



Department for
International Trade

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



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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



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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



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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.



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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.



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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?



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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.

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

2.11AW - Yes

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

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

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

2.15AW – 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.

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

2.17MJ – 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.

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

2.19MJ – 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?

2.21MJ – 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.



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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



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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.



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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.

5.21 Cathy 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 vary 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



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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.

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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.



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- 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.



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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.”



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- 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 not 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 subsidies 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 countries (they want the UK to adopt some)
 - a) Canada, Mexico, India, Argentina have programs



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- 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”

That ended the formal presentation from Barrett. Some questions drove cross talk discussion.

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.



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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.



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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 minimis - 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



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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.



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. Rebecca 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.



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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.



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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



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- 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.



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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



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- 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



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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.



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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.



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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.



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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.

Trade in Services Agreement (TISA)

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 were 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



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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.

Implementation Period

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.



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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 pursue 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.

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Lead Negotiator Analysis/Comments

A good discussion that led 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 matter, 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.



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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.



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



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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.



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)



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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)



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- 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

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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



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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/June 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.



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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



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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 than 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. To achieve freer trade
 - 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



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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. To more closely reflect “realities”
3. To secure future liberalisation through the ratchet
 - 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. To provide clarity for traders and investors
 - 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.



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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.



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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. Has it been scheduled?
 - a. Are there any existing NCMs maintained by a central, regional, or local government which need to be included?
2. Has it changed, subsequent to the FTA?
 - 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



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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



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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.



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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 too distant 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



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4. DIT Services Team to agree with Tom Finn the sequence of future services discussions, including engagement on GATS – Rebecca Fisher Lamb

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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 were 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



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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.



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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



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



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.

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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



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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.



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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



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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.



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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.



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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.



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3. The US highlighted Article 21 and Article 19 of the GMP annex, in addition to the UK's 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.

Update following TTE & EMC regulator-to-regulator discussions:

- 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.



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- 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 foresee 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.



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On 10 generic issues identified going through the MRA that would need to be addressed:

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 accidentally re-establish implementation periods. For GMP, we



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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.



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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.



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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.



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- 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.



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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



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- 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.

Better Regulation:

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.



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.

Regulator Presentations:

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



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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.



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- 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



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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.



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- 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.



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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.



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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.



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- 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.

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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.



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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



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- 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.