US has a wide range of government and business guidance. Some principles are included in trade agreements – information quality (evidence base), paperwork reduction/use of surveys, development of technical requirements, guidance on testing, conformity assessment (TBT), use of international standards. There is US government legal direction that guidance should avoid creating unnecessary obstacles and it should be written in plain language. This is an area where the US feels it could apply more ambition, with more precision on requirements for guidance in trade agreements.

13. There is also a nominated TBT contact in each US regulatory agency.

14. It is worth noting that OIRA was created under the Paperwork Reduction Act.

15. The US looks to publish advance notice of planned regulation well ahead of the legislative start date. The more that upstream information is available, the more businesses are in a position to question and plan ahead. This is also an OECD principle. US regulatory agencies publish their pipeline of future regulation twice yearly. It includes a brief description of the planned regulation, points of contact for each regulator, sectors affected (identified by codes) and whether they are expecting significant effects on trade or investment.

16. RS (US) asked if the UK has an annual plan of regulation.

17. JF and KM (UK) spoke about the public consultation process for new regulation within the UK, and the annual Queen's Speech at the Opening of Parliament. KW (UK) also raised the principle of Common Commencement Dates in April and October as being a useful guide for business for when regulation will commence.

18. The UK also conducts pre-legislative scrutiny of proposed primary legislation, which includes public consultation on the need for the regulation. UK consultations are published on HMG's single information portal GOV.UK. In addition, government departments and regulators maintain their own lists of specific stakeholders whom they will notify directly when consultations are published.

Department for
International Trade

19. RS (US) mentioned that transparency is particularly important for technical regulations. If exporters know technical recommendations in advance they are able to flag up where changes might benefit the regulation. The US customarily publishes all studies and analysis (or links to the documentation) that has been used as a basis for proposed regulation in the single-portal Federal Register as part of the *Notice and Comment* process. This allows stakeholders to indicate whether there is more recent research/evidence to add information. The US also publishes draft text (that has not yet been officially approved) of proposed regulation to garner views on how difficult it may be to comply with the final law, when it comes into effect.

20. Anyone in the world can comment on forthcoming US regulations. In a recent example a Chinese firm was permitted extra time to stop using a soon-to-be banned pesticide. However, it should be noted that consultation is not a referendum on proposals. But is intended to gather information on the potential impacts. Public comment includes issues in relation to the TBT and SPS Agreements.

21. The US believes that transparency at EU-level could be improved as information is not made public before proposals for regulations are shared with the European Parliament.

22. Where legislation may have a significant impact on trade the time limit for public consultation is at least 60 days, or longer, as appropriate, if the legislation will require businesses to make significant changes to manufacturing processes. The minimum consultation period on new regulation is 30 days. NAFTA 2.0 requires 60 days consultation on everything, subject to consideration on TBT exceptions.

23. Public access to proposals is via a dedicated, single portal, freely-accessible website.

24. The US favours publishing comments as they go along, rather than publishing everything at the end of the process, seeing this as an opportunity for the Trade departments to know what issues are of concern.

25. JF (UK) confirmed that the UK publishes comments received during public consultation alongside a summary of the Government's response on GOV.UK. The response also includes a list of contributors, together with a summary of answers to each of the questions.

26. US regulators are all responsible for upholding the principle of national treatment, allowing interested persons to submit comments, which are published immediately. Comments are evaluated, and when the regulation is finalised, all comments are published with the agencies' views on substantive issues raised during this process.

<u>Expert Advisory Groups</u>

27. OECD reviews encourage the development of an open process for Expert Advisory Groups (EAGs) to comment. Examples include the US-Japan Advisory Committees on sectors including pesticides and aircraft. In order to avoid accusations of direct lobbying influence, Congress decided in the 1970s that EAGs must be transparent and should be a complement to, not substitute for, broader public participation. But EAGs are not considered a compulsory component of trade agreements. Mexico for example does not have EAGs for NAFTA 2.0. When negotiating trade agreements, the US publishes draft agreements to encourage public comment.

Department for
International Trade

Challenges from civil society, NGOs and other institutions

28. The US asks for views from civil society – and shares proposals, but sometimes may need to keep papers secret.

29. If the intention behind proposed legislation is to change the existing law, the US government automatically requires regulators to go through the process of public consultation, which means a much wider consultation than simply through Expert Advisory Groups.

30. NB: The FDA has Technical Advisory Groups where members are vetted to prevent conflicts of interest.

31. JF (UK) asked how the public inputs into US Committee meetings. RS (US) confirmed that it is important to provide public access particularly where a Committee may be discussing for example scientific-based concerns. The public is encouraged to provide information or questions ahead of a meeting.

32. JF (UK) said that the picture on advisory groups in the UK varies sector by sector and department to department.

33. KW (UK) confirmed that there is no systematic approach to advisory groups within the UK, but where they exist, it is expected that processes are open and information from the meetings published on GOV.UK

34. The UK is considering future stakeholder engagement arrangements, including consultation on new FTAS. Reports from EAGs are usually put on record through the process of Parliamentary questions and answers although we do not always publish the outcomes of advisory group meetings.

Regulatory Impact Assessments (RIAs)

35. In common with the UK, the US requires proposed regulation to be subject to a Regulatory Impact Assessment process (RIA) – an assessment of evidence-based decision-making. The US does not complete RIAs on minor regulation. Generally, US RIAs should include consideration of feasible and appropriate regulatory and non-regulatory alternatives, anticipated costs and benefits of selected and other alternatives. Consideration of impacts on SMEs and potential steps to minimise. A full RIA is published alongside the final regulation.

36. JF (UK) confirmed that these issues resonate strongly with the UK and parallel UK IAs.

37. In the US experience, most countries carry out RIA "lite" assessment processes. Despite this, the US does not prescribe how RIAs are carried out and where they should sit in a trade agreement.

Notice and Comments process

38. The US finds that there is high public participation in the consultation process, because regulators and agencies publish their deliberations and consideration of comments, at the same time as publishing the final regulation.

39. Public participation encourages those who are interested enough to pay for additional studies because they are confident that the data will be considered and utilised. The Executive's final

action is to publish a Memorandum of how information received from the public was reflected in the regulation This produces benefits upstream as part of the *a priori* process.

Implementing finalised legislation

40. The US legislative process does not incorporate Common Commencement Dates (CCDs) but ensures that any legislation will not be implemented for at least 30 days, which allows regulators time to implement changes. The Government will consider arguments for introducing regulation early.

41. The US recognises that there is room for more ambition in relation to implementation, but any final proposal must be shown to be based on earlier evidence, clearly setting out how the finalised regulation fits the requirements set out at the start of the process.

42. There is also recognition that guidance on facilitation of different compliance dates for SMEs would be useful, particularly amplifying this point in a trade agreement.

43. The process of review and determining whether regulations in effect are in need of modification or appeal are exemplified in the current US Two-for-One review. This places an onus on regulators to consider the effectiveness in meeting initial, publicly-stated objectives, any changed circumstances, new opportunities to eliminate unnecessary regulatory burdens. They must also consider the impact on SMEs (which account for 98% of US businesses).

44. KM (UK) reflected on the similarity to the UK's Red Tape Challenge activities and drew parallels with a domestic REFIT system.

45. The US recognises that retrospective review also allows agencies to prioritise which regulations should be amended. Many US regulations have built-in review clauses, which may place certain obligations on regulators. Links to SPS/TBT requirements in trade agreements must also be considered.

46. Suggestions for improvements to regulation can be made at any time by anyone. Regulators will consider comments from a single person or business entity, as well as other groupings. Issues raised might include reasons why the regulation has become ineffective at achieving the stated objective, if it has become more burdensome than necessary or fails to take into account changed circumstances, or it relies on incorrect or outdated information.

47. Government activity updating old regulations allows companies to petition for specific key standards e.g. ASTM Textiles versus ISO Textiles, which can be used as a tool for introducing flexibilities into new regulation. US agencies will publish these requests on the Federal Register and ask for comments.

48. Consideration of changed circumstances also link with TBT and SPS. The US has ambition to include suggestions for improvements in a GRP Chapter.

49. Trade agreements should lay out the basic elements of information provision about regulatory processes but not set out hard and fast rules. The US considers it important that trade agreement parameters are out in the public domain as quickly as possible.

Department for International Trade

Regulatory Co-operation

50. US-EU *Regulatory Cooperation* was outlined in a 2002 Agreement between the US and EU. It sought to introduce a generic approach to methods of co-operation, encouraging agencies to minimise unnecessary regulatory differences with regulatory counterparts, and to facilitate trade or investment (but does not specifically require harmonisation). The non-exhaustive list should also include
    - Encouraging Government Departments to check proposals with regulators
    - Seeking Parties' co-operation on early research to define ways of joint development
    - US sees co-operation as being between governments but is careful of using the term to draw consequences
    - Common approaches to labelling
    - Sharing compliance information

51. Current US FTAs provide for sector-specific co-operation which already happens on a day-to-day basis between regulators with established and ongoing relationships. FTAs are not intended to take management of existing relationships over, but to encourage regulators to look for TBT issues.

52. The US encourages working groups for specific sectors. In common with the WTO TBT Agreement, each of the FTA chapters have co-operation principles written into them. For example, TTIP would have required the setting up of a TBT Committee, an SPS Committee, a Services Committee, etc. The US believes that any institutional elements should be addressed by those experts who know about those issues. Regulatory Co-operation should not be handled in a top-heavy way and it should work to make regulators' lives easier.

53. GRP co-operation is where guidance should be provided to encourage regulators to talk to counterparts, with the aim of providing a list of things that they could consider to help reduce unnecessary differences. In TTIP, the US proposed more of a stakeholder process for raising issues between the parties, which it felt was missing from the EU side.

54. TTIP envisaged separate GRP and Regulatory Co-operation Chapters. The establishment of a Regulatory Co-operation Committee is not meant to become a huge administrative burden on the Parties. It was intended as a way for having a separate agenda item on co-operation for the Ministerial meetings. A Cooperation Committee would have provided an overview of co-operation undertaken by the other TTIP Committees and to collate an overview of what activities have taken place. It was not intended to create an alternative infrastructure on co-operation.

55. The TPP Regulatory Coherence Chapter came about as an "iterative" development of trade policy as and when new Parties joined discussions. The co-ordination and oversight elements are there but not the transparency requirement which the US required. It is voluntary and not subject to dispute resolution mechanisms.

Dispute Solution Mechanisms (DSMs)

56. KM (UK) asked whether GRP Chapters will increasingly be subject to dispute resolution mechanisms (DSM).

57. RS (US) said that NAFTA 2.0 is very generic but addresses concerns about GRP violations on a case by case basis. The US is not expecting a single violation of responsibilities to trigger legal

Department for
International Trade

challenge, but dispute arrangements can be used where, for example, a government goes back on all transparency arrangements.

58. JF (UK) asked whether transparency provisions in TPP are along the lines set out in in this slide pack. RS (US) suggested that a GRP Chapter should be more explicit on certain issues, for example timeframes for responding. Any FTA will still require a chapter on due processes and administrative procedures. General publication of laws is not necessarily a good fit in a GRP Chapter.

Other points discussed

59. RS (US) indicated that she did not think any of the GRP process should conflict with UK obligations to the EU.

60. JF (UK) explained that better regulation principles had been part of HMG practice for decades, and the UK has the tools, techniques and instruments in place already, which are also applied when the UK implements EU law. The UK consults on EU draft regulation proposals and publishes a draft IA for such proposals. EU regulation still allows EU Member States choices about who assumes legislative responsibility for the regulation and who will be responsible for administering and enforcement. EU Directives are flexibly drafted to make allowances for individual Member States' different domestic systems.

61. For the next Working Group meeting, RS (US) suggested discussing areas where a possible FTA could display more ambition; for example, publication of a bibliography of evidence-based scientific studies on which a piece of regulation had drawn; disclosing how the civil service is to be accountable, and not pressured by, industry; and areas where we see opportunities for more scope.

62. JF (UK) promised to share HMT's Green Book. We would be happy to have further discussions before the next TIWG meeting possibly by digital video conference if helpful.

Actions agreed and confirmed by follow-up email with USTR:

1. The US undertook to share its draft TTIP text on GRP, subject to legal consent.
2. UK agreed to send US a copy of the HMT 'Green Book'
3. Next Working Group meeting should return to areas where there is possibility for more ambition on a GRP chapter.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

US in presentation mode, with UK in listening mode. Very friendly exchange to better understand each other's systems and regulatory environments.

Department for
International Trade

LEGAL GROUP

Date: 10 July 2018

Time: 16:00–18:00

Participants:

Name	Department/Directorate
Victoria Donaldson (VJD)	DIT - Legal
Michael Bartling (MB)	DIT - Legal
Annabelle Malins (AM)	DIT- Trade Policy
Andrew Hobson (AH)	DIT- Trade Policy
Sam Hazelgrove	DIT- Trade Policy
Joanna Moody	DIT- Trade Policy
Sophie Brice (SB)	DIT- UK-US Trade Policy
Richard Salt	DIT- UK-US Trade Policy
Jeremy Hill (JH)	FCO
Emma Payne (EP)	DExEU
Meg Trainor (MT)	DExEU
Harriet Nowell-Smith	HMT
Shirley Rhone	HMT
Russel Stokes	DEFRA
Colin Macintyre (CM)	DExEU
Alexandra Whittaker (AW)	USTR
Matthew Jaffe (MJ)	USTR
Kelly Milton	USTR - Geneva
Brian Woodward	N/A
Andrew Rance	N/A
Jessica Siminoff	US State Department

Key Points to Note

- US interested in whether, practically, the UK or US can table text or negotiate during the Implementation Period (IP) given the concurrent EU negotiations.
- Further detail was sought on what the Chequers statement means, including whether specifically referring to a "free trade area" for goods with the EU and not services has some underlying meaning.
- US colleagues remain interested in seeing and understanding how the UK will capture and implement EU regulations prior to, and during the IP, and how US regulators can maintain oversight of this process.

Department for
International Trade

- To commence negotiations under TPA requires a (public) notification letter to Congress 90 days before negotiations begin. A public consultation takes place during this period. Prior to formal notification, USTR also consults extensively with Congress and key congressional committees.
- The US would prefer to avoid chapter-specific objectives in a possible future UK-US FTA, as they consider that this has an impact on the interpretation of the agreement by a dispute body.
- US looking to discuss some further understandings/agreements on agriculture which had not previously been flagged: (1) Blair House agreement on oilseeds; (2) the understanding reached on rice; (3) side letter on community exports of pasta.

Key questions posed by the US lawyers:

- Will the "free trade area" for goods referred to in the Chequers statement be recorded in a trade agreement, a customs union like Turkey or an EU-style Economic Partnership Agreement that just covers goods?
- The Chequers statement focuses on goods but is there the anticipation on there being an agreement including services (or something other than goods)? If so, would it be in the same legal structure or something different?
- Is the value of trade between the UK and EU and between the UK and US primarily in goods, services or a mixed bag?
- The Chequers statement refers to tariffs and a frictionless border. Could the UK identify what behind-the-border items on which the UK will retain discretion and on which it will continue to be consistent with the EU?
- What will happen about forward MFN clauses in EU agreements?
- Could someone challenge the Withdrawal Agreement before CJEU?
- Why isn't the Withdrawal Agreement going to be a mixed (competence) agreement?
- Will the UK be part of the customs union during the IP? Is there going to be a notification to the WTO?
- Is the December 2020 date for the end of the IP firm or is there a possibility that it will be extended? 18 months is one thing but to extend it by another year and it becomes 30 months.
- For agreements the UK negotiates during the IP, is there a process being set-up with the EU to authorise the UK entering those agreements into force during that period?

<u>Report of Discussions and Outcome</u>

1. Welcome and Introductions

<u>Introductions</u>

- VJD: US and UK participants introduced themselves as per the participant list above.

The following itinerary was proposed:

- **Trade Promotion Authority (TPA)**

  USTR process for country-specific negotiations under TPA; Requirements (information or otherwise) from partner countries

Department for
International Trade

- **Process for agreeing Objectives section of a Free Trade Agreement**

  Pre-negotiation scoping exercises and link to objectives text; Sequencing of negotiations of objectives, interactions with chapter discussions

- **Transparency and Institutions**

  Routes for promoting transparency; US approach to transparency through institutions and rules of procedure

- **Exceptions**

  US approach to the form and location of horizontal exceptions

- **International agreements and the implementation period**

  Opportunity for US to ask any questions following up on 27 June legal meeting on international agreements and the implementation period

2. Trade Promotion Authority (TPA)

Led by Sophie Brice (UK) (SB)

- SB: The UK is aware that there is TPA political level discussion regarding when one can move to formal negotiations, but it would be helpful for the UK to understand the 90-day process for notifying Congress and liaising with stakeholders. What occurs prior to the formal notification and commencement of the 90-day period?
- MJ: The US can start trade negotiations at any time, but before you have TPA (rules process for Congress; changes process by which Congress deliberates on FTAs) you have to undertake the 90-day notification process. Prior to that, USTR engages with Congress. USTR has its own congressional office and engages with Congress every week about the possibilities of what might happen. USTR also shares draft notification text with Congress as part of the discussion prior to formal notification. Once the letter goes to Congress, USTR has the 90-day period to listen to Congress and invite comments about the proposal. It also receives input from the public and then has a hearing. These processes are all part of the TPA formalities. Even as part of the TTIP working group, before the formal notification was given these informal discussions and processes took place.
- SB: The UK and US discussed in March what congressional conversations took place. We are interested in further exploring what these conversations and processes look like. What sort of time frame is there between informal discussions, including on the notification letter, and notification? What are USTR's internal processes before it feels comfortable putting a formal TPA notification before Congress? Does this come out of working group official level discussions? Does it come out of political level discussions?
- MJ: Nothing is done without the Ambassador's direction. Take the Brexit deadline hypothetical, at the latest the discussion with Congress would have to start before December to be in a position to have TPA approval prior to March 2019. One has to take account of Thanksgiving at the end of November and Congressional recesses (e.g. in December).
- SB: In terms of who you share the letter with at Congress, is this shared with committees; people etc?
- MJ: At a minimum it would be shared with the Senate Finance Committee and the House Ways and Means Trade Subcommittee which have jurisdiction over trade. The Agriculture Committee is another priority House and Senate committee to share the draft letter with.

Department for International Trade

- SB: To what extent are draft letters and their content prepared on the basis of discussions had with partner countries or premised on the expected 'asks' of the foreign partner?
- MJ: The US would not be talking to the UK to prepare this letter but would instead refer to previous draft letters pertaining to other agreements.
- VJD: Are there any legally required elements of notification?
- MJ: I don't think so. There just has to be a notification, but it would be based on objectives and the TPA legislation. Those are reflected in the letter itself.
- VJD: Is it a lengthy document?
- MJ: Approximately 3-10 pages (average of 6-7 pages). It is signed off by the Ambassador and addressed to the Chair of the House Ways and Means Committee.
- SB: In terms of partner country input, is it more at a political level (i.e. a discussion between the Secretary of State and their equivalent confirming that both countries are ready to enter into negotiations)?
- MJ: Correct. It would be embarrassing if the partner country rejected the suggestion that negotiations be commenced.
- VJD: Dan Mullaney referred to the Senate Advisory Group on Negotiations and the House Advisory Group on Negotiations committees this morning. Do you speak to them before or after issuing formal notification?
- MJ: They are not committees, but advisory groups of the Senate and House. They are spoken to during negotiations, but not prior to issuing formal notification.
- VJD: What are the contents of the hearing? Are these legal requirements?
- MJ: It's a public hearing. Once we've received comments, USTR and inter-agency panellists hold a public hearing in which the public can make presentations. The hearing can take anything from 1 to 3 days (TTIP took 3 days). AW noted that there's a Federal Register notice that goes out to inform the public of the hearing date.

3. Process for agreeing Objectives section of a Free Trade Agreement (FTA)

Led by Annabelle Malins (UK)

- AM: The UK is interested to understand the US's approach to the text of FTAs, rather than the substance of the text. The UK wishes to use this to inform the UK's policy approach. In particular, we are interested to understand the US's approach to developing objectives, and how that then informs the core text of the particular agreement.
- AH: DIT has been looking across various US texts and the inclusion of text / chapters listing objectives. We have noted that US FTAs sometimes include objectives sections and sometimes they do not. We would like to understand these differences of approach. For example, in the US-Chile FTA and NAFTA there are a set of objectives which appear in the text proper rather than the preamble. Why is this?
- MJ: The preamble is one of the last chapters negotiated in an FTA. It's best to wait until the agreement is finalised to include these things. However, the US doesn't like to use objectives too readily. With respect to dispute settlement, one issue is whether the arbitration panel will try and include the objective as a means for interpreting the relevant provision. Accordingly, the US tries to avoid the inclusion of objectives as such language can be slightly dangerous as it may not give an accurate reflection of the textual meaning. However, the US tries to come up with draft

guidelines for things like where definition sections should be located; how should paragraphs be structured; US English or UK English? Because you have multiple negotiating groups, you try to streamline the process and avoid different groups adopting differing approaches. One of the rules the US puts forward is that the parties do not include objectives. By contrast, the EU often tends to include objectives, particularly because the EU likes to publish objectives to address transparency issues around trade negotiations.

- AM: Accordingly, you do not expect to have objectives in particular chapters?
- MJ: Correct. The only thing to add is that, given the TPA, you do see the objectives in the legislation. One of the things USTR must do is demonstrate that it has met the objectives published under the TPA. This must be done to ensure USTR has complied with the TPA legislation.
- AM: With respect to the joint guidelines you mentioned, are there norms that the US works from?
- MJ: Yes. There are also other things which are helpful, such as surveys of definitions, committees, exceptions (etc). These are the things you want to keep track of. For example, if a definition appears across two or more chapters, it will be included in the definitions section. Once the agreement is done, it will go through the legal scrub process. These drafting guidelines help to make the legal scrub process more streamlined.

4. Transparency and Institutions

Led by Annabelle Malins (UK)

- AM: The UK is looking at how transparency can feature in trade agreements, and how the US approaches this issue in FTA text to support the utilisation of the agreements themselves. It would be useful to get a general view on how we could incorporate transparency provisions.
- AW: You've probably looked at multiple FTAs and will have seen how the US has approached this issue. Older US FTAs tend not to include these chapters, but newer agreements include transparency and anti-corruption provisions. You will also find transparency provisions in specific transparency chapters, but also included throughout other chapters (e.g. regulatory chapters). The idea is to ensure that both parties understand each other's processes when creating regulations which can impact trade.
- AH: It would be helpful to understand why the US texts are structured in that way, and how you make sure transparency provisions are included in the relevant sections of the agreement?
- AW: With respect to where the provisions are located, transparency provisions have overarching elements. For example, dealing with administrative proceedings and ensuring there's a public process carries across several chapters so these matters are included accordingly. Some obligations may only apply to one sector / chapter (e.g. regulation and comment), and therefore such obligations are only included in that specific chapter.
- MJ: As for why the US has taken this approach, it's more of a historical process. Earlier agreements do not include anti-corruption provisions. They only included four key elements. Anti-corruption provisions grew out of the Government Procurement Agreement (**GPA**) chapter which included a basic requirement to investigate anti-corruption. Gradually, it grew until now where there is a transparency and anti-corruption chapter in US FTAs. With respect to the regulatory chapters, the US pursues WTO+ provisions, especially with respect to sanitary and phytosanitary measures (**SPS**) and technical barriers to trade (**TBT**). In these chapters, transparency appears but it is more of a detailed process. The US produced slides for the TBT session this morning which the UK should have a look at on this issue.

Department for International Trade

- AM: Are these provisions built on a statutory basis in terms of the way in which transparency is expressed in the agreement?
- MJ: It is not something that is specific to the US, but the US system is structured to include these obligations. The US system is structured in a way that the legislative branch gives laws to the executive branch. The US found that in the EU process, stakeholders could not easily participate in the executive branch process. Therefore, the EU's revised approach is somewhat based on the US's approach to regulatory matters.
- AW: The main thing is to ensure that the public is involved prior to finalising the regulation. This is particularly seen in environmental regulations, where citizens, business and NGOs have input throughout the regulatory process.
- AH: The EU trade committee procedure rules have been changing over time. What is the US's standard approach to institutional rules and procedure and where are these set out in its FTAs?
- AW: The US creates trade commissions for each FTA and has been relatively consistent in its approach to the creation of institutional bodies.
- MJ: The digital trade session today involved a discussion on the similarity in approaches and the desire to be progressive and assertive in this area. The reason is that when someone comes up with an FTA, other countries read it. There are provisions in the transparency section as between the TPP and CETA which flow across. The US intends to be forward looking as there exists a tendency to copy FTAs.
- AM: That also touches upon the issue of transparency in negotiations and stakeholder engagement planning. Are there specific US requirements about how the UK would need to handle joint text? What are the US's processes for sharing text? Do you have constraints on how joint text is shared?
- MJ: The US does not mind the UK sharing its (i.e. UK) text, but it objects to partners sharing US text. Once a draft is released, it can build up expectations and make it difficult to compromise. As of today, the US would insist that US text remain confidential.
- AM: Do the existence of external US advisers covered by Non-Disclosure Agreements mean that the text is, in practice, shared externally?
- MJ: The US has a process with the Departments of State, Commerce and others in which it formulates text. It is then shared within USTR and then given to the persons on the agreed advisers list. These advisers are subject to non-disclosure obligations. The text is also shared with Congress and the relevant congressional committees. Once it has been shared with all these stakeholders, it is then tabled with the partner country.
- MB: Looking at transparency and other provisions, such transparency is beneficial when you first suggest text. How is transparency managed throughout the negotiations, recognising it could become trying if one has to go back and forth with stakeholders on the text?
- MJ: USTR does not do an update throughout the negotiations. This is not because USTR objects to it, but it objects to statements being imputed to the US. During TTIP the EU gave general updates about what was discussed, but it did not discuss details. It is very difficult to give full updates, even where a chapter is closed, as these provisions can be re-opened. Until a conversation is finished, you don't have disclosure. You may also not finalise a conversation on one chapter where there will likely be trade-offs with other chapters.
- MB: Within the US government, is text sharing an ongoing process or do USTR just deliver an agreed policy and only provide the text when it is progressed to a certain point?

Department for
International Trade

- MJ: US agencies are constantly engaging with USTR. The extent of inter-agency text sharing during negotiations is also negotiation dependent. It will often be very helpful to have other agencies engaged in the negotiation process. It may be that something new comes up which changes the text and, where this occurs, USTR will go back through the inter-agency text sharing process. The revised text will also be shared with Congress and cleared advisers.

5. Exceptions

Led by Andrew Hobson (UK)

- AH: What is the rationale behind the US's general and specific exceptions approach?
- AW: It depends on the agreement. The US tends to have a robust and comprehensive general exceptions list, and a few chapter-specific exceptions but it depends on the subject matter. However, when negotiating an agreement, you may realise that it needs chapter-specific exceptions (e.g. IP, financial services).
- AH: The US's proposed TiSA text contains national security exceptions at the horizontal and vertical level. Why is that?
- AW: I would need to review the agreement to determine why. You would need to analyse the effect of the general exceptions to understand why a specific exception was included.
- AM: Are there any statutory restrictions on the exceptions language in FTAs?
- AW: The words are very important. Similar language is deliberately used to address this issue.

6. US Questions: International agreements and the implementation period

- MJ: Is the UK leaving the EU?
- EP: Yes. The Chequers statement confirms the UK will leave the EU.
- AW: Regarding the Chequers statement and the phrase "free trade area for goods", is the expectation that the UK will have an FTA with the EU that covers goods, or is it a special customs area (e.g. Turkey) or an EPA that just covers goods?
- EP: The UK will have more detail to provide the US when the White Paper is released.
- AW: Is there some anticipation on the EU agreement including services, and will this be included in the legal structure proposed?
- EP: What is clear is that the UK is looking to strike different arrangements on trade in services with the EU and would be seeking regulatory flexibility in that area.
- AW: In terms of the value of trade with the EU, is it primarily in goods or services? What about the global outlook of UK trade?
- EP: We can provide this to you, but the balance is on services.
- JH: The language in the Chequers statement is carefully chosen. On customs, this has to be developed. It talks about a facilitated customs arrangement. We would strike different arrangements for services.
- AW: When I read the term "free trade area", one thinks of something more comprehensive than just goods, but instead something including services and other commitments so using that moniker is different to other free trade areas.
- EP: Adding to the Chequers Statement's language, it is referring to a free trade area for goods.

Department for International Trade

- VJD: In respect of the customs union statement, the UK will retain the ability to sets its own tariffs, so it takes the UK outside of the customs union arrangement of having a common external tariff.
- MJ: My understanding is that the UK would collect UK tariffs for goods coming into the UK, and the EU tariff for goods bound for the EU. Is that correct?
- VJD: That is correct, with more detail to come.
- MJ: I understand that duties will be collected at the border, but the UK will retain authority over behind-the-border measures (e.g. SPS). What behind-the-border measures is the UK retaining discretion over and what measures will require consistency with the EU regulations at, and behind, the border?
- EP: The UK will revert to the US on this issue.
- AW: One issue flagged in the first meeting was that, depending on the future EU-UK trading relationship, the EU's EPAs / FTAs contain MFN forward clauses. It would be interesting to see how that is reflected in the UK-EU relationship and arrangements with other countries.
- AM: We will note that down as another area to follow up on.
- MJ: For all intents and purposes, will the UK be treated as an EU Member State (**MS**) during the Implementation Period (**IP**)? How does this impact the UK's ability to negotiate trade agreements during the IP?
- JH: The legal position is that the UK will leave the EU, and therefore legally it will not be a MS after March 2019. However, the Withdrawal Agreement treats the UK as if it were a MS. The main provisions of the Withdrawal Agreement ensure that the whole of the EU acquis, including treaties, applies to the UK during the IP. As discussed recently, the EU's international agreements will bind the UK.
- MJ: Accepting that this interpretation is technically correct, could someone challenge the Withdrawal Agreement before the CJEU?
- JH: It is hard to speculate. However, both the UK and EU are confident that the Withdrawal Agreement has a solid legal base in the provisions of Article 50 of the TFEU and the Withdrawal Agreement will have been approved by the Council and the European Parliament. It will also have been ratified by the UK as well.
- MJ: Could there be matters / competences which fall outside the EU's exclusive competence?
- JH: Article 50 is accepted by the MS as being a special legal case which enables the EU exclusive competence to do everything related and required within the framework of one agreement rather than having to execute composite agreements.
- CM: Article 50 provides the capacity to do everything necessary to enable a MS to leave the EU. The UK is confident that this is a wide legal basis and sufficient to enable it to agree the Withdrawal Agreement without engaging MS shared competence.
- MJ: The US is just concerned to avoid itself being a third party to proceedings before the CJEU. It is noted that previous FTAs have been the subject of rejection and delay by MS parliaments, such as Belgium.
- JH: The issue noted in respect of Belgium and CETA would not apply here as the MS do not have the capacity to reject the agreement as it's within the EU's exclusive competence.
- MJ: Accepting that, there may still be some concerns that such MS parliaments would challenge the characterisation of the Withdrawal Agreement as an agreement in respect of which the EU has exclusive competence?

Department for
International Trade

- JH/CM: There's been no suggestion from the MS parliaments that the Withdrawal Agreement is likely to be contested, particularly noting that approximately 75% of the Withdrawal Agreement text was agreed at the March European Council.
- AW: It is clear the UK is leaving the EU; will it still be part of the EU customs union during the IP?
- JH: There's been no change to the UK's position. The position during the IP is that the UK is tied into the EU's relevant treaty arrangements, with some minor exceptions, which include the EU customs union, Single Market and other EU treaty provisions. The UK will implement this by introducing a new law after the Withdrawal Agreement is agreed, known as the Withdrawal Agreement Implementation Bill (**WAI Bill**). The WAI Bill will seek to apply the Withdrawal Agreement in domestic law.
- MJ: What is the possibility of the IP not ending in December 2020 and being extended by 12 months or so?
- EP: Both the EU and UK are clear that the IP will end in December 2020, as demonstrated in Chequers statement. CM added that the text contains no provision on extension.
- AW: The Chequers statement contains a reference to a customs arrangement on goods. Given this, could the UK then enter into an FTA with a third country covering goods, services and other areas?
- VJD: The UK will be able to secure trade agreements with other countries, including potentially acceding to the CPTPP. We will hopefully know more when the White Paper is released. Looking again at the Chequers statement with respect to services, the statement provides that the UK will strike different arrangements for services recognising that the EU and UK will have different levels of access to each other's markets. A later provision notes the need for regulatory flexibility on services, given that the EU and UK will have different levels of access and that the arrangements will not replicate the EU Single Market.
- JH: When in Washington last we discussed the Withdrawal Agreement and the broader context of US agencies' processes. It would be interesting to hear if you have progressed that.
- MJ: The answer is yes.
- AW: The comments we made at that meeting are still true, but we are working through this. The US received a document on the existing EU-US agreements and noticed that three agreements pertaining to agriculture were not included in list of omnibus bill agreements (i.e. oilseeds, pasta, MOU on rice). We will raise these agreements tomorrow in the agriculture session.
- JH: On the IP, the UK and EU's concept is that all international agreements will continue to apply. That includes formal international agreements and non-binding arrangements with international partners (e.g. MOUs, exchanges of letters). As between the UK and US, there are a number of arrangements that fall into this category. How those agreements are captured is being discussed with the EU as the notification wording has to be quite careful. It must capture some agreements which have some level of formality, but not only those having legal effect. So, insofar as these three agreements are covered by this process, the UK intends to capture them in the EU's notification to third countries. Second, it should be noted that what the EU writes in its notification is not the only thing which makes the arrangements functional. As the UK will be bound by the EU's regulatory regime during the IP, these EU regimes will ensure the UK's continued compliance with such agreements. Third, insofar as the US takes a regulatory decision on the basis of the EU's arrangements which is intended to have effect in US domestic law, the US will need to ensure within its system that it has the domestic legal basis to be able to implement that regulatory decision during the IP. That is not something which can necessarily be resolved by the EU notification approach.

- AW: We agree that regulatory certainty is essential.
- CM: The fact that the UK is bound by EU acts and bodies (see Article 2, Withdrawal Agreement) will hopefully provide some comfort on these points.
- AW: We note that point, but the US's omnibus approach to ensuring continuity of these legal arrangements requires certainty from its domestic regulatory perspective.
- MJ: We also noted agreements No.35 and No.42 regarding Bulgaria/Romania and Cyprus/Czech Republic on the list of existing EU-US agreements. These seem to deal with EU enlargement, so we are not sure why they've been included on that list.
- MT: The idea behind the list is to capture all the bilateral EU-US agreements, not just those the UK would want to transition during the IP. The second list refined the scope to treaty-based agreements. These two types of agreement are being caught as the UK is taking a holistic approach to the list, rather than suggesting all the listed agreements would be transitioned after the IP ends.
- MJ: Article 124(4) of the Withdrawal Agreement confers on the UK the ability to negotiate international agreements during the IP. Do you think the UK will have capacity to negotiate an agreement which could enter into force prior to December 2020, and will there be any processes in the EU for addressing this?
- EP: During the IP, the UK would not bring any agreements into force. The IP would be limited to transitioning agreements. However, the UK is committed to negotiating bilateral agreements so they can enter into force post-December 2020 or in the event of a 'no-deal' scenario. Continuity will be delivered through the approach discussed with you.
- AW: Secondary legislation is needed to transition EU regulations. It would be important to the US to see that to ensure that the UK's secondary legislation list mirrors the EU's legislation.
- JH: To clarify the mechanism, the WAI Bill will allow the UK to transpose EU law during the IP to apply to the UK in its new status. This would be on the basis of applying both the existing acquis and any new EU legislation which enters into force during the IP.
- AW: Does the WAI Bill give the UK Government the authority to implement the required secondary legislation?
- JH/CM: Yes. The WAI Bill will be presented later in the year.
- AW: The WAI Bill is less important from the US perspective than the secondary legislation list.
- MJ: Negotiating a UK-US FTA will be affected significantly by EU-UK negotiations. Assuming that UK-US negotiations start in March 2019, to what extent can the UK and US negotiate an agreement concurrently with the EU and UK negotiating its future relationship? Can text on chapters for a UK-US FTA be tabled during the IP? This is a practical consideration as there is some motivation for this agreement in the US.
- SB: There are complications in having ongoing negotiations in some areas, although it may be advantageous in some other areas. This clearly something which will have to be worked on.
- MJ: Could you table text during the 18-month IP process for the US to review?
- SB: The UK can negotiate and conclude FTAs during the IP.
- CM: From a legal perspective, Article 124(4) of the Withdrawal Agreement grants the UK the legal authority to do so.
- SB: There will be areas within the negotiations that will be at different stages during the process. It won't be a universal answer.

Department for
International Trade

7. Concluding remarks

Given by VJD (UK)

- This has been a very helpful discussion. It helps us to get to know each other better so that both parties can be well advanced when the UK leaves the EU.
- We are making good progress, and it has been very helpful for the UK to have the benefit of the US experience. It's also useful to learn about how the TPA and engagement process operates in the US.
- AW: Thank you for this opportunity and for the clarification on the Chequers statement. We look forward to continuing these discussions. We're happy to schedule a VTC in the future on outstanding issues.
- VJD: Once the White Paper is released, we could also arrange a future VTC.

Action Items:

- US offer of VTC for further questions on TPA.
- UK offer of VTC following the White Paper.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

This was a productive session conducted in a cooperative manner. In addition to generating useful information for the UK as it plans for future negotiations and develops its policy on core text for FTAs, the session contributed to the building of a good working relationship with USTR counterparts. Our three objectives for the session were met. These were:

  - Clarify the process for USTR notifying Congress and any requirements from partner countries in this process.
  - Advance our understanding of the US approach to core text areas of transparency, institutions and exceptions.
  - Provide an opportunity for USTR to ask any questions following up on the 27 June UK-US legal meeting on international agreements and the IP, and for the UK to reiterate key points from that meeting.

The explanations provided by USTR regarding the process for launching country-specific negotiations under TPA identified the steps that would be taken, and the timing that would be needed for the US to be in a position to launch negotiations immediately following Exit day. The discussion also clarified that although the UK would not need to provide formal input into the notification that USTR must provide to Congress 90 days prior to the launch of negotiations (i.e. in December 2018 for negotiations to be launched in March 2019), USTR would not send the notification unless there had been high level, firm political confirmation that both parties were ready to proceed to negotiations.

The core text team solicited helpful information regarding US preferences on the use and placement of objectives clauses in FTAs, as well as on the process for agreeing any such objectives. Good information was also obtained on US practice regarding transparency, although, as we expected,

Department for
International Trade

the US was somewhat less forthcoming in sharing its strategy and preferences on exceptions clauses.

The US asked many questions relating to EU exit, in particular regarding the implications for a future FTA of the Chequers statement and the customs arrangements contemplated therein. USTR lawyers nevertheless recognised that many of their questions could not be answered in advance of the release of the White Paper on the Future Economic Partnership and accepted that the discussion would have to continue at a later date.

Following the closing plenary, AW and MJ suggested to VJD that they would like to revisit the issues of devolution and the geographical scope of a future FTA in a future Legal Group session.

Department for International Trade

ECONOMIC GROUP

Date: 10 July 2018

Time: 16:00-18:00

Participants:

Name	Department/Directorate
Richard Price (RP)	DIT - Trade Policy
Catherine Barber (CB)	DIT - Trade Policy
Jeremy Kempton (JK)	DIT - Trade Policy
Tom Knight (TK)	DIT - Trade Policy
Nikos Tsotros (NT)	DIT - Trade Policy
Peter Antoniades (PA)	DIT - Trade Policy
Craig Entwistle (CE)	DIT - Trade Policy
Jack Kennedy (JKn)	DIT - UK-US Trade Policy
Yasmine El-Tourgman (YT)	DIT - UK-US Trade Policy
Connor Russell (CR)	DIT - Trade Policy
William Shpiece (BS)	USTR
Fay Johnson (FJ)	USTR
Sushan Demirjian (SD)	USTR
Roger Wentzel (RW)	USTR
Joe Wereszynski (JW)	USDA
Ian M. Sheridan (IS)	US State Department

Key Points to Note:

- Bill Shpiece and Richard Price discussed through the full agenda for the economic session of the working group. **The atmosphere was friendly and collegiate**, with opinion flowing between both sides.
- **DIT outlined the structure of the economic 'Information Pack'** to be published alongside the upcoming Call for Evidence, while giving sight to USTR of the other HMG analytical products (EU-Japan & CETA IAs) with which it would be possible to roughly gauge the content of any future, potential scoping/impact assessment, in lieu of a definite structure.
- **Several takeaways were noted by the chair** (Richard Price), such as sharing and continuing dialogue on best practice relating to communicating the consumer benefits of free trade; on how best to communicate trade in value-added data (given limitations and caveats); and sharing potential US firm-level exporter data sources to aid with DIT/BEIS non-tariff measure survey.
- **DIT analysts** (statisticians and economists) and US analysts exchanged views on differing views of OECD TiVA data / methodologies and how best to use this data; and on trade asymmetries, relating to the ongoing efforts of the ONS through the OECD to minimise or alleviate these, as well as continuing collaboration between the ONS and Bureau of Economic Analysis.

Department for
International Trade

Report of Discussions and Outcome:

1. General Introductions and outlines

- RP (UK) opened the economic session by welcoming American counterparts and participants, hoping that the Economic Sessions could become a regular fixture for UK/US government analysts to identify joint areas of work, areas of research interest and advise one another of upcoming analytical publications / pieces of work. BS (US) echoed RP's sentiments on aims, he was in favour of using the Economic Session to exchange advice for best practice of for analysis, agree data exchanges and reach consensus on 'variables' (i.e. inputs for modelling).
- SD (US) pointed out that economic interactions would depend on other sessions of the Trade and Investment Working Group, especially the Goods Session.
- CB observed an institutional distinction: USTR analysts support negotiations while independent economic modelling is conducted by USITC, while in DIT the analysts work in both capacities. BS (US) noted that USTR holds an analytical umbrella group comprised of analysts from USDA, USITC, DoC among others who provide analytical support to negotiations as well. TK explained the institutional setup of the Government Statistical Service – the ONS is the central statistical body but has statisticians embedded within other government departments (such as DIT) who work in their policy area but also are in close cooperation with the ONS.
- On data sharing, BS (US) pointed out that USTR have a system in place for the exchange of secure documents (MAX) that they would be willing to extend to DIT for document exchange.

2. Analytical publications discussion

- CB introduced the 'Information Pack', pointing out that this will be published alongside the Call for Evidence. CB outlined the Call for Evidence: it will set out the government's desire to enter into discussions for a trade agreement with the United States and allow businesses and the public to provide input into the process, giving their opinions and concerns. The Information Pack would have a 'generic section' to inform the public of the facts and benefits of trade agreements (based off the available economic literature), with a subsequent 'country specific section' which outlines the current bilateral trading relationship (trade flows, investment, barriers etc). BS (US) inquired as to whether there would be a formal advisory group to feed into the process at any point, CB replied that there were some plans for advisory groups, which would soon be announced.
- RP affirmed that there would be constant communication from DIT analysts to USTR of publications of this calibre so that there would be no surprises on their side, working backwards with Congressional/Federal Register notice in mind. The Call for Evidence publications are to launch the narrative and prepare the public for negotiations with the US as soon as possible after March 2019. BS (US) explained that the USITC notice to Congress would only contain advice relating to market access issues.
- CB outlined plans for scoping assessments, i.e. an analysis based on computable general equilibrium modelling (CGE). BS (US) enquired whether scenarios based in this would be based on the result of the Chequers agreement. RP clarified that the impact Chequers would have on HMG analysis was still a work in progress but hoped we would be able to give an update at the next Economic Session. JW (US) asked whether this scoping assessment would be published or not. CB described rough timelines for analytical publications (circa Q3 2018 for scoping assessment).
- IS asked whether this analysis took account of phase-in periods (such as staggered reduction in tariff levels). CB specifically mentioned the already-published UK analysis of the then-

Department for Business, Innovation and Skills on the Transatlantic Trade and Investment Partnership, and that HMG analyses such as those for the EU-Japan FTA and EU-Canada FTA were including more distributional analysis (geographical) of the effects. BS (US) mentioned that for the Trans-Pacific Partnership they had also included geographical distribution analysis, which had shown some regions/sectors had declined in the analysis – this was only relative to the baseline scenario and they did not decline in absolute terms (i.e. grew in absolute terms). It was promised that the UK would provide more detail on this topic during the next TIWG session in the autumn. BS (US) asked whether the variables included in the scoping assessment were the standard measures included in trade agreement impact assessments and whether employment is assumed to be fixed. He drew attention to recent work that Joseph Francois has conducted on assessment of employment effects from trade agreements as something to look at. IS (US) queried a political question as to whether anything had been done to examine whether Leave-voters would gain from free trade agreements or lose. CB raised awareness that DExEU has conducted analysis regarding the economic impact of leaving the EU and that DIT analysis will use that as a baseline; CB also stated that there is a peer review process for the HMG CGE model involving academics. RP stated that DIT has been trying to examine the productivity effects of trade agreements and whether US analysts have any advice for measuring these effects. BS (US) responded by saying that a quantitative analysis is only part of what can be done to fully describe the effects of a trade agreement – that, in their opinion, there should be a full qualitative section accompanying analysis to describe those effects which are hard to capture numerically (such as productivity gains).

3. Trade Asymmetries Discussion

- TK introduced this section of the Economic Session explaining that bilateral discussions are key to minimising and reducing asymmetries. He also explained that it was typically multinational enterprises (MNEs) that were responsible for causing differences between reported statistics. TK explained that the ONS views the OECD as a forum to remedy these trade asymmetries by coordinating between member states. While trade asymmetries are issues, these are dwarfed by FDI stock asymmetries. BS (US) asked whether it was possible to break down the FDI data into disaggregated form to identify sectors which were primary culprits, NT responded that this was possible, but exchanges of micro-data were key; something which is difficult to share beyond the EU. BS (US) replied that is also true for the US.
- On this subject – BS (US) stated that for modelling this can be heavily affected by what the inputs are, such as non-tariff barriers (even if trade asymmetries are corrected for). **FJ (US), at this point, said that she will be asked at some point what the 'real trade balance is'**. NT remarked that the OECD has experimental trade in value added dataset that corrects for trade asymmetries (i.e. there are none). FJ (US) responded with her concerns of the TiVA dataset: that TiVA discounts re-exports. In her opinion TiVA is a black box of a dataset with the process to arrive at outputs very unclear. US stated that they had asked the OECD for a compendium or guide to the methodology to arrive at the TiVA dataset at the last release (2011) but that this had not been forthcoming, they hoped that one would be coming with the next release (next few months). NT confirmed that this compendium was something that other member states of the OECD were pushing for and would like to see as well.

4. Discussion of Trade in Value Added data

- The discussion then moved to the TiVA dataset and its uses for analysis. RP outlined that Secretary of State (Dr. Liam Fox) views trade in value added as fundamental to understanding how global trade works. RP said that he would find TiVA a useful tool to analyse the way in which each other's (US and UK) economies would benefit from a trade agreement. BS (US) then

enquired whether there was an equivalent dataset solely for the EU[1]. TK/NT both responded stating that TiVA, WIOD can be used to analyse global supply chains as well as non-dataset sources (such as qualitative reports from companies regarding their own supply chains). NT affirmed, that in his opinion, the OECD TiVA dataset is currently the best option available

- FJ (US) informed the UK that the US currently are in a working group for TiVA data along with Canada, Mexico, and APEC countries. TK stated that the ONS is working to improve the UK's underlying TiVA data (analytical I/O tables) in their timeliness, granularity and gendered data; he also mentioned that the ONS is working with a consortium of universities to improve TiVA.
- CB asked how the US uses data for supply chain analysis if not TiVA data – FJ (US) replied that they usually use data from industry groups that they are in contact with. SD (US) also said that TiVA data had been used against the US during the first meetings of the Doha Round for tariff arguments (that the US should lower their tariffs more than they were willing to due to it 'harming' their value added). FJ (US) also remarked that the current administration came into power with (negative) assumptions of the TiVA data but that her own opinion of the underlying methodology is so low that she is not of the mind to convince them otherwise. BS (US) said that the US would be interested in value-added data but only when it illustrates how much value added the US itself adds.
- RP questioned how best the UK should engage on value added data to land best in the US, BS (US) replied that it would be good to look at the literature in detail, and especially services embedded within manufacturing. RP noted this as a significant takeaway: both sides can look at the literature and case studies and confer later.

5. Discussion of consumer benefits of FTAs

- RP opened this section saying that consumer benefits are something of an open question for DIT at the moment. FJ (US) remarked that this is very difficult to do – though Ed Gresser had attempted to do prior by linking quintiles of consumer baskets and what goods the partner country produces. US (FJ (US) and BS (US)) also stated that there may be interesting case studies of consumer effects available in the wider published economic literature.
- RP asked the US whether there were influential consumer representation groups active in the US (Which? in the UK) that could be brought to bear in selling a US-UK trade agreement. BS (US) responded that they tend not to be influential and are not typically well disposed to pro-trade arguments, BS (US) gave the example that if it was demonstrable that a pair of jeans would drop from $10 to $8 due to an agreement, this would not be enough to convince them that it would benefit consumers. SD (US) remarked that the discussion becomes very focused within the congressional district level and that there are very influential lobby groups that can significantly sway discussions.
- IS (US) interjected that it may be useful for the UK to sell the agreement based on the similar level of economic development between the UK and US – noting that during the TPP negotiations the narrative became framed around a 'race to the bottom'. FJ (US) stated that to sell an agreement would require very specific examples of benefits – it may be best to frame consumer benefits at the household level rather than the individual level (at household level benefits become larger). SD also noted that when tariffs are liberalised, benefits tend to filter through to company profit margins rather than a full pass-through rate to consumers.

[1] While the OECD 'TiVA' dataset is eponymous with trade in value added, there are other datasets that provide the same level of functionality such as the World Input/Output Tables and the Global Trade Analysis Project.

Department for
International Trade

- RP stated a takeaway from this discussion to be a process of swapping best practice analysis for selling consumer benefits to the public.

6. Non-Tariff Measure Discussion

- CB outlined the framework of the non-tariff measure survey that DIT/BEIS will be using to feed into non-tariff measures (NTM) analysis. BS (US) asked whether the entirety of the survey would be available for sharing or not, adding that USITC might be willing to help convert the responses into numerical estimates of NTMs. CB replied that the intention was to publish the results. BS (US) recommended a paper produced by Christopher Findlay (Uni. Of Adelaide). CR (BEIS) asked whether there were any available data sources regarding US firms that export specifically to the UK. FJ (US) replied that Census Bureau or Department of Commerce most likely have this information but would not be forthcoming with sharing (given firm data has confidentiality requirements). She suggested using American Chambers of Commerce and IS (US) suggested potentially trying LinkedIn groups for US exporting companies as alternative avenues for acquiring this data. BS (US) also took this opportunity to draw attention to the fact that USTR did a report some time ago on barriers that US SMEs faced when exporting to the EU – and that USTR would be producing another similar report in the near future, with regards to the UK.

7. Data Sharing

- PA outlined the core principles of DIT statistician's data sharing process; that they are in line with OECD working group conditions, all data is already publicly available (goods data, services data and FDI data). PA drew attention to the fact that HMRC data differs when it treats EU trade data and non-EU trade data
- BS (US) responded saying that this was very helpful – and that he would not imagine any problems with reciprocating the same level of data availability.

<u>Key Actions and Next Steps</u>

Key Actions

- Both sides have agreed to swap a number of papers and economic material between one another, so as to facilitate best practice, knowledge sharing and to give sight of one another's upcoming publications. This fell into the following areas:
    - DIT publications/material: Public Consultation Information Packs / NTMs Business Survey. The US have agreed to share a similar study that will produce results by July 2019.
    - Consumer benefits of trade agreements.
    - How best to use and frame trade in value added data (both methodologically and to lend best with the public).
    - Impacts of trade agreements on productivity.
    - Wider economic literature (Findlay paper on quantifying NTMs / Francois research on labour market impacts).
- DIT proposed a standard package of data sharing to the United States (national goods, services and FDI data). USTR welcomed the offer and indicated that this should be possible on a reciprocal basis.
- Richard Price and Bill Shpiece agreed a VTC halfway between now and the next working group.

Department for International Trade

- DIT and USTR indicated their desire to continue the Economic Session at the next US-UK TIWG.

Key Actions / Next Steps:

- Given that this was the first Economic Session and involved a lot of familiarisation, next steps should be to exchange the mentioned material, to lay the groundwork for more substantive discussions at the next economic session.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

- The atmosphere in the meeting was positive and collegiate, with participants approaching talking points as common problems to be overcome. The interpersonal relationship between Richard Price and Bill Shpiece is friendly overall and should likely be leveraged in the future economic sessions.
- One curiosity was the late appearance of Ian Sheridan (State Department) during the meeting; his line of questioning was often out of sync with the overall flow of discussion and once or twice there seemed to be visible annoyance from other members of the US delegation to his questioning.
- A potential risk to be aware of was Fay Johnson's warning that she will be asked, at some point, what the 'real trade balance is'. Given the current US administration's fixation with deficits this could spell trouble for the UK later.
- There was pushback against forms of joint analytical work between HMG and US government, Bill Shpiece saying that he was not able to decide on these issues.
- The meeting on the whole was a success – all agenda items were discussed thoroughly, with key participants indicating a desire to build of this initial foundation and continue at the next TIWG in the autumn.

Department for
International Trade

GOODS

Date: 11 July 2018

Time: 09:00-12:00

Participants:

Name	Department/Directorate
Neil Feinson	DIT- Trade Policy
Andreas Lendle	DIT- Trade Policy
Tom Aitchison	DIT- Trade Policy
Hussein Farook	DIT- Trade Policy
Wayne Caffell	DIT- Trade Policy
Mojgan Ahmad	DIT- Trade Policy
Daren Timson Hunt	DIT- Legal Service
Kathryn Woolaway	DIT- Trade Policy
Katie Waring	DIT- UK-US Trade Policy
Adam Fenn	DIT- Trade Policy
James Kane	Defra
Enrik Noka	BEIS
Piers Davenport	HMRC
Philip Walker	BEIS
Katherine Wright	DExEU
Sushan Demirjian	USTR
Kent Shigetomi	USTR
Kelly Milton	USTR
Alexandra Whittaker	USTR
Roger Wentzel	USTR
Brian Woodward	US Dept. of Commerce
Joe Wereszynski	USDA
Jessica Simonoff	US State Department

Key Points to Note:

- Concerns were raised about the Facilitated Customs Arrangement, in particular US highlighting the importance of maintaining US trader confidence in the arrangement, ensuring that all third countries are treated fairly and the practicalities of implementing this. Outstanding questions on implementation remained over; SPS compliance, the splitting of consignments, the EU's role on Goods destined for the UK and the ability to identify origin and destination to apply the correct tariff.

Department for
International Trade

- US outlined the various mechanisms of stakeholder engagement. Interestingly on public consultation USTR relies on this as a mechanism for linking companies to products (with companies submitting replies with HS codes of most use) and as a resource document to consult throughout negotiations. Further explanation of the cleared advisor committees and their parallel interplay with negotiations was discussed. USTR explained their confidence in representing the views of industry and consumers but admits that this is reliant on having key channels, individuals and sometimes having to proactively reach out.
- The US outlined the core components of a market access chapter based on NAFTA, and pinpointed specific clauses that the US has included in its recent FTAs (Remanufacturing Goods, Performance Requirements for Customs Waivers, Imports of Samples, Import and Export Licensing Procedures, and clauses related to Bio-technology). The US spoke to challenges they encountered in TTIP negotiations and clarified why some of these differences emerged.
- Discussion over the tariff offer exchange process, saw the US highlighting the initial focus to be on exchanging trade data and establishing a common understanding of principles and modalities. US approach to these negotiations is to avoid commitments to percentages by treatment but attempts to put as much as possible into “Entry Into Force” in a first tariff offer. Recognition of the interplay with reciprocity and cross-chapter dependencies in compiling tariff offers was noted.

Report of Discussions and Outcome:

1. Facilitated Customs Arrangement (FCA) (30 Mins)

Presentation (UK):

DExEU explained how the FCA would work and what the Chequers agreement was proposing. Stressing that the detail would be explained in the White Paper which will be released “within days” and that they could not “pre-empt” that paper. Noting that the Chequers agreement highlights the UK proposal that will be subject to negotiation with the EU. In addition, the FCA would see the UK ensuring simple and ease of compliance for the FCA.

Interaction and Comments (US):

US asked the following questions:

1. **US Comment**: US highlighted some key points they wanted to ensure remain the case. That (1) this is easily applied, that the ability to identify the correct tariff is simple in its application. Highlighting that their role is to help industries take advantage of preferential rates and therefore it is important that this is understandable. (2) The US also highlighted their concern that all competitors are treated equally. (3) USTR wants to ensure that US industry remain “confident” in the preferential gains achieved under a US-UK agreement; this means clarity on how the separation of trade would work, ensuring easy and correct identification of the tariffs applied, clear and simple identification of the Rules of Origin that apply and clarity and assessment of the impacts on European distribution from the UK. (4) US Dept Agriculture highlighted that stakeholders had hoped to address restrictions to access of the EU market in a US-UK agreement and that the maintenance of these barriers will receive vocal stakeholder reaction in the US.
2. **US Question**: What about products passing through EU member states en-route to the UK? How could circumvention be avoided? The US referred to the calculation of country of destination and applying the correct tariff as a “Kabuki dance” and seemed unconvinced other EU member states could apply this.

Department for International Trade

Response: from DExEU was that they would not speak to other nations customs abilities. That further details of the process and implementation will be outlined in the White Paper.

DIT Comment: There seems to be a misunderstanding on the US side that needs clarifying, that wasn't cleared in the meeting; under the FCA EU member states would not be obliged to offer the UK tariff rate and conduct a calculation on the correct tariff rate. Follow up questions by other USTR officials seems to highlight they understand it is a one-way process but worth clarifying (note: The now released White Paper clarifies this).

3. **US Question**: How will the FCA work for shipments that are split on entry, when some parts of the product go to the EU and some remain in the UK? Do you charge UK tariffs first?

   Response: from DExEU that the arrangement will be designed for ease and simple application, and where there is a need, a repayment mechanism can be used.

4. **US Question**: Do you foresee there being a difference between bound and applied rates, or is the tariff differential only for preferential access (FTAs)?

   Response: from DIT Goods that whilst no decisions have been taken on applied MFN rates, this would apply to applied MFN rates also and that on leaving the EU we will be free to implement our own applied MFN tariff rates.

5. **US Question**: US asked about timelines. Is there a form of public consultation and stakeholder engagement to input into this? When will the UK consult the EU Commission.

   Response: DExEU highlighted that there is ongoing business engagement. DIT pointed to the forthcoming public consultation on UK-US FTA (now published) as another forum to highlight any concerns. On discussions in Brussels – DExEU replied that they are keen to get on with it.

6. **US Question**: US Dept of Agriculture highlighted their concerns of complying with different requirements as part of a US-UK agreement. Pointing to issues over certification and SPS. Noting the UK's proposal of a common rule book, whilst easing trade between EU-UK, would cause problems for third countries.

   Response: DExEU explained that the rulebook would only be used in so far as to achieve as frictionless trade as possible.

   US Comment: USTR lawyers pointed out that this term is incredibly broad "only where they are needed for frictionless trade with the EU", and would need further detail and clarification.

7. **US Question**: US wanted to know further about timelines and when will it be implemented.

   Response: DExEU highlighted that this was in step with the political agreement and that details of the technical implementation will be clear by March 2019.

8. **DIT Comment:** DIT closed by recognising the concerns of the US and noting the need for a continued dialogue. All UK parties spoke to their openness to answer questions in the future on this topic.

<u>Next Steps:</u>

- Continued dialogue and discussions with the US on explaining how the FCA will work in practice as more information becomes available.

Department for
International Trade

2. US Stakeholder Engagement (1 hr)

Presentation (US):

USTR outlined the various ways they interact with stakeholders, including the legislative branch. Touching upon three key elements (1) Public Consultation, (2) Cleared Advisory Committees, (3) Political and (4) Other.

Public Consultation

The formal Federal Register notice lays out the objectives and justifications for initiating negotiations. It invites comments. US pointed the UK to regulations.gov where all submissions are public and where submissions on TTIP can be found.

For tariff negotiations, a key element USTR request, if possible, is for stakeholders to outline their HS codes that are important to their sector. Recognising that this can be difficult to do independently – linking tariff lines to sectors/companies. It helps to flag products and companies to reach out to during negotiations. Maintaining a hard paper copy of responses to be referred to later throughout negotiations is really useful, noting the length of time negotiations go on for – it can be hard to locate digital copies.

The US admits that they only get a few hundred responses that are useable. USTR filter and process the responses themselves but note this is time consuming but adding that being the actual individuals that read the responses is a valuable and useful process for negotiations. They rely on their Public Liaison office within USTR to compile a summary sheet of responses in an excel file – with one-line summaries, this helps to point to the letters and responses that need further reading.

USTR still receives letters during negotiations and have come across last minute stakeholders who disagree with the progress on negotiations. Responses to these letters can include updates on negotiations.

Conflict between businesses and divisions within sectors can emerge, at which point USTR looks for political steer to outline which interests to promote.

USTR noted the advantage of this engagement with Industry (particularly international companies) in order to use international company responses against opposing countries. As such using foreign company responses as leverage in negotiations.

Cleared Advisory Committees

The US described the cleared advisor approach, recognising that they include regional and local authorities. The Trade Promotion Authority necessitates several groups, 14 Industry specific committees, and 3 high level oversight committees. These committees have their own website with limited access for reviewing documents and text. Cleared advisors are expected to act in a personal capacity rather than on behalf of their Trade Association or company. Industry meets in these committees every quarter with Agriculture operating on more formal timelines. Each committee usually consists of 20 members and are all publicly listed individuals. USTR noted that for some committees they have to actively recruit individuals to ensure a balance of opinion – pointing out that companies have less and less people on trade and rely more heavily on trade associations for this role.

Department for
International Trade

Cleared Advisory Committee individuals sit separate to the trade associations, and the individuals have a strong Chinese wall. These individuals recognise their privileged position which they take great pride in, highlighted by their objective advice to USTR on where companies within the association are likely to differ and potentially come into conflict.

Tariff offers, and text are cleared through these committees, before tabling with third countries.

After negotiations have concluded these committees issue a report their view of the agreement which are made public Reports from these committees can be particular harsh in their assessment.

There are a variety of Agri Committees – Grain, Oil, Livestock, Sugar/Sweet, Processed Foods (Which also has a Commerce sister committee). These committees are jointly chaired by USDA (Foreign Agri Service) and USTR.

Political Engagement

USTR noted that engagement by with legislators (Congress) gives an appreciation for politically sensitivities of constituencies. The extent to which this is considered is largely dependent on how vocal they are. USTR regularly presents to Senate Finance Committee, House Ways and Means, Senate Agriculture Committee and House Agriculture Committee.

Trade Promotion Authority also necessitates USTR consult on the impact on fisheries industry (classed as an Industrial Good). This is one of a number of peculiarities left over from the original TPA.

On the whole USTR feels that Market Access very rarely causes controversy, pointing more towards environmental and labour provisions being the controversial, which see NGOs and a much broader set of stakeholders involved.

Other

USTR admitted that locating relevant companies during negotiations is done primarily through trade associations but they have sometimes resorted to "Googling" when it is a niche product.

USTR/USDA/Commerce all noted the informal contact they have with industry, establishing strong relationships with the cleared advisors to be able to engage over a coffee and informally.

Interaction and Comments (UK):

1. **UK Question**: DIT was keen to understand how assured USTR is of their positions and of the coverage of their stakeholder engagement going into negotiations – do they conduct an assessment of this?
   Response: The US is pretty confident that it covers all sectors in its engagement and that they have a good understanding of the interests it needs to represent. However, notes that they do not conduct any assessment. Silence seems to be their best indicator – if they miss anyone out they will likely be vocal.
2. **UK Question:** Does USTR seek agreement from the committees between every round?
   Response: USTR said they brief these committees and congressional delegates at each round – convening these meetings as they see fit. (Note: It is unclear on the whether they would seek clearance from ITAC for every tariff offer.)
3. **UK Question:** How does USTR interact with political leadership on the responses it receives?
   Response: USTR Lighthizer receives direct communications from business and industry, so he is aware. Assistant USTRs also report to him on a regular basis.

Department for
International Trade

3. Market Access Chapter (1 hr)

Presentation (US):

USTR outlined the key components of a Market Access Chapter for the US. Their traditional framework is based upon NAFTA and they are reluctant to drop articles that were used there but are reactive to third party additions. New agreements have evolved to include more elements, but little has been dropped since NAFTA, their concern is over retrospective interpretation of old FTA's if dropped. Recognising that the EU has far fewer elements in their Market Access Chapters, USTR noted that the EU had few reservations about the inclusion of these US articles claiming that any contention was largely over legal language.

Accelerating Tariff Elimination

The EU has traditionally included in its Market Access chapter articles that commit parties to reviewing the speed of tariff elimination through committees. For the US this is not possible due to the legislative limitations, they would need language that enabled this through an "amendment of the treaty". Whereas for the EU this language would require returning to EU Council, they would have preferred to see any amendment in line with EU Commission's prerogative of Trade negotiations and not requiring parties to start a new agreement.

Note for DIT Goods - Pick up these comments with the Legal team as part of Policy Positions work.

Customs Waiver and Performance Requirements

USTR recognises this is an article the US regularly ask for as part of the Market Access chapter. This article prevents countries from making import duty waivers contingent on performance requirements. These performance requirements can be export thresholds.

Temporary Admission of Goods – Samples

This article is a left over from NAFTA. Whilst the US is a signatory to the ATA Carnet it has not adopted all of the articles within the Istanbul Convention on Temporary Admission. Under TTIP this came up with EU TAXUD wanting to expand the article to meet the terms of the ATA carnet, broadening the scope – US pushed back on this.

Import/Export Restrictions

The US stated that their intention was for refraining from such restrictions e.g. on devices containing encryption. They do not want to see IT products with encryption being restricted in any way, this is followed up with requirements in the TBT chapter to avoid forcing companies to disclose algorithms.

Remanufactured Goods

US highlighted this to be a growing sector, noting Vietnams limitations on this. US do not want remanufactured goods to be seen as "used" as this leads to limitations. This definition is strengthened through the Rules of Origin chapter – what processing is needed to qualify as a remanufactured good. Requirements tend to be; it must be "manufactured again", a specific list of products, process to confer origin, inclusion of a factory warranty. US is looking for a global standard of "similar to new". USTR noted that this definition has yet to be enforced and that it is a specific element that isn't of concern to some nations. They made it clear that they will not water down this

article. (Note that in TTIP the scope of remanufacturing was under considerable review, but they did reach an outcome).

The US see economic advantage in remanufacturing, due to the substantial amount of investment and employment opportunities it brings as a labour-intensive industry.

Import Licensing

As part of the US efforts to improve transparency on import licenses. The US include provisions that prevent partners raising import licensing requirements on partner countries, without prior notification to the WTO or through the FTA.

Export Licensing

Similar to import licensing, the US prevents other nations introducing export licenses unless notified on the grounds of national security. USTR highlighted that on Import and Export licensing this was an endeavour that the EU and TPP promoted, following the failure of Doha round.

Administrative Fees

Requirements of nations to publish their trade related fees.

Committee on Trade in Goods

USTR highlighted what this committee would cover; primarily nomenclature updates and trade reviews. Under TTIP this was still being worked on due to the legal impasse over how to implement future changes that worked for both legislative bodies of the EU Commission and US Congress, that recognised where both of their executive powers extended to.

Annex – Exemptions from National Treatment

The US highlighted that they seek a national treatment exemption for the Jones Act as some provisions do affect trade in goods issues, this is repeated elsewhere in the agreement – in other chapters. USTR highlighted that they do not seek an extensive list that includes regulatory discretion, stating that this does not count as national treatment exemption. US also question the need to list import prohibitions in this annex.

Annex – Terms of Tariff Elimination

Annex – Tariff Schedules

Annex – Other

This annex is used for product specific requests to improve trade between both parties. USTR pointed to the KORUS agreement and their specific request for Korea to address the Automotive engine displacement tax.

Department for
International Trade

Agriculture

USTR highlighted that they haven't a preference over whether Agriculture is done in a separate chapter or not. Agriculture sector could include articles on Export Subsidies, SSGs, Bio-Technology / GMOs and TRQ administration. Similarly, Agriculture and SPS committees would be established.

General Definitions

USTR stated that should a term be used in more than one chapter, it falls to the general definitions to outline. If only in one chapter, it is defined in that chapter.

A key definition of confusion between the EU and US was "Goods of a Party" vs. "Originating". The EU wanted to include a term "Originating Goods of a party". US were reluctant to accept this phrase as it seems to suggest that the MA chapter only applies to those goods benefiting from preference (originating), whereas the US saw many clauses of the MA chapter applying to all goods regardless – not just those that are "originating" and would thus benefit from preferences.

Another definition of contention included "free circulation in the EU". USTR believed the EU was suggesting that once a good enters the EU, regardless of origin, it becomes an EU good that can be re-exported to the US regardless of any US restrictions on other countries. For the US, value added is needed to be deferred to the good in order to be traded as an EU good and nations retain the right to restrictions.

Note for DIT Goods – Flag to TBT and Regulatory Team.

<u>Other comments</u>

US recognises that there is always a constant discussion over whether elements are more applicable for the Market Access Chapter or the Customs & Trade Facilitation Chapter.

USTR is open to considering new elements to be added, and keen to be a supporter of raising standards for trade. TPP represents their most modern form of a Market Access Chapter.

<u>Interaction and Comments (UK):</u>

1. **UK Question:** Is Bio-technology always in MA chapter or SPS chapter?

   Response: Can be both or either.

2. **UK Question:** Why address spirits protected terms in market access chapter not intellectual property chapter?

   Response: This is because the matter is viewed in the US as a labelling matter for which the Treasury (Federal Bureau of Alcohol, Tobacco, Firearms and Explosives) is responsible, not an intellectual property right as such and the US see it as a restrictive trade practice.

3. **UK Question:** How do you perceive the process for market access chapter discussions?

   Response: USTR foresee the exchange of text and tariff offers simultaneously and do not foresee consolidating text as a major challenge. Recognition that consultation and discussion between parties in advance of any tabling would aid in the understanding of what is being proposed.

Department for
International Trade

4. Tariffs (15 Mins)

Presentation (US):

USTR outlined the key elements that need to be agreed ahead of tariff offers.

Sectoral Split

The US conducts its tariff negotiations in three parts; Agriculture, Industrial and Textiles. USTR stated that they want to minimise the trade-offs reading across these three sectors for the most part, only the end game should see cross-cutting negotiations. At the outset the US would label those tariff lines it sees as belonging to each sector. Note: It remained unclear to what extent this would mean the UK would be asked to split discussions on its own tariffs along the same definitions.

Data Exchanges

A common agreement is needed early on what reference points are nations using, Free on Board / Customs Value / Customs Insurance Freight? Under TTIP the EU used "dutiable value" which doesn't include imports under inward/outward processing. All data exchanges to be based upon 3 years of trade, the US ask for Rest of World trade as well as bilateral trade. USTR will only ask for import data, recognising its superior coverage – however they will check this against their own export data for internal purposes.

Buckets/Baskets of Tariff Offers

The US approach tariff discussions using 4 categories:

A – Entry into Force (which could be further split into "MFN zero" and "other")

B – 5 years (Note: These are examples. It could also be 3 years, 7 years, etc.)

C – 10 years

U – Undefined. This relates to sensitive products and where reciprocity and chapter dependency is needed. (Textiles have RoO dependencies, Agri has TRQs).

Important for a common understanding of what U means, for the US this doesn't mean those products would not be liberalised eventually – but instead those products that will need to be treated sensitively. Also, for staging purposes both sides need to agree to what 5 years mean? Is it 5 equal cuts, or the first cut after five years?

USTR is open as to whether this is done as a whole, or by sector, or smaller chunks. USTR is opposed to any opening modality that places a % by baskets, for example a commitment of 90% in category A. USTR feel this is too binding and not meaningful – too quantitative and pointless. Would rather improve the offers at each stage but ensuring the EIF basket is the largest. Tariff negotiations are aided by openness about what the UK/US would be defining as sensitive as early as possible. USTR make all tariff offers contingent on satisfactory outcomes across the agreement and other chapters.

On agriculture and TRQs, the US approach is to place an offer next to all lines even if that includes a substantial number of lines being "U" – potentially meaning TRQ. USDA highlighted that this is an initial starting position and go from conservative to liberal, what starts as a TRQ may be subsequently liberalised. Note: Overall, the US approach appears to be more ambitious in that it sees full liberalisation (after a number of years) as the ideal outcome. This is also evident from recent US FTAs.

Department for
International Trade

Next Steps:

- Recognising that time cut this short, and agreement to come back to Tariffs and process over lunch and perhaps at a later date.

Key Actions and Next Steps:

- Continue dialogue on the FCA.
- Follow up the discussion on Tariffs process and data exchange.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

- USA clearly highly concerned about the technical implementation of the FCA and the quality of any UK offer on goods as a result.
- Otherwise a cordial atmosphere, with the session heavily dependent on the US showing and presenting their best practice, experience of TTIP and traditional processes. US very open to answering UK questions.
- We gained useful intel and steers on the practical processes that we and the US will need to undertake as we move into the negotiations phase, and in particular it has started to flag some of the key areas where we need to decide whether to carve out our own approach or follow the US precedent.
- A large showing from UK; DIT, Defra, BEIS, HMRC and DExEU.
- USA keen to get into the substance of discussions on issues and UK positions.

Department for
International Trade

INVESTMENT

Date: 11 July 2018

Time: 09:00-16:00

Participants:

Name	Department/Directorate
Lola Fadina (LF)	DIT- Trade Policy
Matt Ashworth (MA)	DIT- Trade Policy
Louis Bickler	DIT- Trade Policy
Michael Drewett	DIT- Trade Policy
Chrysoula Mavromati (CM)	DIT- Trade Policy
Ben Rake	DIT- Trade Policy
Sukhmani Khatkar	DIT- Trade Policy
Jack Kennedy	DIT- UK-US Trade Policy
Jaya Choraria	HMT
Rachel Hahn-Morris	BEIS
Lauren A. Mandell (LM)	USTR
Emily Kilcrease (EK)	USTR
Janet Shannon	US State Department
Raimonds Pavlovskis	USTR
Tom Barlow (TB)	US Dept. of Commerce
Sofia Vickery (SV)	US State Department

Key Points to Note:

- This was an open discussion which went into much greater detail than the previous working group on the substantive rules of investment protection, Investor-State Dispute Settlement (ISDS) and stakeholder engagement. In particular, the US gave more detail on their rationale for investment protection provisions in their previous treaty practice. The tone of the discussion was positive throughout.
- There were questions on how the UK planned to approach negotiations – with a Model or otherwise. The UK was also pushed on where policy thinking had progressed to and were asked to provide indications on core provisions. The UK made clear that its position was evolving, and policy development was ongoing.
- The US talked through specific details in investment protection provisions, particularly on the prohibition of performance requirements, expropriation, denial of benefits and on the scope and definitions of investor and investment.
- When discussing ISDS, the US expressed again their concerns around the EU's proposals for the Investment Court System (ICS). The US made clear that, if the UK were to pursue a form of ICS in the investment chapter, this would have the potential to significantly impact investment and wider FTA negotiations with the UK. This appeared to come from senior levels of the US

Department for
International Trade

administration. In response, the UK indicated that where there was ISDS in future agreements, the objective would be to ensure a system that was effective, efficient and that could work in a bilateral context.

Report of Discussions and Outcome:

1. Welcome and introductions

Lola Fadina (LF) and **Lauren Mandell (LM)** noted the close ties between the UK and the US and the commonalities in their high-level objectives for investment, though there might be different approaches in getting there. The discussions were aimed at building on the constructive conversations at the Third UK-US Trade and Investment Working Group (TIWG 3).

2. UK to update on policy development progress

Matt Ashworth (MA) - None of the core principles in investment policy are new to the UK. The UK has an existing stock of over 90 Bilateral Investment Treaties (BITs) and is engaging with new developments across a number of international organisations in the field of investment. Ministers have agreed high-level principles for investment for both substantive and procedural areas of investment policy. The substantive areas include promoting Foreign Direct Investment (FDI) and Overseas Direct Investment (ODI); providing a level playing field to foreign investors in the UK and UK investors abroad by providing investment protections; reaffirming the Right to Regulate (R2R); and ensuring the ability of the UK to exercise its diplomatic interests. This would be achieved through protections against discriminatory, arbitrary and manifestly unfair treatment. The UK also wants to keep abreast of recent developments in policy, particularly in looking at options for preventing so-called 'mailbox companies' from treaty shopping, where this was sensible. On the procedural elements, where ISDS is included in investment agreements, the UK would seek provisions that are effective and proportionate – this is in line with the UK's position at the UNCITRAL Working Group III discussions. The details of these policies will be crystallised over the next few months to be ready to negotiate once the UK leaves the EU.

LM – Will the UK be developing a model text? Or has thinking not yet reached the stage of thinking about what the end product of the policy development looks like?

MA – We are still addressing the content of the policy development. The UK is not looking at text so much at this stage and is focusing more on desired outcomes and core principles. The US is right that the UK has had a model in the past and would think about this in the future.

LM – Will your approach include both BITs and investment chapters in FTAs?

LF – The UK is taking views on the most effective ways of conducting investment agreements and wants to ensure that our approach is suitable for bilateral and broader agreements.

LM – It is interesting to compare the UK's policy development to US policy positions. The UK's principles have lots of overlap with US policy, though, of course, the devil is in the detail. The US shares the UK objectives of protecting investors whilst ensuring that regulators have the full ability to protect the public interest. On UNCITRAL and ISDS reform, the US considers the question of whether or not to reform the system to be 'quaint'; the answer to the question is that every negotiation presents an opportunity to reform, and this is a constantly evolving space. Were the US to have a deal with the UK, you could expect to see this reflected in the need to strike a balance between protecting investors and protecting the right to regulate.

Department for
International Trade

3. US talk through select investment issues in the Model BIT

Expropriation

LM – This article addresses both direct and indirect expropriation. While a definition of direct expropriation is relatively simple, it is harder to define indirect expropriation. This question has come up in NAFTA cases and is why the US added Annex B to clarify this. It is also important to draw a distinction between expropriation and non-compensable regulatory takings. The US reflects these distinctions in Annexes to their agreements, when defending cases that have been brought against the US, and in non-disputing Party submissions under Chapter 11 of NAFTA and the CAFTA. Quite often there is a misconception that we ban expropriation – this is not correct; we introduce disciplines to expropriation. Expropriation is legitimate when it is a) for public purpose; b) non-discriminatory; c) on payment of prompt, adequate, and effective compensation; and d) in accordance with due process.

LF – How useful are these submissions in influencing tribunals?

LM – The US views the ability of states to comment on treaty interpretation as fundamental. The US has helped to shape tribunal interpretations and public perceptions of investment by signalling to business, stakeholders, civil society and tribunals how these provisions should be interpreted. In our domestic and international practice, public purpose is viewed very deferentially, and the US would expect tribunals to be deferential to this. This should obviously be balanced with the continuing need to protect investors overseas as well.

MA – One of the areas civil society groups are concerned about is indirect expropriation. How do you engage with civil society on this?

LM – Expropriation has received the most scrutiny from the civil society community. There are concerns that governments are reducing the right to regulate. However, when you look at the jurisprudence, there are few successful claims of indirect expropriation (Metalclad v. Mexico, 1999). The US sees expropriation as an extraordinary act and is very rare. It is also possible to throw the question back and ask whether the government should be restricted from expropriating in certain circumstances. Stakeholders may not have confidence that a tribunal will interpret expropriation in the right way. We point them to non-disputing Party submissions and to our Trade Promotion Authority and ask them to look at the end result. The determination of whether there is expropriation requires a case-by-case, fact-based analysis that looks into: i) the economic impact of the government action; ii) investment-backed expectations and iii) the character of the government action.

Performance Requirements (PRs)

LM – Governments of all types and sizes employ PRs, and so the US sees prohibitions on PRs as a relevant discipline (Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, 2007). The US PR expands on the TRIMS Agreement. It includes a closed list of requirements – these are things like domestic content rules that disrupt supply chains, or requirements to transfer technology. Whilst not necessarily a NT issue (as the PRs could be non-discriminatory and apply to domestic investors), PRs of this sort make it more difficult for foreign investors to operate their investments. At the same time, there are a number of tailor-made exceptions (e.g. non-conforming measures), which should be read together with the main provision to fully understand the scope of the rule.

MA – How does the PR article work in the context of agreements with developing countries?

Department for
International Trade

LM – The US starting point is that developing and developed countries have an interest in ensuring robust domestic industries. Prohibitions on PRs do not prohibit governments from taking a wide range of measures to promote domestic industries – on subsidies, for instance. In the developing world, one of the most important issues is the need to train human capital. US PRs exempt training of staff, in response to this issue.

LF – To what extent is your global treaty practice around setting global norms or is it more country specific?

LM – Both. The US has seen a variety of governments engage in PRs that distort investment flows and not just in East Asia. Some of the US PR clauses are specifically designed to combat Chinese (CN) practice, and we'd view negotiations with a government like the UK as a chance to build a common platform to address the threats posed by CN. Negotiations with the UK on an FTA are a chance to broadcast the message that performance requirements are not acceptable, particularly technology localisation requirements. The US is keen to be even more aggressive on these than it has in the past.

Definitions

LM – The US draws a distinction between investment and covered investment. The term 'investment' is an all-encompassing one that covers both domestic and foreign investments and informs the meaning of the scope of 'covered investment'.

- **Investor**: The US is clear that it is protecting investors in any form, including SOEs and foreign governments. We see the open approach as fundamental to our economy, with exceptions for things like national security. This also includes pre-establishment, so any concrete steps towards making an investment count. The US thinks it's important to have investment protection pre-establishment because having only post-establishment protections cut off the ability of foreign investors to access certain parts of the economy.

- **Investment**: This includes any kind of asset. The term 'asset' is the best we've come up with yet that doesn't have a more loaded connotation. Not every 'asset' is an investment: it must be owned or controlled, directly or indirectly, by an investor, though these terms are deliberately undefined and allow a case-by-case assessment. In non-disputing Party and defensive submissions we have attempted to clarify this. Definition is not a closed list. We believe having a closed list would be arbitrary. Moreover, assets should have the characteristics of an investment which include 'commitment of capital or other resources'; the 'expectation of gain or profit'; and the 'assumption or risk'.

Denial of Benefits (DoB)

LM – This article allows parties to choose who should have the benefits of this treaty and is not a mandatory mechanism for excluding certain investments. The effect of this is to deny certain investors access to the treaty protections and prevents access to the dispute settlement provisions and states bringing related ISDS claims. This is when a) the investor is controlled by a non-Party with which the US does not maintain diplomatic relations; b) the company is owned or controlled by an investor of third country subject to sanctions; c) a shell company is owned or controlled by an investor of a third-country; and lastly d) a shell company is owned or controlled by an investor of a host-state. The article is elective because the US would not want to prejudge any scenario - countries may need flexibility to accommodate changes in a sanctions regime, for instance. The US wants to be able to deny benefits at any time, subject of course to any applicable arbitration rules. The US does not see any downsides to having flexibility to deny benefits.

Department for
International Trade

CM – Under this approach it is still possible for a US-owned company that has substantial business operations in the UK to sue the US. What is the underlying policy rationale, and have you received any criticism (e.g. from civil society)?

LM – This was one of the main hurdles we had to deal with internally during the TTIP negotiations. Civil society would argue that TTIP offers yet another way for US companies to sue the US. Our response to this is that if it is about a *bona fide* investment that fully operates in (for example) the UK, then this will be regarded as a UK company, irrespective of its ownership.

MA – What are the advantages in having a separate DoB clause, rather than excluding these issues as part of the definitions article?

LM – The EU in CETA has proposed an approach under which shell companies are excluded from the scope of the treaty under the definition of investor. This seems fairly novel. The US assessment of the EU's approach is that this is designed to sell to the public, and that this helps messaging to civil society. There is also potentially a substantive point in that it takes the discretion out of the hands of the tribunal – if a tribunal decides that the decision to deny benefits was taken too late. From the US perspective, having a standalone DoB clause enables flexibility, and this is particularly relevant for the current administration. Even if the claimant was potentially a mailbox company, the government would not want to send signals that it would discourage investments from companies of this sort.

Fair and Equitable Treatment ('FET') / Minimum Standard of Treatment ('MST')

LF – It would be good to have a discussion on the different approaches taken by the US and the EU on FET.

LM – To be frank, we've asked the EU the following on the closed list approach: is this intended to be an approach that is more defensive minded or offensive minded? When US investors look at this list, they see opportunities as the list provides terms that a tribunal would interpret according to the Vienna Convention on the Law of Treaties without any guidance. We believe that this would afford protections to investors beyond those under the MST. Tribunals that have judged the CIL norm have agreed that this is a very narrow obligation and a very narrow window to prove a violation. For TPP we added a number of clarifications to say that it was the claimant's obligations to prove a breach under CIL/MST. When comparing the two approaches, the obligations of a closed list appear broader than the CIL standard. The US is open to conversations with treaty partners to ensure that there are sufficient safeguards to make sure that the tribunal gets the CIL standard right. Now, there are circumstances where the US has not agreed with the tribunal's judgement, but we do not think that the CIL standard is really that open to abuse or misinterpretation.

4. Discussion on ISDS/NAFTA

LF – We would be interested in your views on ISDS provisions, especially given the ongoing negotiations and in light of views expressed on the Hill and from stakeholders. We appreciate that this is ongoing.

LM – The current administration's views are different from previous administrations. Certain Cabinet members (including USTR Lighthizer) have questioned the approach to ISDS. In NAFTA it is known that we proposed an opt-in model which would allow treaty partners to make a choice as to whether to allow investors to bring ISDS claims. Thus, even if the current administration is not comfortable with allowing ISDS, future governments may very well be. The NAFTA 2.0 negotiations are ongoing, but I can say that we do not yet have a view on ISDS in future FTAs, including in a US-UK FTA. It is the US view that the ISDS provisions in NAFTA 1.0, in the Model BIT and in TPP are effective,

Department for
International Trade

modern and suitable and we think they strike the right balance. If in a future US-UK negotiation we have an investment chapter that includes ISDS, I cannot say if there would be an opt in opt out model or not, but we do think that any sorts of provision would be similar to those in NAFTA 1.0 or TPP.

LF – Is this a question of a sovereignty argument outweighing the core principles in TPA or is it more about balancing the two?

LM – We take the view that the opt-in approach is consistent with the objectives outlined in TPA. Opt-in ISDS is a political choice as much as it is a legal choice. On the stakeholder engagement piece, we have spent a lot of time on the hill working out whether or not this is acceptable. If we opened discussions with the UK, you would also have access to staffers and potentially to members of congress as well.

LF – Some stakeholders are asking whether we would even need ISDS between the US and the UK (or the US and the EU). We would be interested in your views.

LM – I do not think we have made an assessment on that. There are views on both sides. During the TTIP negotiations this was a common argument from stakeholders. But there is an argument that, even with governments that have high rule of law standards and good track records, there is still a heightened risk to foreign investors. It is also important to have a floor below which standards should not fall. Besides, US investors can sometimes face treatment that we would find surprising, so you may well want this. Then again, both the US and the UK have similar, common law legal systems, integrated economies and good track records so there would be others who would take the opposite view. There is also a strong argument in favour of ISDS between two developed countries, in that you signal to other negotiating partners that you don't 'pick-and-choose'.

LF – What do you consider to be the benefits of having ISDS with Canada?

LM – I cannot be too open as the negotiations are ongoing. However, our investors would say that US investors have brought and won more cases under NAFTA against Canada than they have against Mexico. If you look at the whole history of the NAFTA, you can see cases where there were no adequate remedies under domestic law and were in breach of the NAFTA. US investors have sued Canada more than any other country, but then again, the US has been sued more times by Canadian investors than any others. The US has not been fully satisfied on the evidence of the benefits of investment chapters and ISDS. Then again, we do not have a lot of data to work from. The positions we have taken in the NAFTA negotiations have been in response to how we have fared in other NAFTA countries, in terms of investment flows, offshoring and job loss and changes in the US economy. One could make the argument that the concerns are heightened with border states. Then again, these are decisions that would need to be made at levels higher than mine.

The EU's ICS has attracted a lot of attention. The US government is not keen on the EU's position, to put it mildly. Ambassador Lighthizer has been briefed on the ICS and has taken the view that the chances of having a successful discussion on ISDS would be significantly impaired if the UK were to propose a form of ICS. This would also have wider implications on a future US-UK FTA.

5. US Approach to Stakeholder Engagement

LF – We are keen to get a sense of how the US engages with stakeholders and to learn from your best practice on this.

LM – For the US, trade and ISDS/investment issues are front and centre for stakeholder engagement. There are three kinds of places where we engage: on ISDS proceedings; policy

Department for International Trade

positions in our model BIT; and consultations in advance of negotiations. We have formal advisory committees where USTR appoints individual representatives from business and civil society. These committees have the ability to read the text and advise on positions. USTR are required through TPA to engage with members of Congress and their staff. We are also required to publish our negotiating objectives before negotiations open, and to update them to reflect changes in the US positions. There is also a great deal of engagement with different interest groups and firms in advance of negotiations, in developing our model BIT and on individual investment disputes. Though this is limited by the need to keep negotiations confidential.

LF – Do these groups have a sufficient understanding of the policy to provide useful information?

LM – The challenge in general is not so much that stakeholders are not well informed, so much as each group wants everything - firms want full market access without limitations, civil society want no ISDS, etc. Groups are very reluctant to prioritise, which creates a very challenging dynamic. In unsuccessful negotiations you never work out where groups want to be, and everyone ends up hating the published text.

6. Conclusions

LM – There is value in including ISDS in an investment chapter. The causality is not provable, but even if disputes do not proceed to claims, the presence of a backstop is invaluable in resolving things – including the possibility of Posts reminding a host state of their obligations.

LF – This was a useful conversation. Clearly there is a lot of detailed conversation we will need to have as we move forward. We are still in policy development mode and though we have previous treaty practice, we are yet to come to a view on a new model.

Key Actions and Next Steps:

- Both parties to consider if an intersessional discussion before the next TIWG would be appropriate.
- UK to continue to update US at further TIWGs as its investment policy develops.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

- The atmosphere in the room was relaxed and constructive. This was the most in-depth discussion with the US on investment policy to date. The UK was able to move the conversation into greater detail and the scope of the discussion reflected the UK's progress in developing its investment policy since the last TIWG.
- The US asked for further details on the UK's policy development at several points throughout the discussion. They will be expecting a more detailed and developed update at the next TIWG.
- There are many potential levels of overlap between the US and probable UK positions. The US referenced a large amount of case law during the discussions. The UK will need to continue to explore this in terms of policy implications for the NAFTA cases the US has faced, and the cases that its investors have brought against other states.
- The US messages on the ICS were unsurprising, if forceful. The US was clearly aware of likely UK positions on pre-establishment and were interested to see whether the UK position on CIL and FET would move from current BITs to the EU approach.

Department for
International Trade

SERVICES: TELECOMS

Date: 11 July 2018

Time: 10:00–12:00

Participants:

Name	Department/Directorate
Rebecca Fisher Lamb	DIT- Trade Policy
Chris Woodward	DIT- Trade Policy
George Radice	DIT- UK-US Trade Policy
Harry Lee	DCMS
Mike Hill	DCMS
Henry Shennan	DCMS
Laura Warren	DCMS
Alex Walford	DCMS
Rob McGruer	Ofcom
Jessice Manzone	US Dept. of State
Matthew Jaffe	Associate General Counsel (US)
Thomas Fine	USTR
Robert Tanner	USTR
Diane Steinour	NTIA/DOC
Ellen House	USTR

Key Points to Note:

- The UK provided a detailed outline of their telecommunications domestic regulation, which included future telecommunications infrastructure, the European Electronic Communications Code (EECC), 5G and mobile roaming. The US asked questions and welcomed the information sharing, providing some, although limited, reciprocal explanations.
- There was recognition from both sides of a need to share and understand even more about their respective regulatory systems. The US were open to arranging intersessionals both in-person, where possible, and via VTCs to have further detailed discussions.
- Both sides agreed that this initial exchange was useful and that the aim in the run up to and at the November working group should be for detailed deep dives into areas where we both see potential, including more detailed reviews of the US system.

Report of Discussions and Outcome:

1. Discussion of UK Future Telecoms Infrastructure Review (FTIR)

HS (UK) provided an overview of the future telecoms infrastructure review, which is about to be published. Starting with coverage, he explained that for fixed telecoms government focus has been on superfast broadband (24mbps) and have been successful with over 95% of premises covered.

Department for
International Trade

This is noticeably better compared to other countries. However, basic mobile connectivity is not as far-reaching, with only 80% coverage, including issues on train lines. The UK has four major mobile operators, but there are many regions where there is only one operator. Members of Parliament (MPs) often get consumer complaints about coverage; improving this is a key priority for DCMS.

Barriers for providers:

Openreach is the largest incumbent; however, there are a growing number of smaller network providers. Virgin Media covers 40% of the UK and coverage is improving. Yet, superfast will likely not be fast enough for most consumers in the next five years, and so the UK is looking to ultrafast. The UK's national ambition is to have superfast fibre on 15 million premises by 2020 and a nationwide network (95%) by 2033. Fibre connectivity is currently provided primarily by Openreach, supplemented by other operators such as Virgin and CityFibre. The FTIR sets out the government policy framework needed to deliver that target. The government has made good progress with Openreach in enabling greater access to their ducts, which could be considered a non-tariff barrier. Ofcom have also said that Openreach must make it easier for rivals to install fibre on its telegraph poles and underground tunnels.

RT (US) commented that the US does not have similar legislation that obliges access to poles and asked whether other utility providers allow access to their infrastructure, similar to the US where electricity companies provide access to their poles. HS (UK) confirmed that EU regulations facilitate utilities providing access to TelCos and some power companies are looking to open their infrastructure.

However, HS (UK) noted that wayleave, access to buildings and access to Openreach's passive network structure are the key barriers for operators. Some countries, such as Spain and Portugal, compel incumbents to provide fibre access, but the UK works on the basis of promoting competition. The UK government provides financial assistance where commercial operations are not viable. RT (US) believed that they had similar issues in the US. Presumed consent sounds like a good idea from a TelCo perspective but could be too aggressive for the US legal system. He suggested that he could connect the UK with colleagues in the FCC and New York to follow-up with detailed information. DS (US) added that they have an executive order that allows access to federal lands to lay the cable.

Government programmes:

HS (UK) explained how Broadband Delivery UK is running tenders to support local authorities to facilitate broadband rollout in their areas with the aim of delivering superfast broadband, but it has had a side-effect of promoting competition. RT (US) inquired about the source of the funding, which HS (UK) explained came from taxation. RT (US) found that interesting; they have applied similar policies in the US over the past ten years, including a grant programme under the Department of Agriculture for last mile connectivity. There is also currently a strong congressional interest in broadband rollout and mapping empirical demand against whether there is a sole provider in the area.

Next steps:

RFL (UK) asked whether it would be useful to arrange another discussion once our strategy has been published, and whether the US could share more about how their system operates. RT (US) said that he was happy to facilitate, and that the US was interested in more information about the UK's system. Agreed this would be the focus on a future discussion to understand the US system.

2. Discussion of European Electronic Communications Code (EECC)

Department for International Trade

Overview of UK interaction with the EECC:

LW (UK) provided an overview of how the UK interacts with the EECC. Much of telecoms in the UK is derived from EU legislation. The current framework consists of four European directives. When established the EECC had six principles: 1) technology neutrality; 2) competition; 3) member states should make sufficient use of spectrum; 4) regulation free from interference from commercial interests; 5) removing barriers to the single market; and 6) a flexible and deregulatory framework. On the final principle, the framework operates on an ex ante basis. This means that Ofcom does not need evidence of bad behaviour in order to regulate telecoms markets (which would be ex post). Ofcom instead reviews telecoms markets currently every 3 years. Where Ofcom finds that an operator has significant market power, then Ofcom can impose regulation where they feel that there is sufficient evidence that competition problems may arise. Ex ante regulation should be removed when it is no longer needed.

LW (UK) went on to say that the Commission proposed a new European Electronic Communications Code Directive in September 2016, consolidating the four directives. It broadly aligns with the principles of the current framework, with a few key differences:

- Increased focus on investment in fibre & 5G networks: this includes a move away from technology neutrality. There are new regulatory tools to incentivise investment, but also reduced flexibility for MS over spectrum management.
- A level playing field, or 'same service, same rules': The European Commission introduced this new policy objective, which intended to bring over the top (OTT) communication services into scope of telecoms regulation. After much negotiation, the EU has agreed a 'service blind' approach which will only bring OTT services into scope of consumer protection rules if they connect to the public switched telephone network or, for those services that don't, possess the relevant characteristics. For example, customer contract rules will only apply if the service offers a contract.
- New powers for Governments to regulate: over spectrum and end-user rights
- Harmonised retail price caps on international calls and SMS between EU Member States. This intervention informally known as "intra-EU calls".

In June, the EECC was politically agreed by the EU. It will be formally adopted by the EU in October-November 2018. At this point, the clock will start ticking on a 24-month deadline for Member States to transpose the EECC into national law. The exception to this is intra-EU calls, which will be imposed directly on Member States via an EU Regulation by May 2019. Subject to the final agreement on EU Exit, the transposition deadline will fall within the post-Exit Implementation Period, which will oblige the UK to commit to EU transposition deadlines between March 2019 and 31 December 2020.

US position on EU legislation of Over-the-top (OTT) services:

RFL (UK) inquired, based on the potential regulation change post-2020, what the US thought would be a good future approach. RT (US) responded by saying that the US had been following the EECC closely, and have had a few conversations with other MS. The US have concerns about OTT services, but RT (US) commented that it looks like the UK are taking a pragmatic approach and found the concept interesting of applying similar rules where there is some overlap between traditional telecoms services and non-traditional. RT (US) explained the US perspective. Initially OTTs were completely outside the scope of telecom regulation but due to extraneous issues such as safety and security, the FCC has imposed certain conditions (such as emergency calls) on OTTs that link to Public Switch Telephone Network. However, the US does not see any value in imposing all regulations on OTTs, as the entire regime does not make sense for the modern service.

Department for International Trade

Incentivising investments:

RT (US) asked how the EEC incentivises investments. LW (UK) explained that it reduces the frequency of Ofcom market reviews from three to five years, which provides more stability in investment. The code also introduces mechanisms to reduce the way the regulator can impose regulation, imposes transparency on access, offers forbearance for fibre networks if they offer co-investment opportunities. It also provides power to regulators to identify geographic areas where there is low interest in investment. The regulators can invite operators to invest, with the incentive that they will be the sole operators in the area, providing security.

DS (US) commented that operators are displeased with the move towards regulatory flexibility and spectrum licensing and asked whether the spectrum licensing regime facilitates UK operators to go out of the UK. LW (UK) explained that regulators have to provide a minimum of 20 years investment certainty, which doesn't actually affect the UK as they offer indefinite certainty for mobile broadband. Many UK operators have operations in the EU, and they would not want to discourage them.

TTIP discussions with EU:

RFL (UK) asked on the US's TTIP discussions with the EU. RT (US) explained that it was a challenging discussion. The US has the same pro-competition basis as the EU. However, there is a difference between agreeing on the accomplishment of end-goals and what is included in a trade agreement. The US has made different decisions to the EU, such as rules on unbundling parts of the network and the pricing around dominant suppliers and services. Yet, it is difficult to get into that level of detail in a trade agreement. The EU asked the US to execute similar regulation to what they were imposing, but the US saw that this was beyond the scope of a trade agreement. RT (US) suggested that the EU could have been more 'humble' in the way they dealt with telecoms trade agreements, and that he has never seen a trade agreement that attempts to co-regulate. However, the US sees the importance of providing regulators with the right framework. RT (US) noted that he could go into further detail at a later date, which was welcomed by the UK for a future discussion.

3. Discussion of 5G

Overview of UK approach to 5G:

MH (UK) gave an overview of the UK's strategy and testbed programme. The UK government published the strategy in March 2017; it looks at a number of policy areas such as spectrum, regulatory regime, stimulating the market, and removing barriers. The UK also has the 5G Testbeds and Trials Programme will create the right conditions for commercial investment in 5G infrastructure and services and build the ecosystem. There are two funding strands, the first is a 5G Innovation Centre at the University of Surrey, the University of Bristol and King's College London. The second is a competition in industry to come up with innovative ideas, with six different projects selected in different industries. The programme is also investigating 5G commitments in rail and security. The government is working closely with the National Cyber Security Centre on security. The next steps for the UK is to find a partner for large scale trials of 5G in dense urban environments and following from this the UK plans to undertake a large-scale testbed in a rural setting.

MH (UK) went on to explain that the government has also funded the creation of the 5G Innovation Network (UK5G) via Cambridge Wireless to boost and strengthen the development of the 5G ecosystem in the UK. This is a non-profit, mostly funded through organisations paying a subscription. The UK is also working with catapults, which are funded by the Government and help transition ideas to services (similar to incubators). RT (US) commended the work and offered to facilitate further

discussion with experts. DS (US) added that the regulatory body is interested in the UK's plans in this area, adding that the US also has civil libertarian issues.

Spectrum allocation:

RT (US) asked whether there is enough spectrum and what the future allocations are. RG (UK) explained that (Ofcom) EECC has identified certain bands for 5G. CEPT has a working group. Primary band is 700 MHz with some considering 26 – 28 GHz bands. Allocation could be mid-2020. DS (US) responded that the US has two new initiatives in looking at the default position. They are experimenting with leasing, as the US have a lot of government users in higher bands. They are in formal discussions with EU regulators.

Next steps
RFL (UK) suggested that the UK and US could exchange further detail in this area. RT (US) agreed and added that the US want to understand the reasons for investing for US companies.

4. Discussion of mobile roaming

Overview of UK's position on international mobile roaming:

AW (UK) explained the principles around EU surcharge-free roaming. Mobile data connectivity is important to the world economy. It is predicted by 2020 that there will be 5 billion smartphones 5bn smartphones and 20.4 billion IoT devices around the world. Mobile has become the main ecosystem of the tech industry: smartphones are now the principal way that people go online and access the internet, while Apps now account for over half of internet use. For example: half of Facebook's base is mobile only. Most tech companies have adopted a 'mobile first' approach and for the coming years this trend seems stable. This shift towards 'mobile first' has had a substantial economic impact that goes beyond the digital sphere. In the US, e-commerce and online ads revenue have increased 15-fold since 1999, with mobile now accounting for over half of eCommerce traffic and over a third of its revenue.

More broadly, internet advertising is now over quarter of the global total advertising market. This shift towards a mobile economy has only been made possible because of the huge improvements in the reliability and capacity of cellular networks as well as the general decline in the cost of data. 3G and 4G Networks have made it possible for the app economy to develop. 5G networks will bring a new wave of bandwidth-intensive applications and the deployment of IoT services.

Overall these infrastructure improvements have made it possible to serve users with abundant data at cheap prices. Surcharges on international mobile roaming significantly lower levels of connectivity consumption. Operators report a significant difference between consumers connectivity patterns nationally and their connectivity patterns while temporarily visiting another country. These differences seem to be mainly accounted for by the surcharges faced by consumers, with surcharges faced by customers highly variable from one operator to the next. For Pay as you go customers, one of the UK MNOs charges its consumers travelling in the US £0.01 for using 1 Mb of data, another charges £7.20. That is 720x more - for exactly the same service and some of the MVNO's charge even more. The cost of provision does to some extent vary between operators, as some are able to commercially negotiate better wholesale rates. Overall though, retail prices are either not reflecting cost of provision, or the present structure of the wider telecoms market is such that the dynamics of negotiations on wholesale rates are not working sufficiently well.

On this basis, the UK concern is that these surcharges on mobile roaming are increasingly impeding economic activity of people when they cross borders and that this is having a negative effect on the

Department for
International Trade

development of the digital economy, in particular the development of services targeted at temporary visitors. For example, if a consumer is out of range of Wi-Fi and would like to book an Uber in the street, they might be put off doing so if this means paying an additional charge for mobile roaming.

The realisation that market dynamics are at the moment insufficient to produce reasonably competitive Wholesale prices led the EU to introduce regulation for mobile roaming services.
Since 2007 surcharges have progressively been brought down, and in June 2017, all surcharges for calls, SMS and data were abolished, which is known as 'Roam Like at Home' (RLAH). Since the charges were abolished within the EEA: more than five times the amount of data has been consumed and almost two and a half times more phone calls have been made.

RT (US) noted that the EU, although classed as international, operates in a domestic way. The US allocates spectrum on a regional basis and have a competitive experience with roaming. The US evolved from hired domestic roaming rates to no roaming charges through competition. US has 4 national operators who offer surcharge-free roaming domestically. In addition, AT&T offer surcharge-free roaming for all North America and T-Mobile have deals for 200 countries. Therefore, the EU approach may be successful due to different regulatory tools but does not suit the US. RT (US) emphasised that the US approach is to avoid intervention on a federal level or through trade, unless there is an issue. However, high charges of incumbents are an issue that the US has highlighted in their National Trade Barriers paper. [In margins after meeting: the US was previously approached by Australia for a roaming deal].

Continuing, RT (US) explained that the US believes that operators will transfer the charges to other services. For example, the US is concerned about the EU's approach to international termination rates, where they have noticed that providers charge high prices. The US sees this as a direct result of various EU legislation, such as the cap on roaming rates.

Overview of UK's position on national roaming:

AW (UK) explained that under national roaming, consumer could use other networks in areas not serviced by their network. The UK believes that national roaming would reduce the incentive for mobile operators to invest in new infrastructure. This would be particularly damaging in areas where there is no coverage from any provider - there is no incentive to invest capital for a new mast if other operators can simply piggy-back off your investment. The UK considered national roaming in 2014 and opted instead for a licence obligation that resulted in all operators increasing their network coverage and the MNOs locked in £5bn of private investment for UK mobile infrastructure. The UK view is that reducing regulatory barriers such as reforms to mobile planning (as we did in November 2016) and the electronic communications code (reformed in December 2017) will facilitate further the deployment of new mobile infrastructure.

AW (UK) further explained the UK's approach to rural roaming. As part of the work on developing the UK's future mobile strategy, they are looking at a range of policy options that might deliver improved coverage in rural areas, but no decisions have yet been taken. The government has requested that Ofcom, the independent regulator, considers the benefits (and costs) of introducing local roaming in rural areas. As with national roaming there is a risk that this could undermine investment incentives, while it would deliver a poor experience for consumers due to calls dropping during network handover. Some of these risks might be mitigated by wholesale pricing, but the UK is not in a position to declare a position on this.

AW (UK) asked about the US experiences and RT (US) explained that the US does not have nationwide obligation to provide roaming. Most of the current carriers have built out extensively, and until consumers reach very rural networks, there will be three to four carriers, with one or none in

Department for
International Trade

very remote areas. Here the providers are small and fees for roaming on their network are a significant proportion of their business plan. Roaming plans have “reasonable use” restrictions.

HS (UK) asked how operators get access to spectrum. RT (US) explained that there are different maps of the country based on census blocks. Either small or large blocks can be auctioned. Then there is a secondary market of sale or leasing of spectrum. Primary holders can lease spectrum, but a sale requires regulatory approval by the FCC. Rural operators can have spectrum only for their geographical area.

AW (UK) asked whether roaming charges are passed to the consumer. RT (US) explained that the reality is that no charges on the basis of roaming anymore. There may be rules, but it isn’t how the carriers operate. There may be restrictions in the contract for the balance of use at home versus roaming, a fair use policy.

5. Next steps

RFL (UK) suggested that understanding the US federal and state regulations was critical for a future discussion, the UK had gone into a considerable depth to share our thinking and welcomed the US input to how we might take this forward in the future. The UK would welcome the US going into this level on depth for their system. RT (US) suggested that mutual recognition of the testing of telecoms equipment could also be an area for further exploration as well as barriers to trade in goods as applicable to telecoms equipment, perhaps through a joint session with TBT leads.

RT (US) added that the UK and US will have to prioritise certain areas in digital. He described the session as a good initial overall exchange of information, and that the US would like to engage in deep dives where both sides see potential.

Action Items:

- Intersessional meetings, VTCs or using the next working group to dive deeper into areas of mutual interest and to understand more about the other’s regulatory frameworks.

FOR INTERNAL DISTRIBUTION ONLY

Lead Negotiator Analysis/Comments:

A useful, technical session that focused on providing a detailed overview of the UK domestic regulatory landscape. The specific agenda items were led by DCMS sector experts, who were able to provide a good deal of depth to their issues and engage with US counterparts well. It may be worth considering further in future how to ensure all presentations have the trade angles firmly in mind – there were a number of areas where the level of depth exposed areas the US may push us on in the FTA negotiations. The US seemed to find the session useful and engaged on all items. The discussion sets up well the opportunity for the US to reciprocate and give a technical deep-dive into their regulation.

One particular objective for the UK in this session was to test the US appetite for international roaming provisions, and the US were fairly clear that market intervention was not something they particularly supported.

The session did not get into trade provisions in particular detail, and it will be key to ensure we can get into this space by the next TIWG in November. Discussions in the margins following the session between Chris and Robb Tanner were positive about the number of areas that we would likely be aligned, and we began to identify the likely areas where further work would be needed.

Department for
International Trade

AGRICULTURE - VTC

Date: 11 July 2017

Time: 13:00–14:00

Participants:

Name	Department/Directorate
Neil Feinson	DIT – Trade Policy
Mojgan Ahmad	DIT – Trade Policy
Katie Waring	DIT – UK-US Trade Policy
Ceri Morgan	DEFRA
Sinjini Mukherjee	DEFRA
Russell Stokes	DEFRA
Emma McCarthy	DEFRA
James Dunn	DEFRA
Trevor Salmon	DEFRA
Bob Firmin	DEFRA
Kulin Patel	APHA
Sarah Clegg	British Embassy, Washington
Oliver Wyatt	DExEU
Julie Callahan	USTR
Roger Wentzel	USTR
Dana Du Bovis	TTB
Lori Tortora	USDA
Anne Kirchner	ISDA
Alexandra Whittaker	OGC
Joe Babb	USDA
Joe Werezynski	USDA
Mary Stanley	USDA
Mari Kirrane	USDA
Stan Phillips	USDA, FAS (VTC)
Mara Burr	USDA (VTC)
Chris Thompson	USDA (VTC)
Cheri Courtney	USDA, NOP (VTC)

Key Points to Note:

- During the discussion we did, in principle, reach technical agreement on the spirits agreement text. Defra will work across Whitehall to ensure the approach to expression of consent to be

Department for
International Trade

bound and entry into force, is consistent. We have committed to discussing the consent to be bound and entry into force language in the near future in a VTC.

- On the Organics arrangement the US regulators said that they had a preference to carry out their inspection as if we were an independent country. This would provide certainty in a range of scenarios, including in the event of no EU deal, or the Implementation Period. Defra is now considering the language in the equivalence trigger letter.
- On the wine agreement both sides committed to a technical VTC before the end of July. The US expressed a displeasure with the EU's processes that are captured in the agreement, citing length of time and bureaucracy.
- Overall the US are not happy with the VEA, which they see as providing cumbersome processes for recognition of equivalence and outdated. The US expressed a displeasure of EU rules and principles that they believe are enshrined in this agreement but gave a vague commitment to transitioning on a temporary basis if that came with a commitment from the UK to renegotiate in March 2019.
- The US were keen to understand whether four other agreements needed transitioning: Oilseeds ("Blair House" Agreement); Pasta Products; Settlement for Cereals and Rice and; Calculation of husked rice duties. Defra has previously outlined that these are either not needed or are covered as part of our WTO schedules work. Both sides committed to consult further internally.

Report of Discussions and Outcome:

The discussion began with the UK (Morgan) stressing the importance of continuity to reassure our stakeholders on both sides that we can continue to trade. The UK reinforced the scope of continuity, outlining that we are aiming to achieve technical rectification and no more. The UK stressed that the discussion is not about the future relationship but is supportive of that.

VEA

The UK (Morgan) began with an explanation of short form. Defra explained that the proposed short form text has been delayed due to a new version across all relevant HMG agreements, and we will look to share it as soon as possible.

The US (Callahan) outlined that during the recent June VTC, discussion was focussed on APHIS. The US stressed the need for a technical discussion to talk through specifics on animal health as there are no problems on the plant health side.

The US (Callahan) said that they had produced their own simplified text but realised this resulted in only keeping equivalence determinations and removing everything else. The UK (Morgan) reinforced that this text, not shared at the Working Group, likely would not achieve continuity.

The US (Callahan) are aiming for an agreement that provides a simple understanding that all existing recognitions will remain in place for the US. This will remove the 'baggage' of the VEA.

The US (Whittaker) were keen to understand whether our proposals would create both the short-form text and keep the original text as a reference document. The UK (Stokes) highlighted that the UK aims to have a very short document which would reference the earlier EU-US agreement. The US (Callahan) asked for the UK's reasons for continuing the VEA. They believe that the recognitions and necessary legislation is all in place and if the UK regulators need the aspects of the VEA for trade to continue on Day One of EU Exit, it would be useful to understand why.

Department for
International Trade

The US briefly outlined some areas of concern with the VEA. This included: Yes One, Yes Two system of assurance is too convoluted; Joint Management Committee is not working, and that an ad-hoc regulator group would be more beneficial and; transitioning this, alongside Chequers, could lock the UK and US into an EU SPS system indefinitely.

The UK (Morgan) again stressed the need for continuity in response to these concerns, offering a further VTC before the end of July to discuss areas each side has identified as important. The US (Callahan) indicated that, though they do not necessarily support full continuity for this text, they do understand the UK position and signalled a potential willingness to transition the agreement on a short-term basis. The UK (Morgan) indicated that the UK will investigate further.

The US (Callahan) noted that the VEA itself would not provide assurance of Day One continuity because it does not capture the actual recognitions needed. It is in the EU's legislative package, that will be "lifted and shifted" on day one too so we have all that is needed. The US were interested to hear from the UK if the VEA has elements that we need for continuity. The UK indicated that regulators were clear we needed the VEA for frictionless process.

Spirits

The UK (Morgan) opened with a broad recap on the history of our discussions. The US (Wentzel) responded, discussing their changes, including that they agreed to the language on cross-border Geographical Indications. Both sides agreed to the technical text in principle.

The UK (Stokes) broadly outlined that a broader legal discussion on the process of expressing the Parties consent to be bound and the date of entry into force of agreements was needed in the near future. The US (Whittaker) indicated that the text would need a light 'legal scrub' on the US side.

Wine

The UK (Dunn) opened the discussion by thanking the US for their revisions and comments to the text but, as it had only been received a few days prior, the conversation would be quite high level.

The UK (Dunn) asked for further details on some of the US comments, including maximum alcohol volume and simplified approval of wine-making practices. The US (Kirrane) responded that the former was more of a note, but that it would need to be addressed if the UK was to consider joining the World Wine Trade Group. She also briefly walked through the current EU process for recognising new practices, and why that was problematic.

UK (Morgan) asked how much this is related to the operational challenges compared to what' is actually contained within in the agreement and suggested this should be subject to further discussion.

The UK (Morgan) and the US (Wentzel) discussed the value of the trade, with the US curious to understand whether the UK still intended to act as a gateway to the EU. The UK (Morgan) pointed out that this is yet to be determined, but that international stakeholders, including US stakeholders, had raised the importance of the UK's role as a gateway.

The UK (Morgan) proposed that a technical VTC would be useful. The US (Wentzel) suggested that some of the changes the US had proposed were perhaps a matter for future policy rather than continuity.

Department for
International Trade

Organics

The UK (Morgan) opened by indicating that the UK is on the verge of triggering an inspection and wished to clarify the form of triggering.

UK (Stokes) stated that we want to make sure we are not leaving a gap as there are two scenarios. The current draft request letter covers the no deal scenario. The UK explained that in this scenario we would "lift and shift" the EU organics regulations and amend this legislation to make sure it works properly. In an implementation period scenario, most EU law will apply under the Withdrawal Agreement and the Withdrawal Agreement and Implementation Bill will provision for the EU organics regulations to apply. The UK (Stokes) asked what the US regulatory system needs to ensure continuity.

US (Callahan) pointed out that this is a new type of continuity, as the programme has a legal requirement to inspect. The National Organics Program requested that Defra triggers the audit by the end of July, with the intention to be ready in October.

The US (Courtney) suggested that there are two scenarios to consider in the letter; whether the Implementation Period applies, and if the UK is an independent body with the ability to hold oversight and system control; or whether the Commission retains a role. The UK (Morgan) requested that discussion should begin on the content of the exchange of letters alongside the audit process, in order to expedite matters, given the time pressures and that the UK is a trusted trading partner, The US (Callahan) responded that this is not standard procedure, but in recognition of the unique circumstances, discussion should begin,

Both sides agreed that a simple approach is required, and this should be discussed soon on a technical VTC.

Other

The US (Whittaker) brought up four other legal agreements, asking why they had not been identified for transitioning. These Oilseeds ("Blair House" Agreement); Pasta Products; Settlement for Cereals and Rice and; Calculation of husked rice duties. Defra has previously outlined that these are either not needed or are covered as part of our WTO schedules work. Both sides committed to consult further internally.

Key Actions and Next Steps:

VEA
- The need for a regulator-to-regulator discussion on issues on the animal health side.
- The UK will share a short form text, mindful of the US position.
- The UK will let the US know why our regulators need specific parts of the VEA as on the US side trade would continue without it – the UK needs to establish why it would not from a UK regulatory perspective.
- The US expressed a willingness to transition the agreement if we have a commitment to renegotiate in April 2019.

Wine
- The US and the UK agreed to set up a VTC to discuss technical issues.

Department for
International Trade

Spirits

- The UK will seek final approvals for the agreement from the relevant ministers.
- The UK and the US agreed to set up a technical discussion on the consent to be bound and entry into force language and any outstanding legal questions.
- The UK has clarified the process for ratification of agreements.

Organics

- The UK and the US will discuss the language in the letters and notify a point of contact.
- The UK and the US will set up a VTC to discuss the exchange of letters.
- The UK will supply information and data to the US about the inspection by the end of July.

Other

- The UK will need to discuss with WTO colleagues the questions posed on schedules and how trade will work on husk rice and rice, oilseeds and pasta as the agreements are not being transitioned.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Comments:

This was the most cordial agri-food dialogue with the US so far, particularly welcome off the back of a challenging discussion the previous day on SPS focusing on the Chequers Statement. This was partly due to reaching agreement on our first text, Spirits, and partly to the slow building of relationships over the course of the UK-US dialogues.

We need to move quickly if we are going to transition all four arrangements. The US have become more comfortable with working in multiple scenarios for the text, with a view to renegotiating as part of an FTA discussion in the future. We should capitalise on this with a series of technical VTCs over the summer to bank blocks of text on wine and organics and increase regulator to regulator dialogue.

The VEA is far more challenging. It is an old and unworkable agreement, and we need to consider our position carefully with our regulators on the value of it, both in terms of trade with the US, but what any changes to the agreement with the US might do to our trading relationship with the EU, and what a shift in approach might mean for the overall continuity line.

The US also acknowledged for the first time on wine that this might not be the moment to look to change UK policy. This is partly due to our consistent message, and partly due to growing domestic pressures on the US wine industry. We need to land this.

Overall, good progress. We have developed a rhythm to these dialogues and it shows.

Department for
International Trade

REGULATION: MRAs

Date: 11 July 2017

Time: 13:00–16:00

Participants:

Name	Department/Directorate
Julian Farrel	DIT – Trade Policy
Henry Alexander	DIT – Trade Policy
Tim Harris	DIT – Trade Policy
Ali Kelly	DIT – Trade Policy
Ben Shotness	DIT – Trade Policy
Rebecca Schneider	DIT – UK-US Trade Policy
Cynthia Morgan	DIT – Legal
Richard Thompson	DfT
Jon Elliot	BEIS
Rhidian Roberts	BEIS
Gavia Taan	MHRA
Ian Rees	MHRA
Lea Reynolds	DEFRA
Sarah Norton	DEFRA
Meg Trainor	DExEU
Alex Penfold	UK Accreditation Service (UKAS)
Malcolm Hynd	UK Accreditation Service (UKAS)
Jim Sanford	USTR
Ashley Miller	USTR
Christine Brown	USTR
Rachel Shub	USTR
William Hurst	FCC (VTC)
Mark Abdoo	FDA (VTC)
Anne Kirchner	FDA
Ramona Saar	NIST (Conference Call)
Eric Puskar	NIST
Brandi Baldwin	US Coast Guard (VTC)
Brian Woodward	US. Dept. of Commerce
Cara Lofaro	US. Dept. of Commerce

Department for
International Trade

Key Take-Away Points:

1. The US are interested in the policy space that the UK will have in future and where there will be opportunities for the UK and US to cooperate in the future. The US appreciate that this is an evolving process but are interested in working with the UK as the future relationship with the EU becomes clearer. The US set out that they are keen not to waste time and want to know whether the UK will have the policy space to work with them as they could better allocate their resource elsewhere if this is not the case.

   In detail:
   - The US discussed 'E-labelling' and the 'Medical Devices Single Audit Programme' as two examples of areas they believe the UK may be able to work with the US in the future. Though we will have to wait for further clarity on the relationship with the EU, the UK is keen to engage with the US on these issues at a technical level.
   - US presented on the 'outcome' based approach to greater regulatory compatibility which they use in the FTAs.

2. Regulators fed back on their discussions since the last working group. These discussions have proved to be useful and have allowed regulators to flesh out the practical operational issues to ensure the transition of the agreements.

   In detail:
   - EMC/TTE Annex – UKAS and NIST talked through the accreditation process for conformity assessment bodies in both the UK and US. NIST has set out a number of questions in relation to the future designation process which BEIS/DIT will respond to before the next session.
   - GMP Annex – MHRA/FDA went through the list of issues discussed at previous regulator discussions and will continue to discuss at future sessions.
   - Marine Equipment MRA – DfT/MCA and the US Coast Guard have agreed to work on an operational note as to how the agreement will function and will share the draft text before the next working group.

3. The UK has been working on a draft "mutatis mutandis" exchange of notes for transitioning the 1998 MRA – the UK offered to share this in the coming weeks. The US stated that they are happy to look at the draft text, but they expressed a concern that in the interests of clarity and transparency a new agreement may have to be drafted.

Report of Discussions and Outcome:

1. Welcome and Introductions – *Julian Farrel (DIT)*

2. Update on wider EU exit & UK approach to continuity – *Meg Trainor (DExEU)*

The UK confirmed the ambition to continue the existing mutual recognition agreements and, at a subsequent phase, to build on these agreements in a future UK-US relationship. DExEU set out an update on the Implementation Period (IP). Under the IP approach the UK will continue to be treated as a member of the EU in relation to international agreements. In terms of modalities, the EU will issue a notification to third countries confirming the IP approach. The expectation is that this notification will come after the agreement in October. Notwithstanding this agreement with the EU, the UK are keen that the existing agreements continue after the IP. As any responsible government

would do, the UK is planning for all scenarios, including a scenario where a deal is not reached with the EU.

Details of the Chequers agreement had been set out in the plenary discussions, however, the UK welcomed further questions specific to the MRAs. The US stated that they will look at the White Paper once it is published. The US emphasised that from both a trading and regulatory perspective they are interested in the policy space that the UK will have in future. They would like to know sooner rather than later whether there are things that can be pursued on a bilateral basis which are compatible with the future EU relationship. The US would rather use its resources elsewhere if there is little space to work together on regulatory compatibility. The UK responded that we must wait until the publication of the White Paper and will be able to discuss once there is more clarity.

The US reiterated their position that they do not want to transition the non-operational annexes.

3. Summary of recent regulator-to-regulator discussions.

EMC & TTE annex discussions (1998 MRA) – *Jon Elliot (BEIS, UK) & William Hurst (FCC, US)*

BEIS summarised the recent regulator discussions with the FCC, referring to a slide summarising the UK accreditation process produced by UKAS. It was noted by both sides that these Regulator discussions have been useful. Both sides have exchanged useful information. The slides and input from both UKAS and NIST explaining the relative accreditation processes have been helpful. The UK further explained the role of BEIS in the process; as a designated body, BEIS notifies the EU Commission of CABs accredited by UKAS, following any relevant clarifications UKAS may wish to make. In relation to regulatory alignment, the UK stated that we will have to consider the administrative impacts of this in the future, however, this should just be a matter of fixing information flows. BEIS suggested that it will be useful to discuss this in future regulator sessions. The FCC added that they see the continuity of the existing arrangements as relatively straight forward. The US will receive the designation directly from the UK and vice versa.

NIST presented a slide pack and several questions to be answered in future regulator discussions. NIST explained their MRA programme; notified bodies require formal accreditation, NIST uses several accreditation bodies. Once NIST has achieved confirmation that notified bodies are familiar with the processes they designate these bodies to the UK. NIST set out several operational questions to be discussed at future sessions. The UK agreed to take away the questions.

In response to the question of whether there will be any EU specific requirements in future regulation, the UK confirmed that the EU withdrawal Bill is bringing across the Radio Equipment Directive (RED), therefore these requirements will remain the same at the point of exit. In relation to the question on review time, BEIS stated that they could consider shortening the review time. DIT emphasised that the priority should be continuity of the MRA, so regulators should only consider amendments if this does not jeopardise the continuity work.

UKAS briefly explained the UK's accreditation process under the TTE/EMC annex of the MRA. During the process UKAS employs an appropriate team to assess to the relevant standard. Once assessment is finished the organisation works on any areas they need to improve. There are often several deliberations once the CAB shows compliance. UKAS then considers the checklist provided by the FCC. When UKAS is satisfied they publish two certificates of accreditation and pass these on to BEIS. UKAS accredits on an on-going basis. They visit all accredited bodies on an annual basis. UKAS also has independent internal reviews on the work they do and the reports they produce. UKAS emphasised that the system puts in place a management framework; a CAB must

Department for
International Trade

demonstrate their testing abilities. FCC provides checklists for the normal assessment of those bodies.

UKAS confirmed that no part of this internal process will change if the MRA is brought across. After UKAS has accredited the CAB they send this information to BEIS which then submits it to the FCC directly.

The US are keen to understand what kind of a database system will be used to replicate NANDO. This is important for a seamless transition. The UK confirmed that they are in the process of developing a new database.

Actions:

- UK/ US: BEIS and NIST to continue discussions on e-labelling in technical discussions.
- UK: BEIS/ DIT to prepare responses to questions set out by NIST.

GMPs annex discussion (1998 MRA) – *Ian Rees (MHRA, UK), Lea Reynolds (VMD, UK) & Mark Abdoo (FDA, US).*

MHRA went through the issues log for the GMP annex. On future databases: MHRA explained that all EU member states populate the current databases. MHRA therefore have internal databases used to populate the European database.

MHRA said that GMP is one of the 'common rules'. GMP is not static, there is a need to update the guidance. The UK will continue to be an active participant in the updated guidance which is developed on a consensus basis with PICS. There is an agreement that there is parity between PICS and EU Regulation. On the compilation of community practices: GMP is the standard to which MHRA test against and the compilation is what they work too, this is called 'inventory' in US terminology. MHRA is interested in maintaining this, however, there is an international equivalent through PICS. The lead for the compilation changes is usually the EU and PICS. But sometimes it is the other way around. On the provision of information for marketing authorisation applications: MHRA suggested that a similar situation would continue as under current mutual recognition agreements, this approach focuses on whether the manufacturing site is located there. On the public declaration of conflict of interests: MHRA use an EMA declaration for public interests but also have an internal system. It would be easy to make the current internal system public.

The US were interested in the UK's future relationship with the EMA. The UK government has a stated position to stay closely associated with the work of the EMA. The White Paper may provide more detail on this. MHRA have good operational relationships with the EMA. The UK reiterated that the purpose of the discussion here is to provide clarity that the UK are capable of replicating some of these issues at the national level. VMD confirmed that from a veterinary medicines perspective, the UK are in a very similar position. VMD have strong ties with the EMA now and can replicate much of the operational mechanisms in the MRA.

The FDA confirmed that the summary provided by MHRA was accurate and covered the discussion points. The FDA is keen to discuss more about databases and specifically asked whether any progress had been made on a new joint data system between VMD and MHRA mentioned at the last regulator discussion. VMD and MHRA representatives were unsure on this and promised to go back with information following the working group.

Department for
International Trade

DIT have had a recent stakeholder engagement session for members of the pharma industry, the industry is very keen to ensure continuity. The Pharma industry have seen the number of inspections dropping, the MRA has been beneficial to the sector.

Action:

- UK: MHRA/VMD to check whether progress has been made on the development of a shared database and update FDA.

Marine Equipment MRA – *Richard Thompson (DfT, UK) & Brandy Baldwin (US Coast Guard)*

DfT summarised the regulator discussion between MCA and US Coast Guard. At this discussion, it was agreed that DfT and MCA would do further work on articulating the operation of the new agreement and how the proposed regime would maintain operational continuity. The UK have drafted some operational notes on this theme and are preparing to share those with the USCG at the next meeting in early august. The UK agreed with USCG to produce an explanatory note on the operation of the MRA and will draft this alongside US Coast Guard colleagues throughout the summer. The UK have been preparing a draft text and plan to share this in due course, before the next working group. The parties have spoken offline about market surveillance and other issues and will continue these discussions at the next regulator session. The US Coast guard emphasised that the US and EU have long been aligned. Both parties are very committed to a seamless transition.

The US-EU agreement is currently being amended to reflect the new product scope. These changes ought to be replicated in any UK-US agreement. The Commission have said that the approval of these changes is imminent. Having that text finalised and published will help both parties to push forward and start drafting with the US-UK MRA. DfT have heard through MCA colleagues that this technical annex will be finalised by the end of the year.

4. Update on 'issues for discussion'

Draft Text: The UK proposed transitioning the MRA by using a *mutatis mutandis* short-form agreement. This will include a number of clarifying clauses. This is the UK's preferred approach and this model is being used across the board. Lawyers have discussed this approach separately. The US had several issues with this approach. First, how the transition phase will be addressed during the implementation period. Second, the US is concerned that the specific changes required are many and complex. For this reason, the US would prefer a revised, new text to ensure clarity and transparency. The UK responded that the reasoning behind the short-form is to transition the agreement in the least administrative/bureaucratic way whilst keeping legal certainty. The UK pointed out that the short-form works off a consolidated version of the text which incorporates the many amendments. But the UK noted that this is not a legally binding document. The UK have been drafting the text and suggested they share this with the US and discuss as they believe that many of these concerns are sufficiently dealt with in the clarifying clauses. The *mutatis mutandis* agreement is about 3-4 pages.

Inactive sectors: The UK position remains that these should be brought across in line with the continuity approach.

References to EU legislation: The European Union Withdrawal Act has now received Royal Assent. This gives the UK legal certainty that EU legislation will be transferred into UK law at the point of EU exit. The UK said that this is not dependent upon a deal with the EU.

Department for
International Trade

Entry into force issues, including transition periods: The UK would like to remove any transition periods for entry into force where they have expired to ensure continuity on exit day. As set out in the draft withdrawal agreement, the UK will act as a member state until December 2020. The UK wants to ensure that the agreement continues to function the day we leave the EU.

List of Conformity Assessment Bodies: The UK has provided links of current CABs for EMC and TTE and are in the process of developing a database to replace the EUs NANDO database. The UK are keen to ensure that CABs which are currently designated will continue to be recognised. We may need a clarifying clause in the agreement to give certainty on that point. The US would like to see a less bureaucratic process in terms of the listing of CABs. The US found that the joint committee does not work very well and contains complex rules pushed for by the EU. In the US-UK context we could streamline this process. For example, the designating process of 60 days – the US would like to use a shorter time-period.

Actions:

- US: USTR to send the current Joint Committee Rules.
- UK: DIT to share *mutatis mutandis* text.
- UK: DIT to send link of the consolidated text to USTR.

5. Other regulatory compatibility issues *(USTR)*

The US framed this discussion as part of the US' 'outcomes-based approach'. MDSAP and E-labelling are two areas of interest to US stakeholders and regulators. There is also the possibility that the UK could work with the US in these areas if closely aligned with the EU. The US wants to know if the UK can consider these discreet issues and whether the UK can look further in future discussions.

E-labelling: The FCC introduced e-labelling and illustrated the benefits, in particular, e-labelling provides opportunities for additional information to be provided to the consumer. The FCC have been looking at e-labelling on a pilot basis and the US Congress have passed a law to allow e-labelling of devices (products which have a display such as a smart phone/wifi access point etc.) The UK responded that the possibility of using e-labelling is an interesting proposition and a useful tool for manufacturers. However, whilst a member of the EU, the UK are bound by the Radio Equipment Directive (RED). As the UK does not yet know what the policy space will look like in the future, the UK cannot publicly commit to e-labelling in conflict with the RED. However, under Article 47 of the RED the EU Commission must carry out a scoping study to consider the possibility of E-labelling. This is forthcoming. The UK have yet to see the outputs from this. BEIS has a forward looking strategic programme, they have commissioned work looking at how e-labelling might work in the UK. In particular, BEIS are interested in e-labelling from a market surveillance perspective. BEIS would like to talk to the US on this.

Action:

- UK-US: to continue discussions on e-labelling in technical discussions.

MDSAP: Medical Devices Single Audit Programme: The US have been discussing MDSAP with NAFTA partners. They flagged that Canada has signed up and they are currently having discussions with Mexico in relation to joining. The US envision that there can be closer collaboration with MHRA and FDA on an operational level than with the EU writ large. The FDA agreed that MDSAP is an opportunity for greater collaboration once the UK leaves the EU.

Department for
International Trade

MHRA responded that the UK is currently represented by the Commission for MDSAP. The UK and Ireland have observer status at this forum. The Commission has declined to formally participate in MDSAP and have been observers since 2015. However, the UK is supportive of the principles of MDSAP. In the short term, greater UK involvement is unfeasible due to areas of shared commitments with the EU. The priority for the UK is ensuring continuity of existing arrangements with the EU. However, longer term, the UK is interested in this and would like to become more involved if there is policy space to do so. MHRA specified that they would like to continue having dialogue with the FDA on this. The US clarified that MDSAP is not an either-or proposition, the UK could choose to accept both or either, there could be a flexible process. The US is currently discussing these options with Mexico. The UK reiterated that they must see how the EU negotiations pan out but are keen to stay plugged in to this process. MHRA described the auditing process. MDSAP audits are undertaken by third-party conformity assessment bodies, known as Auditing Organisations (AOs). Several AOs (e.g. BSI) are also EU Notified Bodies, and therefore offer 'combined packages' where they provide both MDSAP auditing and CE marking to devices manufacturers, as part of the same assessment process. This practice does not technically constitute a 'single audit', and an MDSAP certificate does not exempt firms from future QMS auditing (as part of the CE marking process) should they switch to a different Notified Body. The US expressed interested in this and would like to learn from the case of BSI.

Action:

- UK: Speak to BSI on MDSAP take-up.

6. Approach to coverage of FTA Regulatory Sectors *(USTR)*

USTR presented a PowerPoint presentation on the US approach to FTAs. This was in response to a request from the UK at the last working group.

The current approach is to handle policy topics not as annexes to TBT, but rather as sectoral annexes in a separate regulatory sectors chapter, which combined TBT, SPS and GRP aspects for one sector in one place. US stakeholders increasingly are seeking concrete outcomes that yield greater regulatory compatibility. The sector specific approach allows the US to go deeper, for example, in terms of transparency/data protection. The goal is to identify key sectors of commercial interest which produces a 'win-win' in terms of cost savings for companies and regulatory efficiencies for regulators.

The US reiterated that there can be greater compatibility without reducing standards. The US uses a bottom-up process, by gathering input from stakeholders as they are best placed to identify where collaboration has benefits and efficiencies can be made. In terms of regulatory efficiencies, USTR works closely with regulators which is important for implementation, the US drew attention to failed attempts on the inactive annexes in the MRA. There is also a significant consumer benefit. The US emphasised that this work will be driven by confidence in the systems of each party. It will be the regulators who will be implementing the outcomes. It is not just a harmonisation approach. There are several tools available which can be used.

The US summarised the 3 main tenets of the outcome-based approach. This includes; 1. A focus on meaningful outcomes, 2. Evidence-based – involving an evaluation of each party's regulatory requirements, systems and processes, and 3. Achievable – relying on buy-in from regulatory agencies. The US also set out a range of 'regulatory cooperation tools'.

7. Proposed next steps

- Share short-form text before the next TIWG.

Department for
International Trade

8. AOB

- US Legal raised a query about whether the EU Withdrawal Act will bring across the MRA. And if it were to do this why do we need to transition the MRA.
- The UK said that the EU Withdrawal Act will bring across some of the powers of the MRA but this does not solve the problem. A UK-US MRA will still be needed to ensure continuity.

Key Actions and Next Steps:

- UK: MHRA/ VMD to check whether progress has been made on the development of a shared database and updated FDA.
- US: USTR to send the current Joint Committee Rules.
- UK: DIT to share *mutatis mutandis* text.
- UK: DIT to send link of the consolidated text to USTR.
- UK/ US: BEIS and NIST to continue discussions on e-labelling in technical discussions.
- UK: BEIS/ DIT to prepare responses to questions set out by NIST.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Comments:

Overall a good discussion with the US, notably on progressing the MRA and on understanding their approach to sector specific annexes.

The US, however, made it clear that if there was not going to be regulatory space for the UK to negotiate with the MRA (as might be the case under the 'common rulebook') then 'we are all very busy and have other thing to do'. The US said that they wanted to use e-labelling and MDSAP as examples to test if the UK will have regulatory space for a UK-US agreement – so it will be important that the UK assesses the implications of the White Paper and communicate this back to the US carefully. The US also reiterated that they saw MRAs as quite an outdated tool – reinforcing the message that the US were not particularly interested in extending the scope of the MRA into new sectors.

Department for International Trade

INTELLECTUAL PROPERTY: PATENTS AND PHARMACEUTICALS

Date: 11 July 2018

Time: 13:00–16:00

Participants:

Name	Organisation
Mark Prince (MP)	DIT – Trade Policy
Olivia Wessendorff (OW)	DIT – Trade Policy
Sam Gibb (SG) – Scribe	DIT – Trade Policy
Cordelia Jonathan (CJ)	DIT – UK-US Trade Policy
Oliver Griffiths	DIT – UK-US Trade Policy
Richard Salt	DIT – UK-US Trade Policy
George Radice	DIT – UK-US Trade Policy
Megan Heap (MH)	Intellectual Property Office (IPO)
Nicki Curtis (NC)	IPO
Jason Belia (JB	IPO
Zac Stentiford (ZS)	IPO
Daisy Ellis (DE)	Medicines and Healthcare Products Regulatory Agency (MHRA)
Rachel Mumford (RM)	Department for Health (DH)
Bilal Sameja (BS)	DEFRA
Christine Peterson (CP)	USTR
Miriam DeChant (MD)	US Patent and Trademark Office (USPTO)
Linda M Quigley (LMQ)	USPTO
Charles Eloshway (CE)	USPTO
Marina Lamm (ML – Video Conference)	USPTO
Rachel Salzman (RS)	US Dept. of Commerce
Michael Shapiro (MS – VC)	USPTO
Mark Ye (MY – VC)	USTR
Shannon Nestor (SN – VC)	USTR
Caridad Berdut (CB – VC)	USPTO
JoEllen Urban (JU – VC)	USPTO
Karin Ferriter (KF – VC)	USPTO
Donald Beers (DB – VC)	Health and Human Services (HHS)
David Henry (DH – VC)	US State Department
Steve Aitken (SA – VC)	Intellectual Property Enforcement Co-ordinator (IPEC)
Summer Kostelnik (SK – VC)	IPEC
Joe Wereszynski (JW)	USDA
Raimonds Pavlovskis	USTR

Key Points to Note:

1. This session provided the UK with an opportunity to provide a comprehensive overview of our approach to patent policy and highlight how this is intricately linked to the UK health system. The UK provided a broad overview of how the UK patent system contributes to an innovative pharma sector and facilitates a balance between generics, innovators and the public whilst stressing the importance of this system for the health sector. A strategic approach combining five

Department for
International Trade

presentations from UK teams presented our system in a very strong light and was well received by US counterparts.

2. As expected USTR and USPTO pushed hard on Grace Periods, Patent Term Extension and Adjustment. With respect to grace periods we highlighted that it is not just a matter of legal compatibility with the European Patent Convention (EPC) (which is not an EU institution), but also of political signalling as the UK are a leading delegation at the EPC.

3. US and UK provided presentations on patent extension and SPCs respectively. US were interested to see the similarities in systems but they ask in FTAs that the patent is extended rather than as an additional IPR sitting above the patent (as an SPC does because EPC allows max 20-year patent length). UK clarified accelerated approval for patents which means patent adjustment is not as relevant for the UK.

4. Regarding Patent Linkage (which is one of the big three defensive areas for us in Patents alongside Grace Periods and PTE/A) – the US appeared to be looking to understand the UK system on the resolution of patent disputes for pharmaceuticals to see if there was room for manoeuvre to accommodate the existing UK system with their trade policy. The US used a new term 'Expeditious Resolution of Patent Disputes' (ERPD), which we interpreted as being the same as the Early Resolution Mechanism (ERM is lighter touch than Patent Linkage, with similar objectives). The US would like clarity on the time between notice given to innovative pharmaceutical companies where a generic has gained marketing approval for a patented product, and when the generic will go to market. They would also like clarity on what proportion of cases generics follow the 'Clear the Way' (due diligence) process, and what happens when they fail to do so.

5. USTR were very interested in what will be published in the FEP White Paper, particularly regarding the Unified Patent Court and they were looking for reassurance that data exclusivity periods will remain unchanged. We agreed to discuss further once the White Paper had been published. MP suggested this could be done on a more regular basis, by incorporating time in to our existing fortnightly JES VCs.

6. We recognise that several of the most challenging parts of the IP chapter in CPTPP were originally proposed by the US. We sought the US view of the suspended clauses in the IP chapter in CPTPP. USTR confirmed that what was in CPTPP was still a long way from what they originally sought in the IP chapter and that they believe the suspended clauses remain to tempt the US back in. US view is that even the removed IP clauses do not go far enough and would look to strengthen these in the future.

Report of Discussions and Outcome:

Introductions

1. MP (UK) introduced the day's session, split into 5 UK mini-presentations and 1 US overview of their non-paper. The session with focus on patents with respect to pharmaceuticals and health, topics covered will be:
    - Overview of UK innovation and how the patent system works with respect to pharmaceuticals/health system
    - A UK patent system case study
    - USTR to present their non-paper
    - Data/market exclusivity rules in the UK
    - Supplementary Patent Certificates
    - An overview of the UK Patent Courts

Department for
International Trade

2. CP (US) noted that they have more familiarity with the EU system following TTIP negotiations, but want to understand the UK specific system, and that they would be grateful if the UK could highlight ways their system currently differs, or will differ post-EU exit, from the EU system.

A) The UK's Innovative Pharmaceutical Economy

3. AT (UK) presented the UK pharmaceutical sector and outlined why the UK patent regime was central to this industry. The pharmaceutical sector has an annual turnover of £48.2 billion, it employs over 100,000 people from 2,000 businesses, and it is closely integrated with the UK's national health system. The UK sector has strong links with the international pharmaceutical sector. The strength of the UK science industry is critical to the strength of the pharma sector. These companies are looking to protect their investment in R&D and therefore have a great interest in the UK patent system. The UK government is one of highest spenders on the innovative pharmaceuticals industry, second only to the US on government expenditure in this area. When looking at the life sciences strategy in the wider industrial strategy, R&D is vital, therefore the patent system is key for maintaining and enhancing UK R&D and its foothold in the larger global R&D industry.

4. IP is a major pillar that supports the pharmaceutical sector as it provides a temporary and exclusive right that provides some security to investors for their upfront investment. This facilitates new drug production. IP protection is key for pharmaceutical research as there are high upfront costs and risks.

5. A fundamental principle that runs through the UK IP system is the balance of providing exclusive rights to encourage investment and innovation, whilst recognising there is a health need for these innovative products and therefore a need to ensure that they are appropriately available. The UK takes a balanced approach to our IP regime, considering the interests of generics, public and innovators.

6. As a result, the UK has one of best IP regimes when looking at Taylor Wessing global index: 1st in patents, 3rd overall and 5th for the global innovation index. We have a system that represents a high global standard and encourages other countries to provide IP rights as an incentive for investment into R&D as a source of innovation led economic growth.

B) Case Study on UK Patent System

7. NC (UK) presented a case study of the UK patent system to describe how it works in practice. There are 3 routes for filing patents available within the UK: UK Intellectual Property Office (IPO), European Patent Office (EPO) and Patent Co-operation Treaty (PCT). The focus of the case studies was on the UK and EPO routes as both systems follow the PCT process, the difference is that filing takes place in either the European or UK office.

UK IPO patent application

8. In the UK, the search and examination stages are performed separately. The search is conducted within 6 months of the request to identify prior art. The application is then published after the search and the applicant must request substantive examination 6 months after publishing. CE (US) asked if these were IPO current times or a target. NC (UK) clarified that those are their current times and these times are reducing. CE (US) then asked if there is there a backlog of applications and the number of applicants in the queue. NC (UK) responded that the search is

to be done within 6 months and average time for the whole process is 4 years. NC (UK) did not have the number available but this can be found out.

9. The IPO offer an acceleration option for patents which is free and can come in the form of a combined search and examination completed within 6 months or accelerated publication. It can be requested at any point in the process. Whilst there must be a reason for acceleration, it does not need to be onerous e.g. if investors are interested in the product want to see protection for the idea, or if the creation provides an environmental benefit. About 12-13% of grants have had some form of acceleration and 50% of filings have had a combined search and examination. The average time for accelerated options is 2 years and 10 months from filing to completion. CE (US) asked if an application can be completed within a year. NC (UK) explained there are some elements that cannot be accelerated due to statutory limits (e.g. 3-month third party observation period), but there have been applications completed in a year.

EPO patent application

10. The other route (for the UK) is via the EPO which operates under the European Patent Convention (EPC), a non-EU treaty (therefore no EU exit impact). There are 38 countries including all EU member states, but with extensions this number increases to 44. The UK is a founding member of the office which provides a single application that can cover multiple countries.

11. EPO application process - Through the EPO, there is one single application to cover multiple countries. When filing an application at the EPO, applicants select which countries they want their patent to take effect in (it can be costly to have patent protection in all available countries, applicants can pick and choose territories to be covered). Successful applicants are granted a bundle of national patents (therefore legal cases are dealt with in national courts). The process is like the UK system with search and examination undertaken separately. Within the filing examination stage there is an opportunity to appeal against the examiner's decision, heard by the boards of appeal. Once a patent has been granted (or notice of intention to grant patent is given) there is a 9-month window to oppose the patent. The full grant is only in power once any opposition has been resolved. There is a current backlog of resolution here.

12. Unitary patent process - A unitary patent can cover all those who are members of the Unitary Patent scheme (including multiple EU member states). This patent is upheld by the Unified Patent Court and therefore is taken out of the national legal system.

13. CE (US) sought clarify on dual applications: would a priority application at the UK IPO and the same application at the EU IPO proceed in parallel? NC (UK) confirmed both would proceed in parallel but there is an opportunity to warn the applicant of the duplication and if necessary the UK patent can be revoked. CE (US) asked whether this depends on what is covered. NC (UK) answered that we compare the EU and UK claims, if there is overlap the UK patent will lapse unless the holder decides otherwise. There is also an opportunity for the applicant to change their application. This process also applies in a similar situation involving the PCT.

14. The UK Patents Act 1977 is aligned with the EPC. It is desirable that we have close alignment on our systems, as it ensures consistency in the standard, which simplifies the process and lowers costs. We work closely with the EPO to share best practices and IP examination tools. The UK is an influential delegation at the EPO. The EPO is important to the UK and the US, with 90% of UK patents in force coming through the EPO route, 92% of US applicants for patents in the UK are through the EPO. This number is even higher for life science patents (98%).

Department for
International Trade

15. CE (US) was surprised the UK government ratified the UPC agreement before the UK's exit., and asked what the implications are for judgements of the CJEU, as the Court of First Instance which cover pharmaceuticals is based in London – what will happen post exit? NC (UK) confirmed we have ratified the agreement and we have a positive view of the court. We intend to stay part of the agreement throughout the implementation period (a transitional phase in which we will abide by EU rules). Beyond this is subject to negotiations. The FEP White Paper is due to be published; we can have a further discussion following its publication.

16. CE (US) asked about the constitutional challenge in Germany which is holding up their ratification. If this process takes longer than expected and the UK leaves before then will the UK's ratification be null and void? MH (UK) responded that we are not sure but are preparing for all eventualities.

17. CE (US) asked if within the EPC, is it possible to still get coverage for EU members and then get a bundle of patents which also covers the UK, Switzerland, Norway etc. Would these patents be subject to the Unitary Patent Court (UPC)? NC (UK) said this was the case, but we will need to come back on whether they would be subject to the UPC.

18. CE (US) accepted that these are difficult questions but there is interest amongst US stakeholders given importance of UK markets and they are strongly in favour of the Unitary Patent due to reduction in cost and simplicity. MP (UK) stated that it is helpful to ask now as when we get clarity these can be bought up in future working groups or on VCs.

19. *Deviation from the EPC* - CE (US) explained that the US understanding is that under the EPC obligations, national law must conform with the convention. Is it possible that the UK could diverge from the convention to, for example, adopt a grace period? NC (UK) clarified that the convention is clear that patents need substantial alignment. We are not sure the degree of deviation allowed, but how the current system works would suggest that alignment is important. CE (US) followed up asking whether it would be possible as a purely legal matter. (UK) indicated that there are already some legal aspects where we have taken a different view to the EU courts, so it is not impossible although these divergences are often to do with interpretations e.g. patentable subject matter.

20. CE (US) has seen situations where some parties to the convention have a 12-month grace period compared to the 6-month restricted standard within the convention – could the UK offer more generous grace periods? (UK) stated that we take our standing in the EPO seriously, the grace period question is important for all applicants and choosing to deviate from the EPO is not something that would be politically helpful. Legally there is an element of interpretation which could be challenged in other states who currently have a grace period.

21. MP (UK) suggested it would be useful to see any US research on this area if possible. CE (US) answered that the driver behind the research was a meeting with UK stakeholders who had positive views of grace periods. As a result, the US wanted a view of grace periods in the context of Europe but accept that it does create political problems. UK adoption of a grace period could signal to other countries that there is value more generally in getting one. NC (UK) stated that UK stakeholders are not against grace periods but they would want global harmonisation i.e. getting China and Europe on board and third party safeguarding.

22. ZS (UK) explained that currently it is difficult to answer the question around what value a grace period would add for UK businesses and consumers. Changing the current system would cause practical problems, which would mean that organisations filing in the UK (as opposed to other EPO countries) would then only be able to get a UK patent (although there would be

some residual value in having a UK one available if they are not eligible for an EU patent following disclosure). There is the possibility of a UK grace period showing others that there is value in having a (longer) grace period and encouraging the adoption of a grace period.

23. CP (US) provided trade context: within US FTAs, they (USTR) like to include 12-month grace periods and this could come up in stakeholder consultations. The grace periods enable the biotechnology industry (and others industries) to publish findings in academic conferences without losing chance of patenting. NC (UK) highlighted that when the IPO talk to technology transfer offices about grace periods they strongly encourage stakeholders to file first then publish, which is the convention that they now follow. NC (UK) highlighted the historic and cultural differences which have led to stakeholder behaviour with respect to filing.

24. Patent eligibility - CP (US) mentioned that there have been conversations about patent eligibility standards in previous FTAs. FTAs provide an opportunity to ensure the same standards of new uses, and plant matters are patented in the other Party. NC (UK) suggested that it would be helpful if the US could provide an outline of what they are interested in in this space.

25. CE (US) has found that (half of their) stakeholders support, and the other half oppose, the new US policy: the Myriad case (*Association for Molecular Pathology v. Myriad Genetics*) ended 20 years of practice on granting patents for isolated gene sequencing (an issue previously seen as settled). The USPTO issued guidance that changed how they examine applications especially with respect to abstract ideas. Additionally, industry have put forward proposals to look at statutory language changes for subject matter eligibility. This is favourable for users of technology as there are fewer patents, innovators oppose this as they lose out on their investment into R&D.

26. The legislation is divisive, life sciences are disturbed about the direction taken due to the uncertainty it causes. The issue is setting up for Congressional action – however there have been higher priorities recently and this will carry on over the next few months, whilst waiting for the Supreme Court vacancy to be filled. The new USPTO director is interested in the patentable subject matter issue and they are hoping for a positive change that provides more certainty and a broader swathe of eligibility.

27. CP (US) highlighted there are constraints surrounding what is eligible to be patented/available for patenting in India (who have included an extra barrier to pass before something can be considered as inventive), Indonesia and Argentina with the US working to open this restriction. There is no guarantee of a patent being granted but it is better to get patent for new formulas. NC (UK) added that this is mirrored by UK stakeholders.

C) US non-paper presentation – Patent Term Adjustment, Patent Term Extension, and Data Exclusivity

28. Patent term adjustment - The US offer patent term adjustments for office delays (section 154) where applicants are entitled to an adjustment of their patent term for delays attributable to the USPTO. Statute sets USPTO deadlines and failure to meet these entitles applicants to a one-day extension on the patent term for every day of USPTO delay.

29. Patent term extension - The patent term extension (section 156) is offered for delays in the granting of marketing approval for regulated products i.e. drugs and medical devices which are defined by statute. This extension is on top of any other adjustment to the patent term. The two sources of delay are separately compensated. Extensions are 0.5 day per day spent during

clinical examination, and after that is 1 day for 1 day from filing for new drug to new grant by the FDA for marketing approval.

30. There are limitations and considerations for extension as well as a due diligence requirement, there is a statutory time limit of 60 days to apply for the extension. There is a mechanism between the USPTO and FDA for calculating what the extension term is.

31. DB (US) explained that there can be multiple patents that could claim different aspects of a particular pharmaceutical product. The extension available for the marketing delay with respect to the FDA review is available for only one patent for each product so the applicant must choose. NC (UK) confirmed this is the same in UK and asked what happens when more than one product is covered in single patent. DB (US) stated that the extension is for the term of the entire patent but the rights enforceable are only for what was reviewed by the FDA.

32. LMQ (US) highlighted that a patent covering multiple products would require the applicant to decide which product would be covered by the patent and so have the rights of extension. CE (US) explained that if a product is approved for a medicinal indication, but the applicant was then using the product for something else, e.g. 'paint thinner' this application is outside the scope of protection which is only granted for what has been authorised (in this case a medicinal indication).

33. LMQ (US) stated that the principle of the US system is similar to the UK/EU supplementary protection certificate (SPC); SPCs say upfront what the limits of extension are and the US is similar. CE (US) highlighted that in the US the Patent Term Extension is an extension of the patent term but in the UK the extension sits on top of the patent as a separate IP right. However, there are similarities e.g. one per product and maximum extension of 5 years.

34. Data exclusivity - This is separate from patent exclusivity. The US data exclusivity system works in same way as in Europe. When the innovator files a new drug application for a new drug product they must provide clinical data to show efficacy of this drug. The FDA then assess and approve, if appropriate.

35. Data exclusivity provides protection if another party seeks to get approval for the same drug product by filing a generic application using previous clinical trial data, without first party consent. The basic term of protection is 5 years during which another party cannot apply with reference to the innovators data. An additional 3-year protection is available for new clinical indications.

36. For orphan drugs there is 7-year data exclusivity protection, to incentivise development of a drug for rare diseases. In the US this is defined by less than 200,000 diagnosed (in Europe it is a prevalence of less than 5 in 10,000 people – there are different thresholds for this exclusivity between US and Europe).

37. There is an extension of exclusivity for paediatric studies (similar to Europe SPC extension). Additionally, there is further exclusivity protection for antibiotic or anti-fungal drugs of 5 years on top of any other existing extension.

38. Patent linkage - The US operates a linkage system through which a generic that makes an application for FDA approval of a generic drug using an innovators data, must make a certification as to the drugs patent status. The FDA then alerts the innovator that an application has been made for a product against that patent. The US has an "Orange Book" pharmaceutical patent database, which allows them to action the linkage and gives transparency to generics as to the patent status of the drugs.

Department for
International Trade

39. The linkage system is different between biologics and small molecules, as the Hatch-Waxman Act did not settle these issues. The Biologics Price Competition and Innovation Act is subject to a long Congressional debate which is linked to the difference between small molecule drugs and biologics. US stakeholders are relatively happy with how things are working so far; however the 12-year extension was a point of contention (some US stakeholders have sought 15 years).

40. UK asked what the reason for was giving 12 years. US responded that a key reason is the difference between the manufacturing process for small molecules and biologics. Small molecule generics can be created as an exact copy of the patented pharmaceutical; this process is relatively straightforward. Biologics are complex molecular structures, and the configuration depends on how it is structured e.g. how it folds (Scientific term – Protein folding, which determines the physical structure of the molecule). Biologics are therefore defined by how they are made, rather than their chemical structure. This means it is difficult to define within the patent what has been created as a biologic, and therefore to exclude competitors, as a competitor could use a different method to create something biosimilar (biosimilar – term used for a generic biologic pharmaceutical) which thus avoids patent infringement.

41. When arriving at the 12-year mark, the US considered the importance of the biotechnology community and the two forms of exclusivity (patent extension and data exclusivity). For small molecules the average total term of market protection was 11.5-12 years, which was why they settled on 12 years for biologics. It is also expensive to get a biologic product to market ($1-$1.2 billion) from innovation/R&D to clinical trials and onto market. The balance in the US is to incentivise the creation of new products but to also enable affordable, similar products onto market, in order to meet the requirements of both consumers and innovators.

42. MP asked how has this played out in NAFTA 2.0, has data exclusivity featured given it was a challenging area for TPP. CP (US) replied that the NAFTA negotiations are on-going, but exclusivity is an important objective for US. It has not been welcomed by the (Canadian) generic pharmaceutical industry.

43. NC (UK) asked what the impact is on generics for the delay to market. (US) Research has been undertaken to examine how long it takes to get biologics onto the market which found that biosimilars were coming to market approximately 16-17 years after the original biologics were approved. This has been attributed to the long test process. NC (UK) pointed out that the processes around approving biologics is always changing and the speed at which regulators are operating mean the timing might look different in the future.

D) UK Data/Market Exclusivity System

44. DE (UK) presented the UK's approach to Data/Market Exclusivity. Within the UK there is no difference between biologics and small molecule pharmaceuticals (aside from orphans). Exclusivity lasts for 8 years and during that time other organisations cannot use or reference the innovator's data. Data extensions are enforced after the market protection term, which is 2 years, during which generics can manufacture but not market. Data extensions can result from a change in the product classification e.g. from Prescribed to Over the Counter and only apply to the data which pertains to that change in classification. There is a potential further 1-year protection for a new indication e.g. new target disease or different phase of disease, but the application for this must be submitted in first 8 years.

Department for
International Trade

45. Market exclusivity is for orphan drugs/treatments only – the prevalence of these types of condition is low, c.5 of 10,000 of the EU population and must be severe e.g. chronically debilitating. There is an additional explanation that without the exclusivity recouping of R&D costs would not be possible. The total protection in the UK is for 8 + 2 + 1 = 11 years. The starting point is when the innovative organisation is granted market authorisation, and this runs in parallel to the patent term.

46. CP (US) asked for clarification about the 1-year data exclusivity protection. DE (UK) explained that it is not market exclusivity but is used to compensate for additional studies that are required to show the efficacy of the treatment. This 1 year only applies to the data that is used to prove the efficacy of the change. Market protection means others can see the data, but they cannot sell the product. They can secure market authorisation as authorisation is based on safety and clinical examinations. Extensions are capped at 11 years compared to 12 years in the US.

47. (US) This process comes from an EU directive but does UK law mirror everything that is in this directive? DE (UK) said that we think so with respect to the national court procedure, but we will come back on this. Prior to 2005 when directive came into effect there was a patchwork European approach to extension times: Centralised, decentralised and national – 3 tiers. National aligns with decentralised but we will confirm if UK law requires alignment.

48. The authorisation process is a national process. An applicant only seeking to go to market in the UK would present to the MHRA for approval after which the 8 years exclusivity + 2 years data extension + 1-year extension for a new indication model would apply. Innovators would go to the decentralised tier to get European coverage. There are 2 forms of mutual recognition: where the application is recognised in one state but also wants coverage in others, and where applicants want some but not all states covered. In both scenarios the countries have opted in for 8+2+1 model.

49. CE (US) asked if there would there be any change to the structure following the EU exit. DE (UK) confirmed that we are seeking associate membership of the European Medicines Association (EMA) which would need high alignment with EU. But we cannot comment further at this stage.

50. CE (US) asked if the non-EMA centralised process would apply for the UK or is this subject to negotiations. DE (UK) confirmed the UK are seeking to be part of whole regulatory framework including in the decentralised process. CE (US) asked what would happen should there be objections to new guidelines that UK did not want to apply. DE (UK) answered that this would need to be thought through in our associate membership agreement. We would want flexibility to decide which guidelines the UK would follow. An associate membership would also likely help limit any border problems with shipments that are currently envisaged.

51. (US) To get the 5-year exclusivity period in the US it must be the first time they have approved the active ingredient present in the product, is this the case in UK? DE (UK) There is no data exclusivity for an existing active ingredient, but we are happy to come back to the US on this.

52. CE (US) asked about the case where the applicant was using a compound which combines a previously approved active ingredient with new active ingredient, using new data and not referencing old data. Is this able to obtain the new exclusivity? MP (UK) answered that this is one to take away and respond to later, although any case studies for this would be helpful for us to see. DE (UK) said, on a similar note, once an orphan drug is approved and given exclusivity it would block similar substances seeking protection for the same indication. However different approaches for developing an orphan drug treatment could be on the market. (**Action** – MP to follow-up with DE and MHRA colleagues to confirm several points outlined above and agree to further VC with the US on specific questions)

Department for
International Trade

E) UK/EU Supplementary Protection Certificates.

53. NC (UK) presented on SPCs. Like the patent term extension, SPCs are a national right, however they are provided for by EU regulations i.e. if you want an SPC in the EU you must approach individual states separately, but the laws governing the conditions for the SPCs are set out in EU regulation. This does have consequences for EU exit.

54. The SPC enters into force when the patent expires and provides a further period of exclusivity to compensate delay whilst waiting for marketing approval for the drug. However, unlike the US, it is not an extension of the patent, it is a separate IP right. SPCs are applied to encourage innovative pharmaceutical research and create a consistent system across the EU. The UK cannot currently create a patent term extension as there is a 20-year patent term limit under the EPC and extending the patent term would exceed this 20-year mark.

55. SPCs protect pharmaceuticals and plant products including pesticides. An SPC adds patent protections to the combination of active ingredients for which the marketing authority has been obtained. It is possible to have multiple SPCs from one patent. SPCs are available in the EU for medical devices (this is subject to litigation following the application for an SPC for a medical device which was rejected by the UK IPO). There is also a wider EU review of the whole SPC system.

56. CE (US) asked what is the point of contention with respect to medical devices. (UK) The contention is a legal question over the current drafting of the SPC regulation; whether a medical device meets these conditions. The case currently underway relates to a combined product that also administers the drug, so it is at the borderline of what is a product and a device.

57. The US asked if multiple SPCs can run concurrently. NC (UK) answered that it depends on marketing authorisation for that compound. SPC protection only extends to protect for the compound that was approved.

58. NC (UK) explained that between 1993 – 2016 there were 749 SPCs: 639 for human/veterinary medicines and 45 of those for veterinary are UK only patents and those that relate to plant protection account for about 10% of the 749. CE (US) wanted to know how does this compare to other EU countries. NC (UK) clarified that the UK is one of the bigger granting authorities and that Germany has similar numbers.

59. NC (UK) highlighted that for plant protection, the product's data exclusivity period is more important than the SPC, as the innovator company invests in modifications or new uses of existing ingredients rather than inventing new active ingredients (seeds).

60. Calculating term length - The term length is the difference between the filing date of the patent in Europe and when authorisation is granted, minus 5 years. NC (UK) stated that stakeholders have not raised any issues about the UK system in this area. Whilst there are different formulas between the US and UK both generally come to the same conclusions. There is an additional incentive for paediatric medicines of an additional 6 months exclusivity.

61. CP (US) thought that we should look at case studies of patent term extension and SPCs that show similarities between the US and UK regimes. All agreed that his would be a useful next step.

Department for
International Trade

62. CE (US) highlighted that there is a dashboard within the USPTO which shows progress of getting through the current backlog.

63. CP (US) mentioned that the June statement refers to an agreement made on SPCs within the withdrawal agreement – what was this agreement. NC (UK) clarified that there was an agreement regarding SPC applications which are pending when the UK leaves the EU. The agreement is that EU regulations would still apply to those applications that have already been filed.

64. CP (US) asked if post EU exit, will EU regulations on SPCs apply. NC (UK) stated that the Withdrawal Act carries over EU legislation for the interim period to provide certainty for business, but that the future system is subject to the negotiations of the FEP.

65. NC (UK) highlighted that there were UK stakeholder concerns regarding the EU SPC Manufacturing waiver and there is ongoing consultation with stakeholders (innovators and generics). The proposal allows a generic manufacture to produce SPC protected medicines if done exclusively to export to non-EU markets where such a protection has expired or never existed. Innovators do not disagree in principle, however there is concern around stockpiling of non-exported products, for day 1 generic entry. From a legal standpoint we (UK) are concerned about the lack of clarity in the text. There also needs to be clarification around whether this change will be to new SPC applications or if it will apply retrospectively.

66. CE (US) described a scenario where the UK leaves and cannot agree with the EU on medicines, and implied that this would make the UK an export market. Will this lead to an issue with markets being flooded with competitor products. NC (UK) answered that this will be considered during the FEP negotiations.

67. CP (US) stated that stakeholders are concerned about stock piling, export exceptions and the proposal the European Commission (EC) has made. The US are concerned how it could expand/morph in parliament and are monitoring closely. NC (UK) highlighted that the UK still has seat at the table to influence the proposal and the EC want an agreement by May 2019.

68. The US asked if a patentee can get a SPC even if they were not the original party that submitted the data for the approved product. (UK) The SPC right follows the patent, so this could be possible.

69. Negative SPC - A rare but possible strategy when marketing authorisation was granted within the 5-year period. This would result in a negative term SPC; however, innovators do apply for negative SPCs to which there are additional extensions e.g. an applicant has their application approved in 4 years and 9 months. Under the formula 5 years would then be subtracted leaving them with an SPC of negative 3 months. However, by obtaining this SPC they can then add extensions to it which provide protections e.g. a 6-month paediatric extension (giving the applicant a 3 month right).

70. CE asked if SPCs can also apply to biologics. NC (UK) confirmed this was the case. CE (US) asked how an active biologic is defined. NC (UK) explained that this has not yet been tested in the courts and only a handful of biologics have got far enough to qualify for SPC protection. As SPCs fall under EU law there is a role for the CJEU which can interpret the legislation with referrals mainly to provide clarity. CJEU is not bound to follow its own precedent and some interpretations have created uncertainty. Our relationship with the CJEU depends on our FEP negotiations.

Department for
International Trade

71. CP (US) asked about the Chequers statement which states that there would be due regard to CJEU statements. When will this apply, and would it be only for those rules that form part of the common rulebook? MP (UK) stated that discussions on the details of this should take place in the coming weeks, and it would depend on the FEP negotiations.

72. CE (US) asked with regards to the paediatric extension, does it apply to any paediatric studies or only ones that apply to whole paediatric population (0-18 years)? NC (UK) explained that applicants must develop a paediatric proposal plan and that then makes them applicable for the extension if it is approved.

73. CE (US) asked about any controversy regarding what constitutes an active ingredient. NC (UK) stated there have been challenges, for example where a later product has been authorised for the same active ingredient but the patent it relies on is a new active pharmaceutical ingredient, this opens the possibility of having an SPC even though there is already an authorised product. CE (US) explained that the reason for asking is that there is controversy whether two molecules are classified as the same or different, for different uses (the contention lies around the understanding of statute definitions). NC (UK) stated that the UK has had cases exploring what is a product and what is an active ingredient. We can provide cases which highlight the differences.

74. CP (US) stated that an element of US trade policy that relates to SPCs is that the system should extend the rights and benefits of the patent, there is a footnote in TPP that addresses this issue in relation to the Canadian system. The Chequers statement references the UK exploring the possibility of joining CPTPP, which has many suspended provisions which are of importance to US. However, USTR feel that even the suspended provisions do not reach the level of ambition that the US are looking for on IP for future trade agreements. Those suspended provisions are important to the US and they would like to take them further. MP (UK) asked for USTR thoughts on why the remaining states removed/kept the IP clauses that they did. CP (US) thought that part of IP suspensions could be to draw the US back in later with concessions in these areas.

F) UK Court System for Patent Disputes

75. NC (UK) provided an overview of the UK court system with a focus on how it functions for patent disputes. The UK is a common law jurisdiction, so the legislation sits alongside precedent. The IP courts are civil courts with no juries, and the judges are IP specialists, who often have an extensive background as IP barristers.

76. There are three tiers of court the Patent Court (High Court), the Court of Appeal, then the Supreme Court. There are low-cost options (IPEC and SCT) within the legal system which can be suitable for many IP disputes. The Court of Appeal sits as panel of 3 judges however it is not uncommon for pharmaceutical disputes given their size to go to the UK Supreme Court.

77. Injunctions - In most IP cases judges are hesitant to grant what they see as draconian injunctions but for the pharmaceutical sector where generic launches can cause unrecoverable losses to the innovator, judges are more willing to grant injunctions. Generics must show they have followed due diligence (using the clear the way doctrine) before launching a generic that could infringe on an active patent. The clear the way doctrine specifies that generics should seek revocation of patent or declaration non-infringement of patent before proceeding with their generic product.

78. CE (US) highlighted there is no linkage in the EU, is this the same in the UK? NC (UK) confirmed this is the case. In lieu of this, there is a case law onus on the generic to make their way through the litigation procedure before launching. The “clear the way” doctrine looks to balance out their

power of knowledge (of innovators products) by having them obtain the necessary clearances from all required parties before proceeding with their generic.

79. The UK system is quick to launch injunctions and they can be done in the same day, with case studies showing that they have even been granted by phone over the weekend. Stakeholders have expressed no concern about the time taken to grant injunctions. The UK has one of the shortest litigation processes in the EU (12 months). If the generic is found not to infringe the patent, the generic can claim damages to offset loss from speculative claims of infringement.

80. Publication of marketing approval - Marketing authorities are not involved in the process to determine what (if any) infringement is occurring when a generic applies for authorisation. The market authorisation process is purely scientific, concerning the clinical, safety and health implications of the product. Therefore, a generic can get market authorisation even if litigation has commenced. MHRA publishes all products that have received marketing approval monthly. Innovators can see any generics who have gained marketing approval and take legal action if required.

81. CP (US) asked how soon after the publication of marketing approval can the generic drug launch. DE (UK) stated this can vary and there is not an allowance for determining this within the marketing authorisation process as this could withhold marketing without a scientific rationale, which is against the EU regulations. The drug could go to market two days after receiving authorisation. The EMA sends out a preliminary notice: a draft of what products they plan to authorise, this is published online 60 days before the final authorisation on an EU level. The MHRA publish this monthly but there is no preliminary launch at the UK level.

82. CE (US) asked what information is made available at UK level. The US are trying to understand if the UK process is akin to linkage without statutory linkage provisions. The information published is key to understanding this, what information is published that would allow innovators to know the generic company that is about to infringe. DE (UK) explained that the EMA and MHRA publication lists provide a range of information, including the molecule/product, the name of the company who has made the application. We can provide links to the EMA and MHRA table that are published. (**Action** – MP to follow-up with DE to provide relevant links via email to USTR)

83. CE (US) followed up by asking if there is no forewarning to innovators beyond the MHRA list unless the generic has undergone due diligence. NC (UK) explained that whether the generic followed the due diligence is part of whether they would be hit by an injunction, this legally incentivises generics to follow the due diligence process.

84. CE (US) asked what percentage of cases do generics fail to follow the due diligence, and causes innovators to seek an injunction. NC (UK) said this is hard to measure but feedback from stakeholders is that the process is efficient and satisfies their need. There has been no demand for alternative approaches.

85. CP (US) stated that within US trade policy, patent linkage (also known as Expeditious Resolution of Patent Disputes) is an opportunity for innovators to resolve any issues before having to more extensive legal proceedings. With the key emphasis on providing notice, and fast resolution. MP (UK) an action for the UK is to show the US some case studies of use of clear the way and use of injunctions.

86. MP (UK) concluded by thanking the US IP delegation for 3 days of productive talks at the SME Dialogue and TIWG 4.

Department for
International Trade

Key Actions and Next Steps:

- **UK patent filing process:** UK to provide the current backlog of patent filings in the IPO.
- **Unified Patent Court:** Once the UK has further clarity on the FEP negotiations and the implications for the UK's membership of the UPC we can discuss either at future TIWGs or via video conferencing.
- **Patent eligibility:** The UK to ask the US for an outline of what they are interested in exploring further with regards to patent eligibility. USTR highlighted that there have been conversations about patent eligibility standards in previous FTAs and how does it match with the UK.
- **Data exclusivity:** In the US, to get the 5-year exclusivity period it must be the first time they have approved the active ingredient present in the product. DE (UK) did not think there is data exclusivity available for an existing active ingredient but UK to come back on this.
- UK to respond on the possibility of a **combined compound** using a previously approved active ingredient with new active ingredient using new data and not referencing old data to obtain new exclusivity.
- **SPCs/patent linkage:** UK and US to review patent term extensions and SPCs to highlight the similarities between the two regimes.
- UK to provide links to the **market authorisation tables** published by the EMA and MHRA which lists those applications that have obtained marketing approval.
- UK to provide case studies showing the **due diligence procedure** (clear the way) and the use of injunctions to protect innovators in scenarios where due diligence is not followed.
- **Active ingredients:** UK to provide cases that explore the difference between a product and an active ingredient.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

- There was mutual recognition that this was a conversation between two of the world's leading countries with regards to patent policy. The US were testing our system and eager to push their positions but all in a highly respectful manner. Nicki Curtis (UK IPO) and Charles Eloshway (USPTO) both demonstrated a depth of knowledge of one another's systems. I would recommend that a useful way to move the agenda forward is for further expert sessions (via VC) to tackle detailed points.
- We have reached a point (for Patents in Pharmaceuticals/Health) where beyond specific policy details in niche areas, we are awaiting the clearance to negotiate and exchange text to really take significant further steps. There is however significant scope to discuss patents in other areas at future sessions, in particular: Technology and Agriculture/Chemicals.
- The agenda for TIWG 5 should focus on broadening the patent discussion to ensure that all areas have been covered and to tease out further thinking from the US in the area of Patent Linkage/ERM/ERPD. (See IP Session 1 note for further IP topics to be discussed at TIWG 5)

Department for
International Trade

SERVICES: FINANCIAL SERVICES

Date: 11 July 2018

Time: 13:00-16:00

Participants:

Name	Department/Directorate
Rebecca Fisher-Lamb	DIT – Trade Policy
Johanna Michael	DIT – Trade Policy
Sukhmani Khatkar	DIT – Trade Policy
Michael Drewett	DIT – Trade Policy
George Radice	DIT- UK-US Trade Policy
Elizabeth Sutton	DIT – Legal Advisers
Jaya Choraria	HMT
Matt Mueller	HMT
James Flannery	HMT
Harriet Nowell Smith	HMT – Legal Advisers
Shirley Rhone	HMT – Legal Advisers
Umar Akram	HMT
Lauren Skarkou	HMT
Haytham Agabani	HMT
Matt Sullivan	US Treasury
Matt Swinehart	US Treasury
Laillee Moghtader	US Treasury
Tom Fine	USTR

Key Points to Note:

- UK talked through high-level principles for Financial Services on mutual benefit, ambition, resilience and comprehensiveness. US was generally positive and receptive. They agreed on shared ambition but noted need to understand EU angle and consider details.
- UST presented on their approach to the FS chapter. We had a detailed and useful discussion which has deepened our understanding of the US approach and sensitivities and clearly illustrated to US counterparts UK readiness to engage in the detail.
- We agreed to continue specific discussions on FS at next TIWG.

Report of Discussions and Outcomes:

1. Opening Remarks

HMT (JC) welcomed UST and USTR, noting that we are delighted to have first the substantive discussion on the approach to Financial Services (FS). The focus of the discussion is FS in FTAs to lay the groundwork for FS provisions in a future UK-US FTA. The discussion builds on the brief

Department for
International Trade

discussion of FS part of the US "5-Chapter Model" at TIWG2. HMT recalled that the US presentation of its Non-Conforming Measures (NCM) approach to services and investment at TIWG3 excluded financial services. HMT noted that the agenda for this session was, firstly, for the UK to set out high level principles for the approach to FS in FTAs and, secondly, for the bulk of the discussion to focus on the US presentation of their approach to the FS chapter and discussion of this. UST (MS) agreed with the agenda.

2. UK Approach and High-Level Principles

HMT (JC) noted that HMG was in the process of developing the UK's approach to trade and investment policy. At this stage, we can outline principles and objectives of our approach with the caveat that the discussion is exploratory and without prejudice to future policy positions for a UK-US FTA which we would being to set out in the Autumn. HMT invited DIT to briefly recap on broader services discussions.

DIT (RFL) recalled technical discussions on cross-border services and investment issues at the last working groups and noted it was great to be able to dive into the detail on specific sector approaches, whilst making sure we are linked up across the piece.

DIT noted that the Prime Minister had emphasised in her Chequers statement that a key test for any agreement with the EU will be the UK's freedom to exercise an independent trade policy. The Prime Minister has made clear that the UK will maintain flexibility to secure ambitious trade agreements that are in our economic interest. The UK set out in the plenary session a future US/UK trade deal remains a top trade priority for the UK. The Chequers statements and the message from our Ministers has been clear that we will strike different arrangements with the EU for services, where we feel it is in our interests to have regulatory flexibility. Across services, HMG will need to take a case by case approach to each issue in each area, to consider what is in the UK economic interest going forward.

HMT (JC) noted that the PM's statement recognised that current levels of market access would not remain the same and explained consequences for financial services. The PM has been clear that passporting will come to an end, but the UK retains its aim to protect stability and preserve the benefits of integrated markets. The Chancellor had previously been clear that equivalence was not sufficient. HMG still wanted an ambitious outcome with the EU. HMT asked if the US had any initial questions and noted plans to discuss EU Exit in more detail in a subsequent HMT-UST bilateral meeting.

The US (LM) acknowledged that UK policy is under development and appreciated that achieving positive negotiating outcomes with the EU is key to UK objectives; they too had one eye on Chequers outcomes.

<u>HMT (JC) outlined the UK's 4 principle for FS in FTAs:</u>

1. **<u>Mutual Benefit</u>** – The UK and US are the two leading global financial centres, unparalleled in size, internationalisation and sophistication. Similar levels of FS exports in absolute value – almost £15bn in UK exports and over £12bn in US exports. FTA discussions are supporting and enhancing our already strong relationship in FS is in our shared interest. The possible FTA exists in the broader context of already substantial FS flows, business relationships that work well, and comprehensive and effective government and regulatory cooperation.

2. **<u>Ambition</u>** – A possible UK-US FTA, within financial services, can redefine what is possible in an FTA. FTAs are currently limited on FS – models such as TPP and CETA are an inadequate benchmark. We should not be constrained by what is already on the shelf. We have the opportunity to set a gold standard.

Department for
International Trade

3. **Resilience** – Financial services are unique due to their interconnectedness and centrality to the economy. Both jurisdictions already adhere to the highest regulatory standards and continued cross-jurisdictional cooperation is key to ensuring financial stability, market integrity and consumer protection. Given the structural importance of FS to the economies of both parties (i.e. the size of our FS sectors of GDP is 6.5% in the UK and 7.3% in the US respectively), clarity of application of a possible future FTA is essential.

4. **Comprehensive** – The UK emphasised that a possible future deal should be comprehensive – various options for delivering a comprehensive FTA are under consideration. These include enhanced market access commitments, robust dispute settlement provisions, structures for cooperation between the parties' authorities and ensuring an appropriate level of prudential safeguarding.

   US (LM) responded that they share the goal of having strong agreements and noted that details will be developed over time. From the US side, further elaboration requires better understanding of how developments play out between the UK and the EU.

3. US Presentation

US Treasury (MS) opened by noting that the presentation provided an overview of the US' historic approach to FS in FTAs, without prejudice to future negotiating positions. Historically, FS has been included in all US FTAs. US FS disciplines build on the principles laid down in the WTO.

UST (MSw) clarified that the FS components of their FTAs have always focussed on market access rather than cooperation on regulatory issues. UST noted that some confusion had arisen around regulatory cooperation provisions in TTIP – US policy is to develop comprehensive financial services provisions in FTAs, but exclusively in relation to market access.

UST (MSw) agree that financial services are subject to unique considerations which is why it is essential for financial services to be covered by a standalone FTA chapter – these considerations are primarily the primacy of prudential regulation and the role of FS as the "nervous system" of the whole economy.

A. **Scope** – UST (MS) noted that FS Chapters apply to financial institutions, investors and their investments in financial institutions and cross-border suppliers of financial services.

   In US agreements, a financial institution is defined by reference to the domestic law of the parties. In the US system, this definition relies on whether a firm is regulated as an FI (for instance, if it is subject to regulatory capital requirements).

   UST (MSw) also noted language on "in like circumstances" to ensure direct comparisons between like financial institutions – e.g. applying the same principles to firms operating in the same FS sub-sector – to permit consistent interpretation of the agreement.

B. **Coverage** – UST explained that US FS Chapters apply to all commercial presence, and to a specific set of cross-border financial activities. In the US view, the most up-to-date model for cross-border commitments is that found in TiSA.

   HMT (JC) pressed on US thinking about whether cross-border commitments can be expanded, including proposals from US industry. UST noted that there have been recent innovations on cross-border commitment in the US model – Portfolio Management Services and Electronic Payment Services were added in TPP and have been carried over into NAFTA 2.0. However, UST has no current view on where cross-border commitments can be expanded.

   USTR asked about UK industry thinking on additional cross-border commitments. HMT (JC) noted that we are at the early stages of getting input from industry.

Department for
International Trade

Additionally, UST (MSw) noted that Financial Information & Auxiliary Services can be interpreted broadly, potentially covering FinTech. HMT (MM) noted that Fintech is an important area where we should explore how we can use definitions and provisions to keep FTAs up-to-date, allowing FS trade policy to "move with the market".

C. **Core Obligations –** The US focussed this section of the presentation on the obligations they see as core to the agreement – National Treatment (NT), MFN, Market Access, Transfer of Information, Transparency & Institutional Structure.

For NT & MFN, UST reiterated the point on coverage "in like circumstances" permitting direct comparison between firms in individual sub-sectors.

NT now applies across all commitments and is now much cleaner, but negotiated outcomes can result in deviations.

On MA, the US follows the approach taken in GATS.

HMT (JC) queried how the MA provision applies for FS in KORUS – excluding cross-border provisions. UST (MSw) clarified that there has been a change of US approach post-TiSA – mirroring the wider cross-border services approach. This new approach provides additional clarity about what the agreement covers and what is permitted. HMT (JC) pressed the US on the rationale for MA obligations not covering cross-border supply of financial services in earlier US agreements and asked whether the new US approach was more like CETA where the FS chapter pulled in MA for both mode 3 and cross-border supply of services.

UST provided background on how MA provisions have been drafted. In the early 90s, the novelty of GATS negotiations engendered different approaches, including a divergent model for FS as a result of separate FS negotiations. The US has looked to tighten up MA drafting in recent FTAs to ensure consistency across different parts of the agreement and that all differences are intentional. However, consistency of form is subject to negotiations – the form of TPP was a function of negotiations taking place with 11 other parties.

More generally, the US is also prepared to consider where things can be made consistent – for instance on transparency (as in TiSA) and the list of cross-border commitments. HMT (JC) asked about the rationale for having a specific commitments section which was a mix of different elements. What was the value of having commitments e.g. on EPS that were best endeavours and didn't seem to include national treatment obligations. US (MSw) noted that whilst they take a different form from other market access commitments it is important to ensure cross-border obligations are treated in the same way as other commitments (i.e. subject to MFN/NT) especially where commitments are being added – i.e. on EPS/Portfolio Management in TPP.

UST (MSw) flagged that ensuring NT and guaranteeing consistent legal form for cross-border obligations for financial services is a US priority.

D. **Data & Transfer of Information** – UST and USTR noted that the US has a broad objective to prohibit data localisation requirements for FS and that this is a key interest for the US. This is subject to assurance that regulators will have access to relevant information required to carry out supervisory functions, particularly in a crisis scenario.

UST (MSw) acknowledged that this is a new area of FS trade policy development, especially relevant to restrictions on flow of data in EMs (China, India etc.).

UST (MSw) referred to TiSA proposals as an example of a "best offer" on data. HMT (JC) noted language on "immediate, direct, complete and ongoing" access to firm-level data for regulators in the proposal on data localisation and asked how these terms were defined. UST explained that this language is derived from discussions with US regulators when reviewing rules on data access and targeted localisation measures. US regulators have experienced narrow – but significant – problems regarding access to data, particularly in relation to developing markets.

Department for
International Trade

Supervisors receive data through a portal – moving away from on-site regulator inspections – but need to be able to access in real time. Immediate does not mean instantaneous but 'on demand'. HMT (MM) probed on the difference between immediate and instantaneous. UST (MSw) suggested this was the difference of milliseconds and that the crucial point was that regulators have access when they need it without any delay.

UST explained that this is especially relevant in the context of resolution, where flow of data to supervisors needs to be close to instantaneous. Key is that regulators get what they want when they need it. US position is informed by targeted approach to individual firm supervision and general tightening-up post-crisis, during which several cross-border resolution scenarios were played out. In the US view, the bottom line is that regulators get access to firm-level data and have the ability to share information around resolution.

HMT (JC) asked whether the US had drafted the provision in line with existing domestic practice, or whether the US had needed to change its domestic measures. US explained that their approach to data and data localisation is consistent with domestic legislative practice. Where the US approach deviates, this is listed as a reservation. For instance, domestic rules previously changed to stipulate that insured deposits could be held only through a subsidiary rather than a branch. Existing branch deposits were "grandfathered" under the new regime – which also "grandfathered" some data localisation requirements relevant to branches.

HMT (JC) asked whether the US had any written explanation of the definitions. This would help us assess how the proposed US provision related to UK regulatory requirements. UST acknowledged that we wanted further explanation but USTR (TF) said that as the language itself had been so difficult to negotiate with the regulators there was not any further explanation (given that it would also need to be negotiated). UST noted that we could discuss further in subsequent discussions.

HMT (MM) asked whether there had been any particular issues, e.g. in resolution during financial crisis, that directly informed the new language developed.

US (MSw) explained that during the financial crisis cross-border resolution was a key issue, most notably in the case of Lehman Brothers. This showed that securing clear commitments to access to data for regulators is critical but also that this needs to be facilitated by more collaboration between regulators to facilitate information sharing.

HMT (MM) noted that there is a significant technological shift occurring in data management in the whole sector and that firms are increasingly moving to cloud-based computing. It is important to ensure FTA provisions stay relevant as the technology changes. HMT (MM) asked how the provisions apply to clouds given third party providers are not specifically referred to.

US (MSw) clarified that their approach applies to both in-house and third-party data. Acknowledged that – although clearly relevant to emergent technologies like cloud computing – current language does not explicitly cover these activities.

USTR (TF) clarified that the digital services chapter does not define this in any other way and it isn't covered more broadly.

UST (MSw) provided clarification on the scope of FS data provisions. The 'locating and use of computing facilities' provision applies solely to financial institutions or financial services suppliers that the US requires to be regulated as a financial institution. Under the US definitions of 'covered person' and 'computing facilities' for FS, some firms – e.g. PayPal, Visa and Mastercard and certain types of swap dealers – are not subject to the FS localisation provision. However, there is no "black hole" as firms not covered by the FS localisation provision are captured by the locating of computing facilities provision in the e-commerce chapter.

Department for
International Trade

E. **Transparency** – US commitments on transparency are all in line with existing domestic legislation and there had been no need to amend legislation to accommodate trade commitments.

US (MS) pointed out the 120-day timeline for processing licensing applications, noting that this commitment is overlaid with "to the extent practicable" language. HMT (JC) asked whether "to the extent practicable" meant the provision was "best endeavours. UST (MSw) noted that it was stronger than best endeavours.

The US indicated that their preferred model is for transparency is TiSA – rather than TPP – given the higher level of specificity, particularly on licensing requirements. DIT (RFL) asked if there were areas where the US would have gone further. TF (USTR) noted that some TiSA members were not up to the "gold standard" on transparency, and there had been some US desire to push commitments further.

US emphasised the desirability of negotiating high standards across agreements where possible, whilst also noting that provisions are subject to negotiations – for instance, this may explain the absence of a notice and comment provision in KORUS.

F. **Institutional Provisions** – the US emphasised their view that the Financial Services Committee focusses exclusively on implementation of the agreement and not cooperation. The committee has a role in dispute mediation insofar as it is a forum for raising issues with agreement implementation.

HMT (JC) asked for more detail about how the US approach in the NAFTA renegotiation was evolving given previous UST comments about this.

UST (MSw) noted that NAFTA institutional provisions are atypical and not current US practice – melding regulatory cooperation with implementation is not the current US policy model. HMT asked whether this meant that both the UST International Banking Office and International Trade teams attend the FSC versus in future just International Trade team attending. Would regulators be brought in as relevant? UST noted that nothing precludes regulators from participating in the NAFTA FS committee, but discussion is normally trade-focussed, so the discussion is not necessarily a good use of regulators' time.

UST (MSw) also stressed that NAFTA is the only agreement in the US to specify that FSC meets annually. Generally, the US (compared to the EU) is not "committee happy" and takes the view that committee meetings should be useful and not held unnecessarily. Going forwards the Committee would meet as needed.

On practical applications of the FSC, UST (LM) noted that the NAFTA text looks like it should be limited to implementing the FTA – however, the need for things to talk about in annual meetings had led to elements of cooperation being incorporated into discussions. UST noted that the FSC has played an important and effective role in KORUS, particularly in ensuring implementation of transfer of data obligations by the Koreans. The US was conscious of time and wanted to avoid FSC meetings becoming a check box exercise.

HMT (JC) noted that it was interesting that the EU and US seemed to be moving in different directions on the role of FS Committees and asked the US for their view on the model for the committee established under CETA and the EU-Japan agreement. UST responded that, in their view, the CETA FSC mirrors committee arrangements in NAFTA.

USTR (TF) noted that in previous discussions about TTIP, industry mistakenly used to say that financial services weren't included in TTIP due to regulatory cooperation not being included. HMT (JC) noted that it often had to correct such drafting too and acknowledged that it was a mistake to say that FTAs did not cover financial services.

Department for
International Trade

DIT (RFL) queried coordination between committees under the US system. USTR noted that the Services and FS committees do not generally meet together.

G. **Exceptions –** UST (MS) talked through the exceptions they see as being key to FS: Prudential Carve Out, Monetary Policy Exception, Affiliate Exception, General Exceptions (incl. Law Enforcement Exception).

HMT (MM) queried the need for a separate Affiliate Exception, noting that this could be covered by the PCO. UST noted that the exception provides an additional level of security for regulators that they will be able to intervene when necessary to impose restrictions on the ability of banks to distribute profits to affiliates. This is especially relevant in a crisis scenario.

UST explained that the law enforcement exception covered criminal activities operated or facilitated through the financial system, most notably money laundering.

H. **Prudential Carve Out –** UST asserted the US view that the PCO should apply to all non-goods chapters – this is the consistent approach and intention and the substance of PCOs in all US agreements has remained constant.

On drafting of the PCO, UST noted that the US avoids an exhaustive list of what constitutes a prudential measure both in a FTA or outside; in their view, prudentialism is fact and circumstance-specific – there is a risk that if the PCO is described too specifically, it becomes too narrow. Additionally, UST noted an IMF and OECD attempt at producing an exhaustive list but clarified that they do not think that this should be used to interpret agreements and that UST opposed this work at the IOs.

When asked by HMT (MM) for thoughts on broadening a non-exhaustive list, UST noted that the preference is not to add to the list. US preference is for an approach based on "appropriate generality" – using a list model means it is hard to maintain the right balance between generality and specificity. It was difficult to come up with examples that maintained generality. Payments and clearing systems are an integral part of this. In the IMF context, they have attempted an exhaustive recitation of macro-prudential measures and the US has a disclaimer that this is not an exhaustive list and is not to be used for interpretation of any agreement.

HMT (MM) asked for views on the PCO drafting model in CETA in that the PCO in CETA refers to integrity of FS suppliers in general, as opposed to the US model which refers to the integrity of cross-border suppliers. UST suggested that the CETA drafting model is overly-complex – possibly a mistake from mixing EU and NAFTA approach – but fundamental approach is the same to US model.

HMT (MM) asked for views on the EU inclusion of a reasonableness test in the PCO. UST noted that the US drafting model includes an anti-abuse clause as standard in the 2nd clause of the PCO. Furthermore "reasonableness" is a further – in the US view, unnecessary – ratcheting up of the legal test

Primary US objective in drafting the PCO is to avoid potential questioning of a prudential objective (for instance, in the WTO *Argentina v. Panama (Measures Relating to Trade in Goods & Services)* case) and avoiding any kind of cost/benefit analysis of regulatory actions. However, UST also noted that the PCO has not been invoked in many disputes.

HMT (MM) asked about the coverage of the PCO in TPP compared to other US agreements and whether this applied to all services or just financial services. UST (MSw) suggested that the intention of the coverage was the same, but the drafting was flipped around. The substance was the same.

Department for
International Trade

I. **Non-Conforming Measures (NCMs) –** UST noted that the non-conforming measures are a separate "bucket" of things not covered by prudential or other exceptions – NCMs are a distinct set of issues.

HMT (JC) noted that industry often flags lack of scheduling of US state level barriers as an issue. UST noted that the US does bind state-level NCMs, including state-level measures on licensing, and addresses state-level issues around transparency – e.g. the illustrative list in TPP – to provide additional clarity for FTA partners. USTR (TF) commented that where there are legitimate concerns about transparency the US does make attempts to address these.

HMT (JC) asked whether TPP provision on consultations on regional NCMs in the FS chapter was now part of the US model. UST (MSw) said that this provision didn't really have any effect in practice. HMT (JC) noted that this was no doubt an important provision for the US's trading partners.

UST noted that the model in US FTAs is simply a function of the US federal system. HMT (JC) noted that issues around state measures had also been discussed in the broader services/investment session. USTR added that the US was clear with the EU Commission during TTIP negotiations that they were happy to "have the conversation" on specific local measures if such measures could be identified.

J. **Disputes –** UST noted that the US is re-developing its policy on dispute settlement and that all discussions were without prejudice to future conversations and negotiating positions.

On FS ISDS provisions, UST outlined the US model for the prudential filter, including the 120-day limit for initial determinations by a panel. HMT (JF) queried the US approach to inclusion of Minimum Standard of Treatment as grounds for an FS ISDS claim, noting that this is not in the scope of FS ISDS for some US agreements – e.g. KORUS and NAFTA. The US were defensive, emphasising changing views on MST and stating their approach has "no particular trajectory" and that in TPP the US ended up with it as a negotiated outcome. UST (MSw) reemphasised that the US is currently developing policy and that specific questions on broader investment policy should be filtered through US investment colleagues. HMT (JC) noted separate discussions led by investment leads on ISDS and asked about FS industry views on novel US proposals.

On SSDS, UST (MS) emphasised the importance of including provisions to avoid cross-sectoral retaliation. The intention of these provisions is to limit harm that is done in the FS sector and avoid bringing disputes in the real economy into the sector, triggering knock-on effects.

Additional Questions: TLA (HNS) asked an additional question on US NCMs in TPP, relating to the prohibition of deposit-taking by branches of foreign firms. UST noted that in general prudential measures were not scheduled but some things were on the line.

4. Closing Remarks

HMT (JC) noted that this initial discussion on financial services had been very useful and it would be useful to continue thed discussion with a financial services specific session at the next Working Group in Washington in November. UST agreed it was a useful discussion and they are keen to continue discussions. HMT suggested that HMT and UST should take stock nearer the time to decide what areas to focus on. UST agreed and noted that we could continue discussion on data. DIT (RFL) noted that it would be necessary to review sequencing with USTR ahead of November, in particularly scheduling the investment and FS sessions separately.

HMT (JC) closed the session, noting that we looked forward to meeting again in Washington in November.

Department for
International Trade

Key Actions and Next Steps:

- HMT and UST to have a discussion in early Autumn regarding the agenda for the FS session at next Working Group. Possible options for the agenda include encouraging UST to provide a response to UK high-level principles, a further discussion on data (where we would like further information from the US on how to define and interpret their TiSA proposals) as well as more detailed discussions in other areas of possible ambition as HMG's policy development progresses.

FOR INTERNAL DISTRIBUTION ONLY

Session Lead Analysis/Comments:

This was a constructive initial discussion and it was positive that UST was willing to engage on financial services as part of the TIWG given their historic allergy to trade discussions. In response, the US nodded, acknowledging our view that there was an opportunity to be ambitious and set a gold standard for FS in a possible3 future UK-US FTA (and confirmed this informally after the close of the session). However, it is not clear what they mean by "ambitious". We emphasised that we should think beyond existing precedents. UST explained their general approach to FS in FTAs was based on their existing practice as well as their proposals in both TiSA and the NAFTA renegotiation. The US does not seem to have started thinking specifically about prospects for financial services in a UK-US FTA.

UST hyper-sensitivity about keeping FS regulatory issues out of FTAs showed in the Q&A about the role of Financial Services Committees in FTAs as well as their introductory comments. We will have to continue to tread carefully and be strategic about our engagement on this particularly sensitive, but important, issue.

As in the broader services and investment discussions, the US were also defensive about state-level measures and their approach to ISDS.

The separate UST-HMT bilateral also took place before the Brexit White Paper had been published. UST have not yet asked any specific questions about implications for UK-US relations on financial services.

Department for International Trade

CLOSING PLENARY SESSION

Date: 11 July 2018

Time: 17:00-17:30

Participants:

Name	Department/Directorate
Oliver Griffiths	DIT- UK-US Trade Policy
Richard Salt	DIT- UK-US Trade Policy
Sophie Brice	DIT- UK-US Trade Policy
Victoria Donaldson	DIT- Legal
Neil Feinson	DIT- Trade Policy
Rebecca Fisher-Lamb	DIT- Trade Policy
Julian Farrell	DIT- Trade Policy
Lola Fadina	DIT- Trade Policy
Jaya Choraria	HMT
Rhys Bowen	DExEU
Ceri Morgan	DEFRA
Dan Mullaney	USTR
Tim Wedding	USTR
David Weiner	USTR
Sam Rizzo	USTR
All participants from UK and US delegations present.	

Key Points to Note:

- Agreement to have ongoing UK-US discussions between lead officials to answer questions following the publishing of *The future relationship between the United Kingdom and the European Union* white paper.
- Agreement that subject matter expert meetings should not be one-off occasions at the Working Groups, but commitment to maintain an ongoing dialogue between the UK and US policy leads across all areas – particular conversations to be scheduled on digital/telecoms and sustainability ('labor and environment').
- Agreement that UK would pull together full list of actions that have come out of this Trade and Investment Working Group and share with US counterparts.

Report of Discussions and Outcome:

US Overview: The US (Mullaney) thanked the UK for the hospitality of this working group, and noted that there had been great engagement from both delegations – leading to a strong, diverse set of meetings. The US noted three types of discussions now underway:

- Areas with a high level of ambition. These are areas with significant overlap in terms of UK/US interests and priorities including: SMEs, professional services, and intellectual property. There had similarly been strong work on continuity agreements – particularly the veterinary and organics agreements.

Department for International Trade

- Promising conversations. The US thought that the GRP, digital, telecoms, financial services, economic, and legal group sessions had all made a promising start. We should look for future conversations to be driving progress in all of these areas, building on the next steps identified in these discussions. The US noted that these future conversations should get into further detail on policy positions, especially on investment.
- Areas of uncertainty. The Chequers statement has left the US with a number of questions surrounding the future regulatory framework for goods and agriculture. The US noted that they will want to come back to this topic in future conversations. The US noted that further questions/issues remained on:
  - Future UK plans on technical regulations, especially on industrial products.
  - The US will want the UK to preserve sufficient policy space and flexibility for in different sectors, especially on horizontal TBT issues. This is also true for SPS and agri-food issues. The US also noted their stakeholder pressures, especially on agriculture – noting that any future FTA deal would need to be approved by Congress, who is especially sensitive to these sets of issues in any trade deal.
  - The US concluded by asking the UK to keep enough policy space to achieve regulatory compatibility – not necessarily through (or just through) MRAs. Instead they stressed the need for regulators to have comfort/confidence in the other regulators.

UK Overview. The UK (Griffiths) thanked the US for discussions and for their summary, stating that Chequers had provided a 'real context' for discussions. He invited DExEU to give a further update:

DExEU Overview. The UK (Bowen) welcomed this valued conversation with the US, and the opportunity to discuss more detail on the UK's future relationship with the EU and our future relationship with our wider trade partners (including the US). The UK reiterated the approach set out in the Chequers statement, our intention for an independent trade policy, that allows the UK maximum freedom to develop our own policies, while maintaining no hard border between the Republic of Ireland and Northern Ireland. The UK knows that goods and agriculture are two areas in which the US has expressed concerns; however, *The future relationship between the United Kingdom and the European Union* white paper will answer some of these questions and will be an important step in giving the US more details on what was set out at Chequers statement. The UK noted that they expect the US to still have questions once the White Paper is published and agreed that we will follow up in order to help answer these.

STOs and Continuity Agreements Summary. The UK (Griffiths) summarised work accomplished on Short-Term Outcomes. Officials committed to having a joint economic IP study in place for the next working group, as well as agreeing a date for the next SME dialogue. On Continuity Agreements, the UK noted good progress and that discussions were useful, especially on Spirits, Organics, Wine, and the Veterinary Equivalence Agreement. To summarise progress and actions:

- The Spirits text had been agreed in principle (both sides welcomed this).
- Organics: UK notified the US that the UK will write for an inspection [To be held September 2018].
- Wine and VEA: Agreed a follow-up VTC by end of July 2018.
- MRA: short-form text to be shared with US shortly.
- New (possible) agreements were tabled: pasta, cereal, oilseeds, and wheat. The US to give the UK further information on these to assess.

Department for
International Trade

- The UK also noted the legal group that has been set up to help answer questions around the continuity agreements and implementation period. The UK will help support the flow of information and offered to answer any questions that Clete Williams (US) might have.

Future FTA. The UK (Griffiths) noted the growth and expansion of the Trade and Investment Working Group, both in terms of officials attending and depth of discussion. This Working Group was beneficial to better understand each other's systems and approach, in light of a future FTA. The UK noted how this Working Group held successful initial discussions on digital and financial services and saw dialogue blossoming in other trade areas. The UK was glad to hear that during this Working Group there was some scoping discussions of chapters that might be included in a future FTA, and this spoke to the good progress the discussions had made.

Conclusions and next steps. The UK (Griffiths) offered to follow-up with US counterparts to answer questions following the publishing of the future relationship between the United Kingdom and the European Union White Paper. The UK also encouraged policy leads to set up follow-up / interim conversations between now and the next TIWG in order to progress discussions. Finally, in conclusion, the UK agreed to pull together the full list of actions and share with US counterparts.

Key Actions and Next Steps:

- Actions summarised from STOs and Continuity Agreements to be carried forward by group leads, as noted.
- UK lead officials to offer, and set up (if necessary), discussions with US counterparts to answer questions following the publishing of the future relationship between the United Kingdom and the European Union White Paper.
- UK/US Policy leads to set up follow-up / interim conversations between now and the next TIWG in order to progress discussions.
- UK to pull together the full list of actions and share with US counterparts.

End of report

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

Richard Salt
Deputy Director, UK-US Trade Policy Group
Department for International Trade

Department for
International Trade

UK-US Trade & Investment Working Group

2- 7 November 2018

Full Readout

Department for
International Trade

FINAL AGENDA & TABLE OF CONTENTS

Thursday 1 November		Page
13:30 – 17:30	SME Dialogue	3
Friday 2 November		
14.00 - 17.00	Digital	10
Monday 5 November		
09:00 - 10:30	Opening Plenary	21
10:45 - 12:00	Customs	24
10:45 - 17:00	Investment	30
13:00 - 17:00	Intellectual Property Rights (IPR)	37
13:00 - 15:00	Good Regulatory Practice (GRP)	45

Tuesday 6 November		Page
9.00 - 15.00	Agriculture	49
9.00 - 12.00	Legal Services Roundtable	53
9.00 - 10.00	Industrial Subsidies	59
10.00 - 11.15	State Owned Enterprises (SOEs)	63
13.00 - 15.00	Services	70
13.00 - 15.00	Coordination Team Planning	71
Wednesday 7 November		
9.00 - 12.00	Mutual Recognition Agreements (MRAs)	72
9.00 - 10.30	Textiles	73
9.00 - 10.30	Financial Services	74
10.45 - 16.00	Economics	88
13.00 - 15.00	Technical Barriers to Trade (TBT)	96
13.00 - 15.00	Competition	97
15.00 - 17.00	Closing Plenary	102

Department for
International Trade

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 Ordern	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

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) reflexted 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'.

Department for
International Trade

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 Cmmmerical 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.

Department for
International Trade

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 9th 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 400th 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 9th April. AC (UK) noted that BEIS is the lead agency on this, but that Defra should be involved too.

Department for
International Trade

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 10th 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 involved 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.

Department for
International Trade

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

Department for
International Trade

- 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.

FOR INTERNAL DISTRIBUTION ONLY

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.

Department for
International Trade

DIGITAL TRADE

Date: **November 2, 2018**

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

Participants

Name	Department/Directorate
Rebecca Fisher-Lamb—RFL	DIT
Chris Woodward—CW	DIT
Tom Dannatt—TD—Absent	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:

Department for
International Trade

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 UMCA 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

Department for
International Trade

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 OCED 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-broader 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 inhibits 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 counties 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

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.

<u>New USMCA Items</u>.

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 1st 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 3rd 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,

Department for
International Trade

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.

Department for
International Trade

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.

Department for
International Trade

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 existed 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 processed 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 GATTS 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 serve 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?”

Department for International Trade

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)

Department for
International Trade

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 olbigations 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?

Department for
International Trade

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 endourse 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?

Department for
International Trade

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

FOR INTERNAL DISTRIBUTION ONLY

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.

Department for
International Trade

OPENING PLENARY SESSION

Date: **November 5, 2018**

Time: **09:00 – 10:30**

Participants

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

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 1st 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 day before negotiations starts. 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 3rd 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

Department for
International Trade

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 elated 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 **3rd 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

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*].

FOR INTERNAL DISTRIBUTION ONLY

Department for
International Trade

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

- 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

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

Department for
International Trade

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 transhipment. The failure of the UK to move towards automation will make the UK a less desirable transhipment 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

Department for
International Trade

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 renumeration 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.

<u>Key Actions and Next Steps</u>

Department for
International Trade

- 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.

Department for
International Trade

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.

Department for
International Trade

- 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.

Department for
International Trade

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

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.

Department for
International Trade

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.

Department for
International Trade

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.

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

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.*

Department for
International Trade

INTELLECTUAL PROPERTY RIGHTS

Date: **November 5, 2018**

Time: **13:15 –16:00**

Participants

Name	Department/Directorate
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.

Department for
International Trade

- 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.

Department for
International Trade

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, ad 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

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.

Department for
International Trade

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

Department for International Trade

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.

Department for
International Trade

- 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.

FOR INTERNAL DISTRIBUTION ONLY

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

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.

Department for
International Trade

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.

Department for
International Trade

.
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).

Department for
International Trade

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.

Department for
International Trade

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.

FOR INTERNAL DISTRIBUTION ONLY

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

Department for
International Trade

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

Department for
International Trade

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.

Department for
International Trade

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.

Department for
International Trade

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 diary 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.

Department for
International Trade

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.

Department for
International Trade

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 steams, 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.

Department for
International Trade

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.

Department for
International Trade

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

Department for
International Trade

(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.

FOR INTERNAL DISTRIBUTION ONLY

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.

Department for
International Trade

- 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.

Department for
International Trade

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.

Department for
International Trade

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

Department for
International Trade

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.

FOR INTERNAL DISTRIBUTION ONLY

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

Department for
International Trade

- 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.

Department for
International Trade

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.

Department for
International Trade

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

Department for
International Trade

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[1] 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. [2] 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

Department for
International Trade

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[3] – 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[4].
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

Department for
International Trade

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

Department for
International Trade

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[5] 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[6]). 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

FOR INTERNAL DISTRIBUTION ONLY

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

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

Department for
International Trade

SERVICES

(Readout delayed)

Department for
International Trade

COORDINATION TEAM PLANNING

(Sophie to insert)

Department for
International Trade

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 Abdoo	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

Department for
International Trade

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 to 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-operational.

- 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?

Department for
International Trade

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

Department for
International Trade

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 undre 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

Department for
International Trade

- 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.

Department for
International Trade

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.

Department for
International Trade

- 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.

- 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.

Department for
International Trade

- 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 riles 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.

FOR INTERNAL DISTRIBUTION ONLY
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

Department for
International Trade

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.

Department for
International Trade

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:

Department for
International Trade

- 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 UMSCA 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.

Department for
International Trade

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 revaluating 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).

Department for
International Trade

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.

Department for International Trade

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.

Department for
International Trade

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.

Department for
International Trade

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.

Department for
International Trade

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 or 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

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.

Department for
International Trade

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-

Department for
International Trade

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.

Department for
International Trade

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

Department for
International Trade

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.

Department for
International Trade

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 Antoniades	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

Department for
International Trade

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 wold be publisged 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.

Department for
International Trade

- 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 4th 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.

Department for
International Trade

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.

Department for
International Trade

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.

Department for
International Trade

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) date.

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 valued-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

Department for
International Trade

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.

Department for
International Trade

- 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.

FOR INTERNAL DISTRIBUTION ONLY

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.

Department for
International Trade

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.

Department for
International Trade

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 that 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.

Department for
International Trade

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

Department for
International Trade

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.

<u>UK consultation</u>

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.

<u>Key Actions and Next Steps</u>

Further discussion once greater clarity on FEP provisions.

Department for
International Trade

FOR INTERNAL DISTRIBUTION ONLY

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.

Department for
International Trade

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.

Department for
International Trade

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

Department for
International Trade

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 disapplied.

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[1] 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.

[1] For some enforcement matters, sectors are divided between the FTC and DoJ.

Department for
International Trade

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[2] 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.

FOR INTERNAL DISTRIBUTION ONLY

[2] 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.

Department for
International Trade

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

Department for
International Trade

CLOSING PLENARY SESSION

Date: **November 7, 2018**

Time: **15:00 – 16:00**

Participants

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

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 5th TIWG; the 3rd 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 1st quarter of 2019 – would probably the last in the current format. We would then move into an entirely new mode. **DM** said that leads had done a very god 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.

Department for International Trade

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 Vetinary 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 4th 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

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

UK-US Trade and Investment Working Group – high level read-out

The sixth meeting of the UK-U.S. Trade and Investment Working Group (TIWG) was held in London on 10-11 July, following the fourth UK-U.S. SME Dialogue in Bristol on 9 July themed around emerging technology.

'Finishing the first lap'

The TIWG involved 12 chapter-level discussions (see Annex for details), including topics such as procurement and disputes which the U.S. had resisted to date. It means that we have now had at least preliminary discussions across all the major policy areas that we might expect to feature in a UK-U.S. FTA. As I said in the closing plenary, we have completed the first lap (the US delegation said privately that they feel we are at a point they would expect to reach one year into a formal negotiation).

This was the first TIWG since we signed the trade Continuity Agreements. Both sides recognised the achievement of having all relevant trade related agreements in place to ensure continuity when we leave EU. These include MRAs (covering sectors worth £12.8 billion of trade) and the Organics, Wine and Spirits agreements – the latter celebrated at a Scotch Whisky Association-hosted reception following the working group. We noted the commercial importance of remaining agreements being progressed in the parallel Economic Working Group – notably the Customs Agreement and Privacy Shield.

Most sessions focused on preparing the ground for a future FTA. In areas where conversations are already well advanced (such as agriculture, services, intellectual property and SMEs), discussions explored the US negotiating objectives and drilled further into potentially useful textual precedents in USMCA and CPTPP. Alongside procurement and disputes, we held first discussions on trade remedies and set out UK priorities on Sustainability (including anti-corruption and gender) and Trade for Development. There are two final sessions of the working group to follow next week on Industrial Subsidies and Financial Services.

We continue to look for short term outcomes where we can demonstrate progress ahead of an FTA. The SME Dialogue – which received very positive feedback from the businesses that attended – continues to be the most visible of these. We agreed to publish a joint UK-U.S. economic report on intellectual property in the autumn and identified potential opportunities for collaboration on marine plastics (on which USTR Lighthizer placed personal emphasis in recent Congressional hearings). More broadly we registered concern over recent developments in the Airbus-Boeing case and our support for a negotiated settlement.

Preparing for a change of gear

The USTR team is keen to move into the formal phase of negotiations. Ahead of the publication of UK negotiating objectives, there now little that we will be able to achieve in further pre-negotiation engagement. USTR officials noted continued pressure from their political leadership to pursue an FTA and a desire to be fully prepared for the launch of negotiations after the end of October. They envisage a high cadence negotiation – with rounds every 6 weeks – but it was interesting that my opposite number thought that there

would remain a political and resource commitment to a UK negotiation even if it were thought that the chances of completing negotiations in a Trump first term were low. He felt that being able to point to advanced negotiations with the UK was viewed as having political advantages for the President going in to the 2020 elections. USTR were also clear that the UK-EU situation would be determinative: there would be all to play for in a No Deal situation but UK commitment to the Customs Union and Single Market would make a UK-U.S. FTA a non-starter. We will play the sequencing of the next full working group by ear but have agreed a work programme for the next two months for coordination teams to take forward discussions on structure, sequencing and ways of working.

Communications

We are set to issue a joint public statement summarising the meetings. In the margins of the TIWG I participated in two stakeholder roundtables hosted by City of London Corporation and BritishAmerican Business, with common themes around the future public communications battle, the importance of ambition and the strong base from which we start. Meetings took place against the media backdrop of Kim Darroch's resignation and a *Daily Telegraph* story on the – allegedly poor – status of preparations for a UK-U.S. FTA sourced from a separate leak of documents. The timing and scale of this week's discussions (with participation from over 150 officials from the two sides) meant DIT was well placed to rebut the *Telegraph* story strongly - and the USTR team was robust with UK stakeholders on the state of talks.

Oliver Griffiths
12 July 2019

Annex – UK/U.S Trade and Investment Working Group 6

Agenda

Wednesday 10 July 3 Whitehall Place, London SW1A 2AW	
12:00 – 13:00	**Lunch** (Ground floor Business Lounge)
13:00 – 14:30	**Plenary** (Room LG05+06)
14:30 – 17:30	**Legal Group** (Room 3G3) **SMEs** (Room 3G5) **Intellectual Property** (Room 3G8)

Thursday 11 July 3 Whitehall Place, London SW1A 2AW	
09:00 – 09:30	**UK delegation Pre-brief** (Room 3G8)
09:30 – 12:30	**Services** (Room 3G5) **Coordination Group** (Room 3G8)
12:30 – 14:30	**Lunch** (Ground floor Business Lounge)
14:30 – 17:00	**UK: Sustainability/ US: Labor, Environment, Anti-corruption** (Room 3G5) **Economic Group** (Room 3G8) **Agriculture** (Room LG05)
17:00 – 18:00	**Closing Plenary** (Room 3G2)
18:00 onwards	**Scotch Whisky Association Drinks Reception** (Dover House, 70 Whitehall, Westminster, London SW1A 2AU)

Working Group sessions happening separately (but to be included in the press release and formal record of the Working Group)

- **Procurement** session on 26th June in Geneva
- **Trade Remedies** session on 27th June
- **Industrial Subsidies** on 17th July in London

- **Financial Services** on 17th July in Geneva