



UK-US Trade & Investment Working Group

10 – 11 July 2018

Full Readout



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Department for
International Trade

OPENING PLENARY SESSION

Date: 10 July 2018

Time: 09:30-11:30

Participants:

Name	Department/Directorate
Oliver Griffiths	Plenary Chair - DIT- UK-US Trade Policy
Dan Mullaney	Plenary Chair - USTR
All participants from UK and US delegations present.	

Report of Discussions and Outcome:

1. Opening Context

Oliver Griffiths UK DIT (OG) opened the plenary by setting out the UK context. In particular, the Chequers Cabinet agreement and details of the UK's Future Economic Partnership (FEP) with the EU would be material to many aspects of the working group discussions. In her statement to Parliament, the Prime Minister was clear that the UK's ability to exercise its independent trade policy and enter into FTAs (US was top of list) would be key to the FEP. The Future Framework White Paper would issue later this week. OG encouraged the US delegation to raise questions and concerns about the Chequers package.

OG then went on to say that the UK was disappointed that the US had imposed tariffs on steel and aluminium against allies, including the EU. We would look to seek a permanent resolution and de-escalation. On autos UK Ministers would be making strong representations – we estimated that the EU car industry supported half a million jobs in US. UK auto imports were not a threat to US national security.

Dan Mullaney US USTR (DM) set out the US context. The US was very interested in deepening the current relationship with the UK now. It was also important to continue the work to lay the foundations for a future FTA – it was very much a priority for the current Administration to enter into a comprehensive FTA with the UK.

The US was also very disappointed that no resolution had been reached on S.232 – the Administration understood that the UK was not a national security threat. The US wanted to engage with allies on overcapacity issues, they had been hopeful that talks between Commissioner Malmström and Secretary Ross would result in a solution and were disappointed this had not happened. The S.232 investigation showed the need for allies to work together with respect to China: this was a joint problem and whilst the US and EU response might differ, there was a strong incentive to work together.

On the wider context in the US: NAFTA – 7 formal negotiating rounds had taken place. There was currently a pause for the Mexican elections, but the intention was to move forward on a trilateral basis. Trade Promotion Authority had been rolled-over until 1 July 2021 – as long as negotiations on FTAs were completed before the expiration of TPA, a vote in Congress could be held under the current TPA authority. The Administration was still very focussed on the challenges presented by China – specifically regarding non-market economy status, overcapacity issues and IP theft and



forced technology transfer. The US wanted to continue discussing these common concerns with the UK and in the trilateral (US-EU-Japan) format – the recent trilateral statement at the OECD Paris meeting had been encouraging. The Administration was still committed to an FTA with UK and was looking at FTAs with Africa (no specifics yet).

DM and OG both hailed the success of the 2nd SME dialogue that had taken place the day before the working group. It would be useful to find ways of getting more info out to SMEs, so they could get past the “fear factor” of entering another market.

Christina Sevilla (US – USTR) and Kate Maxwell (UK – DIT) fed back on the 2nd SME dialogue. Both were very pleased with turn-out. US SMEs from California, Texas and the Mid-West had travelled to London to participate. There had also been strong interest from IP organisations, small patent and trade mark firms, as well as long established manufacturers from the UK and brand-new start-ups. There had been a good discussion about the importance of public/private partnerships. There was also an emerging idea to look at cooperation over clusters (e.g. Wave and ocean technologies in specific regions) and to reduce the duplication of standards and unnecessary bureaucracy. There would likely be another (3rd) SME dialogue towards the end of the year.

2. 4th TIWG Objectives

OG said he was conscious there would not be many TIWGs left before the UK left the EU. In terms of the objectives for this 4th meeting: **i)** Preparing for an ambitious FTA – it was important that the UK and US understood each other’s systems. We should also look for opportunities to be trail-blazers in Chapters of any future FTA. Negotiations with the EU were ongoing, and it was therefore important that the US made the UK aware of any concerns (this was important for UK policy making). **ii)** The working group needed to think about where next with STOs. This working group would be relatively low key in terms of announcements. It was however encouraging to see new ideas gaining pace (SME session on blue economy, joint task force on emerging technologies, joint economic study on IP protection). We needed to think broadly and if other ideas came out of discussions we should progress. **iii)** Continuity Agreements. The UK would welcome an update from the US side on the approach to international agreements agreed at March European Council, including what more the UK could do to provide assistance to US inter-agency processes. Progress was also needed on individual agreements. It would be particularly good to work towards getting the spirits agreement agreed in principle during this working group.

DM. Agree with the overall objectives for the working group. The teams had done a very impressive job in a dynamic environment so far. Discussions on an FTA should be pushing for maximum ambition. The UK and US had a huge amount in common and push together to set global best practice. UK-EU negotiations were part of the dynamic and shifting environment. The US was watching where UK-EU negotiations were going and what the future relationship would look like as this would have implications for a UK-US FTA. The US were keen for a UK-US FTA to be ambitious and remove as many regulatory barriers as possible: goods, agriculture, TBT etc. The US were very interested in the detail behind the Chequers statement and in particular the Common Rulebook. On STOs, we needed to remain attentive to ways to strengthen the UK-US trade and investment relationship now. On Continuity Agreements, UK-US legal teams were discussing the proposed continuity approach, including at this working group – US recognised that the ball was in the US’ court.



3. UK-EU: Chequers Statement

Rhys Bowen UK, DEXEU (RB) briefed the plenary on the status of negotiations between the UK and EU, and the UK Cabinet agreement reached at Chequers on the UK's future economic partnership with the EU.

Brexit update. The March European Council (MEC) delivered the UK's objectives on the Implementation period. The June European Council (JEC) on the other hand had always been intended to be lower key – there were no decision points and the objective was to demonstrate progress as a milestone to the October European Council (OEC). At the October Council, the UK was hoping to have a political statement on the future framework for the UK-EU relationship post Brexit (both economic and security). As HMG takes the Withdrawal Agreement through Parliament, we will need to give MPs a strong sense of what the future relationship looks like. On the Withdrawal Agreement, the UK and EU Commission put out a joint statement before JEC: most text has now turned “green” but there are still a small number of outstanding issues. On Northern Ireland, all parties remained committed to no hard border and there were three scenarios: Plan A no hard border; Plan B agreement to some changes with the consent of all parties; and Plan C a “backstop period” to provide extra time to be able to deliver on the commitment of no hard border. The next step was to go through the Chequers package with the EU, with the aim of completing the Withdrawal Agreement before OEC.

Chequers package. RB updated on the Chequers agreement. The UK Cabinet had met to discuss the UK's future relationship with the EU. The subsequent statement was a recognition by the Cabinet that the UK position needed to evolve, including the detail on a Future Economic Partnership. The Future Framework White Paper would add some detail – it could not however include every detail as this was down to negotiation with the EU. The core proposition included: i) a Free Trade Area for goods (including agri-food products) between the UK and EU; a Common Rulebook to enable frictionless trade between the EU and UK for (i) above; and iii) a Facilitated Customs Arrangement. On the Free Trade Area for goods, there were two key objectives: a direct economic objective – frictionless trade between the UK and EU was very important and there were deeply integrated supply chains, which the UK needed to maintain and develop (a message received from business); and Northern Ireland, where there remained an absolute commitment to ensure no hard border and that frictionless trade was preserved on that border (this would secure economic and broader political and security objectives). On the Common Rulebook, we were conscious of the implications for wider trade policy. As such, the proposition was for the rulebook to encompass only those elements needed for frictionless trade at the border – this would require discussions with the EU on how to differentiate from behind the border regulations. The rulebook would however still provide for flexibility on conformity assessment. Parliament would also have the power to decide whether or not the UK should harmonise with future EU rules – taking into account the economic impacts. The Facilitated Customs Arrangement was a new and untested model, which sought to remove customs checks and would see the implementation of UK trade policy/ tariffs for goods staying in UK and EU policy/ tariffs for goods going to the EU. In summary, HMG felt this was the right package to achieve the UK's economic, Northern Ireland, EU and wider trade policy objectives.

On services, RB explained that the UK choosing between the single market for services and WTO status was too stark a distinction. In her Mansion House speech, the PM had been clear that to be part of passporting, the UK would need to sign up to the single market financial services rulebook, which was not feasible. However, the Chancellor had indicated that he thought it possible to have a deal or close relationship with the EU on financial services. Conversations with the EU have developed, with HMG arguments on importance of London hitting home and EU Member States recognising the difficulty in moving this onto the continent. The UK was not looking to current Single Market arrangements on services, but we did want a close relationship.



RB touched on International Agreements (IAs) stating that there was still a strong commitment from HMG to deliver a smooth Brexit, but we recognised that 3rd countries would want to take a view on the agreement reached at MEC. Here, we were keen to understand US views. UK felt that the MEC agreement offered a robust mechanism for delivering IAs through the Implementation Period. Following discussions, the EU Commission was willing to accept responses from 3rd countries. DEXEU and FCO Legal Advisers had visited Washington recently and we were now keen – through the TIWG and VVIP visit – to get a sense of the US position. Andrew Lorenz US – National Economic Council responded stating that the US Administration, through an inter-agency process, was studying a draft list of agreements subject to the MEC agreement. The hope was to have this work finished shortly and then take steps on policy side to respond to the EU. Cathy Adams – UK, DEXEU reassured that the MEC agreement was not intended as a unilateral agreement – rather, it was intended to involve 3rd countries.

Key Actions and Next Steps:

OG and DM agreed that there would be two further working group meetings in the current format before potentially moving onto the “next stage of talks” in April next year. Given the need to de-link working groups from European Councils, it was agreed that the 5th TIWG would be held in November 2018 (exact dates tbc).



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SMALL & MEDIUM-SIZED ENTERPRISES

Date: 10 July 2018

Time: 11:00–16:00

Participants:

Name	Department/Directorate
Kate Maxwell (KM)	DIT- Trade Policy
Julian Farrel (JF)	DIT- Trade Policy
Chris Woodward (CW)	DIT- Trade Policy
Sophie Brice (SB)	DIT- UK-US Trade Policy
Jack Kennedy (JK)	DIT- UK-US Trade Policy
Angelina Cannizzaro (AC)	BEIS
Deborah Matthews (DM)	BEIS
Lewis Barton (LB)	BEIS
Tim Wedding (TW)	USTR
Rosalyn Steward (RS)	US Small Business Administration
Lori Cooper (LC)	US Dept. of Commerce
Christina Sevilla (CS)	USTR
Raimonds Pavlovskis (RP)	USTR
Diane Steinour (DS)	US Dept. of Commerce
Christine Peterson (CP)	USTR
Kim Tuminaro (KT)	US State Department
Sarah Bonner (SB)	US Small Business Administration
Pat Kirwan (PK)	US Dept. of Commerce
Rob Tanner (RT)	USTR

Key Points to Note:

- We agreed that the 2nd SME Dialogue went well, and to hold a third US-UK Dialogue focussed on digital trade opportunities for SMEs in the US before the end of the year.
- We agreed to collaborate on production of a joint UK/US e-commerce resource for launch at the next Dialogue. (DIT to coordinate)
- The United States and the Organization of American States extended the invitation to the United Kingdom to attend the 10th Americas Competitiveness Exchange (ACE) 21-28 October to explore potential public-private sector partnerships.
- The SME working group agreed to raise awareness of the close regional connections between the US and UK in the ocean and marine technology sector (i.e. Blue Economy) and explore pilot opportunities for US-UK trade promotion and trade show collaboration in 2019.



Report of Discussions and Outcome:

Reflections on the 2nd UK-US SME Dialogue and Next Steps

1. The SME Working Group reflected on the 2nd UK-US SME Dialogue on 9 July. Both Christina Sevilla (CS) and Kate Maxwell (KM) agreed that the event had been a success and had been well attended by a diversity of SME stakeholders from a variety of sectors across the UK and US (including from as far afield as California, Texas and the Mid-West), providing for compelling discussion of opportunities and challenges of UK-US trade. The event built productively on the first Dialogue, offering a varied but sufficiently focussed range of sessions that effectively prioritised audience engagement through integrated Q&A sessions – a ‘best-practice’ that we should seek to replicate.
2. Reflecting on stakeholder input at the Dialogue, the Group agreed that we should take forward discussions on how to support SME cooperation and information sharing – including through deepening public-private partnerships and relationships with trade associations, developing regional connections, and promoting SME involvement in trade fairs, shows and business-to-businesses opportunities. CS noted that the US consider work on regions and clusters as a potentially productive vein of activity – a way of accessing communities of businesses and creating connections between them. While governments may facilitate this process, the emphasis should be on inspiring private-sector leadership. The Blue Economy (see below), may be a good place to start.
3. In a trade policy context, several SMEs at the Dialogue expressed interest in how regulatory and conformity assessment processes might be eased to enable greater market penetration by SMEs – including looking to mutual recognition where possible.
4. A number of stakeholders reported that they considered the event to be a good use of their time.
5. The SME working group agreed to hold an ‘unprecedented’ third US-UK Dialogue focussed on digital trade opportunities for SMEs in the US [potentially New York] before the end of the year [possibly early November]. The third Dialogue would involve a half-day event comprising policy discussion alongside more practical ‘how-to’ sessions/tutorials led by a relevant private sector partner (e.g. PayPal, eBay) to ensure optimal value for stakeholders. We will work to reach a wider variety of stakeholders – including very small businesses or entrepreneurs – and seek to engage a range of trade associations (including British American Business /Federation for Small Businesses). CS proposed a joint UK/US e-commerce product for launch at the third Dialogue [a working draft had been circulated ahead of the meeting], and profile this alongside existing resources (an updated version of the Doing Business brochure; Intellectual Property toolkits). After the third Dialogue we agreed that we would switch to an annual basis, alternating between the UK and US at the regional level.

Actions

- UK and US to collaborate on delivering the third SME Dialogue by the end of the year in the US
- The UK to supply comments on US e-commerce product by the first week of September. (DIT to coordinate)
- The Working Group (UK and US) to consider updates to the Doing Business brochure by first week of September. Agree new content by the end of September to leave October for production.

A dedicated SME Chapter and SME-friendly Provisions in a Prospective FTA



1. KM pressed US colleagues on their preferences regarding a dedicated SME chapter and SME-friendly provisions within a prospective future FTA.
2. CS said she would expect a dedicated SME chapter to contain articles on information sharing and a committee/SME points of contact, as well as language encouraging cooperation on SME-friendly provisions threaded throughout the FTA text. The chapter would not be subject to dispute.
3. CS agreed with the need for ambitious information sharing requirements, she was clear however that while these should specify the types of information parties will be required to provide, they **should not be prescriptive of how** information should be shared (e.g. they should not specify a dedicated web-platform with required characteristics). Any resource should be flexible to nimbly respond to any changes in the regulatory environment.
4. CS clarified how they see the role of FTA SME 'Committees', framing these as a formalisation of existing bilateral SME policy officials and stakeholder fora (e.g. the SME Dialogue). As a joint institution the Committee (and Dialogue) enables SMEs to 'have a voice at the table' and may liaise with other committees (e.g. IP) to raise issues relevant to SMEs. The relationship between committees is not intended to be hierarchical.
5. CS noted that it is expected that a dedicated chapter will include language that lends profile and significance to and encourages parties to cooperate on SME-relevant provisions contained throughout FTA chapters (e.g. provisions on common data entry, automated forms, advance customs rulings in GRP/Procurement/IP chapters) These may be summarised and cross-referenced in the SME chapter.
6. Other chapter leads will assume responsibility for SME-friendly provisions within a given chapter. Kim Tuminaro (KT) noted that SME policy leads should work closely with chapter leads as texts develop to ensure that they continue to reflect SME priorities. CS emphasised that SME leads would not see it their place to negotiate with chapter leads over what their respective chapters should include.
7. The UK agreed that it is vital (for SMEs, as well as politically and for recommending the agreement) to be able to demonstrate how the agreement delivers tangible benefits for SMEs and other stakeholders. CS explained that the US produce plain-language fact-sheets that profile the benefits of an agreement in general and, where relevant, on a sector-by-sector basis.
8. CS stressed that SME-friendly provisions do not however imply special or preferential treatment for SMEs – or any special derogations; she emphasised that the presiding intention is that SME requirements are collaborative rather than prescriptive.
9. CS continued to explain that the chapter – through the 'committee' provision – allows for formalising the SME Working Group and Dialogue as mechanisms for ensuring continued regard for SME needs and interests and providing stakeholders a space to voice concerns and be heard by policymakers. The US has a constellation of advisory committees under the 1974 Trade Act, and an open domestic consultation process is required for a huge amount. The Dialogue offers the opportunity for us to listen to them together. The Chapter elevates this process through codification as a legal text (albeit one not subject to dispute).
10. KM pressed the US on further details on NAFTA. While unable to provide full details, CS described the agreement as 'TPP+', highlighting an SME Cooperation section containing language on cooperation on trade promotion/match-making/clusters and pilot programmes. The



agreement will contain language on (online) information sharing – again specifying what types of information parties will commit to providing but retaining flexibility on how this is provided.

UK Invitation to the Americas Competitiveness Exchange (ACE)

1. Pat Kirwan (PK) provided an overview of the 10th Americas Competitiveness Exchange (ACE), that will take place 21-28 October 2018, showcasing key Northern California destinations that are helping to move the success that is Silicon Valley's Innovation and Entrepreneurial Ecosystem across the Golden State. The [website](#) will go live on Monday 16 July.
2. The US and the Organisation of American States (OAS) extended the invitation to the UK to attend the 10th Americas Competitiveness Exchange (ACE).
3. PK advised that attendance is expected to be at Assistant-Secretary or Director-General (i.e. an appropriate decision-making) level. Attendees will visit each of six sites (San Francisco and Silicon Valley; Monterey Bay Area; Santa Cruz; Salinas Valley; Fresno; and Sacramento) with the objective of providing an opportunity to extend potential partnerships and cluster to cluster collaboration. The US advised that an example aim may be to attend with view to securing a partnership (the US agreed to send details of past examples).
4. KM and Angelina Cannizzaro (AC) advised US colleagues that the invitation should be forwarded in the first instance to Department of International Trade (DIT) Permanent Secretary Antonia Romeo and Department for Business, Energy and Industrial Strategy (BEIS) Permanent Secretary Alex Chisholm.

Actions

- US to issue invitation to ACE to DIT Permanent Secretary Romeo and BEIS Permanent Secretary Chisholm by the end of the week; UK to respond;
- US to provide example details of partnerships created through the ACE process.

Digital Trade and the Third UK-US SME Dialogue

1. DIT Services Team (Chris Woodward (CW)) and Robert Tanner (USTR (RT)) joined the Working Group for a discussion on digital trade and the prospect of a digital trade focussed SME Dialogue in late 2018.
2. The US emphasised the importance of digital trade (e-commerce) for SMEs, noting that many SMEs are becoming involved as digital exporters (either by accident or design), due to the strong opportunities it offers for allowing small businesses to export more easily and in greater volume. While SMEs engaged in exporting will usually export a single good to a single market overseas, those exporting through e-commerce platforms will export to 19 or 20 different markets. The e-commerce market between the UK and the US is one of the most intensive.
3. CS noted that we are working to do more to support SMEs to export more – including by exploiting opportunities provided by e-commerce. We have produced resources – such as the *Doing Business in the US and UK* brochure and IP Toolkits – to inform SMEs of their options and available support and will be working together to produce an e-commerce resource (see above).
4. CS suggested a digital trade focussed third SME Dialogue to be held in the US later this year [Provisional title: *SME Exporters Taking Advantage of Digital Trade*]. She noted that this would involve a broader discussion of the role of digital trade as relevant to SMEs, as well as offering opportunity to launch the e-commerce resource – intended to raise awareness of the possibilities of e-commerce for promoting business. The event will marry discussion of policy areas first,



followed by practical 'how to' elements to increase relevance and value for stakeholders and bring the relevance of policy into sharp relief.

5. CW agreed that the proposals sound very positive. The UK has a strong and vocal global role in the digital trade sector, which we consider an area of ambition. The idea of the third Dialogue integrating policy and 'how-to' sessions is particularly appealing and agreed with the US to start fleshing out a programme. CW noted that we would need to draw on support and expertise of ITI (including DIT teams and colleagues at Post in NYC), DCMS and BEIS. The initial draft of the resource is also helpful – and something the UK could provide input on.
6. We agreed to draw on lessons learned from the first and second Dialogues in organising the third. As with the first Dialogues, we will need to introduce the TIWG as laying the groundwork for a future FTA. We would then call on partners in the private sector to support delivery of practical 'how-to' sessions aimed at increasing stakeholder understanding and capacity of key issues. At all times we should optimise stakeholder participation in panels and opportunities for engagement – including encouraging stakeholders to raise concerns and discuss barriers to trade. The event would, however, be shorter and more focussed than the second Dialogue – likely half a day.
7. CP raised Privacy Shield as a potential topic, including a practical session on what it means, and how it may be applied. CW noted that this is something we are unable to comment on at present; but that we retain a watching brief. The US suggested that we might alternatively consider a session on data-flows and digital trade best practices more broadly. We agreed to take offline further discussions about how brief sections on GDPR and Privacy Shield may be helpfully included in forthcoming respective e-commerce resources.
8. We agreed that the highly relevant and important area of cyber security would be too broad to unpack in either the third Dialogue or the e-commerce resource, and that any consideration should be kept to essentials only. At the Dialogue we could approach the US Department for Homeland Security or the UK National Cyber Security Centre for materials to distribute. In the e-commerce resource we can signpost sources for cyber-security information or support.
9. We agreed that it will be important to reach out to different bodies and associations to capture new stakeholders and encourage maximum inclusivity – including approaching those that may not have yet considered exporting, such as entrepreneurs. From the UK-side, TECH UK and BAB may be able to assist; we could approach ITI on identifying stakeholders and trailing the event.

Actions

- UK to comment on US e-commerce publication by first week of September;
- US and UK version/additions to the e-commerce publication to be finalised and agreed by end of September 2018;
- UK and US to approach respective cyber-security departments/agencies to request links and material for use in e-commerce brochure and SME Dialogue;
- UK (CW; KM) to start putting together provisional agenda for third SME Dialogue.

UK-US Cooperation within the Marine Technology Sector (the Blue Economy)

1. KT repeated a compelling pitch for US-UK collaboration in the ocean and marine technology sector (i.e. the Blue Economy) [**N.B.** the US have suggested collaboration in this area before; while open we have always requested greater specificity about what any work might look like in practice].



2. KT highlighted 'significant' private sector interest on both sides of the Atlantic in the Blue Economy [which – as part of the 'clusters' model – involves development of dynamic regional, national and international linkages between commercial, research and public-sector stakeholders to promote sustainable use of ocean resources for economic growth, improved livelihoods and jobs, and ocean ecosystem health]. While KT explained that the US does not have a *national* Blue Economy strategy, there are several regional-level initiatives being pulled into the international space. The US Dept. of Commerce has secured a grant for trade cooperation with the Maritime Alliance of San Diego (a 'triple-helix cluster' involving SMEs, research institutions and universities, and government), a US Blue Tech industry association and co-founder – alongside a number of UK marine associations (Marine South-east; Cornwall marine Network; Mersey Maritime; Team Humber Marine Alliance) – of the Blue Tech Cluster Alliance.
3. Through active (international) collaboration and cooperation between the three (Public, Private and Research) sectors KT outlined the potential for joining up and commercialising the various elements of blue economy activity. This could also dovetail well with stated UK future sector priorities [N.B. these were outlined and shared with US colleagues by BEIS prior to the Working Group], including education, robotics (e.g. autonomous shipping), AI, digital and tech. We might also explore intersections with emerging technologies and avoiding regulatory barriers, data-protection and transfer issues, and how to prepare for careers in the sector.
4. KT set out that cooperation would take place within the framework of the Galway Trilateral Context (i.e. in the context of the Galway Statement (2013) between the EU, Canada and the United States of America). Primary concerns under this agenda at present include:
 - The sustainable use of ocean resources in the North Atlantic, and understanding of current and future stressors on ocean health (e.g. business, tourism, etc.);
 - How to harness ocean energy (e.g. wave technology) to further and support Blue Economy activities (e.g. shipping or aquaculture) – with a call for international cooperation in this space [N.B. the US stated that this has already started with Scotland].
5. AC noted that the proposal for collaboration sounds positive, but that the 'Blue Economy' remains a relatively new concept in the UK and engagement across government and with other stakeholders is needed. In the immediate term, a scaled-down pilot approach may be feasible – subject to agreement with DEFRA, the BEIS Climate team, and other relevant teams. KT suggested we could potentially join up with an existing trade show (e.g. [Ocean Business 19](#) in Southampton, April 2019), followed by a policy discussion in the margins as a first step with this work. CS noted how this may, in addition, provide a hook for UK-US synergies in UK priority future sectors, including artificial intelligence and robotics.

Actions

- UK and US to collaborate on delivering a Blue Economy theme to Ocean Business 19 Southampton Trade Fair – including an official-level meeting in the margins.

UK-US Cooperation on Future Sectors

1. Lewis Barton (LB) briefed the US on the UK's Future Sectors agenda – which focusses on areas where rapid technological development (e.g. AI or Blockchain) is disrupting sectors and transforming the economy. The UK has tended to be a little slow in adopting new technologies and needs to get on the front foot. The BEIS is working alongside other government departments to shape an ambitious policy framework which has, in turn, led to a sector-deal between



government and academia and the formation of a new Artificial Intelligence (AI) team. Next generation robotics is our next priority; we have started to develop clusters of scientists throughout the UK (e.g. in Edinburgh, Cambridge). We acknowledge that the US is a world leader in robotics. We would like to understand more on how the US supports the industry and identify potential opportunities for collaboration on shared priorities (e.g. the Plymouth-Plymouth autonomous ship voyage).

2. PK noted that smart fabrics are for an emerging priority for the US, and this is driving a lot of cluster work in certain areas (i.e. health, and general apparel). There is also a great deal of interest in drone-technology, with a lot of University-level activity and an inter-regional competition focussed on different aspects of drone use and different forms of drone-technology application (e.g. agriculture; how drones interact with local airspace). There may be good opportunities for collaborating on drone technology, although it is less certain where we might collaborate on the robotics side given this is not a Silicon Valley cluster focus.
3. KT asked whether we were looking for immediate or longer-term collaboration on robotics. LB noted that there may be opportunities for both. We suggested that it would be helpful to create a banner to raise the profile and raise the visibility of these work-streams – as with the ‘Blue Economy’ – to help identify and make progress towards longer-term objectives. CS suggested that we could join some of this work up within the Blue Economy piece and look to introduce some robotics stakeholders in the proposed April 2019 Southampton Trade Show event. The event could serve as a small pilot that may lead to bigger things; and we agreed that we could use it to announce the Plymouth-to-Plymouth autonomous shipping voyage.
4. KT sounded a cautionary note, underscoring public sensitivities over the perceived risks to livelihoods posed by these technologies. We may want to look at profiling transformative sectors that are perceived as having a less ambiguous socio-economic impact, such as e-health (where a lot of work is being done). While we accepted this risk, CS noted that there is operationally no reason that we should not invite the robotics cluster to participate at the April 2019 event; we can then decide on appropriate framing and messaging to ensure that this does not generate concerns over job-losses. UK agreed and noted that as part of our collaborative efforts within the sector we expect there to be a wider piece of work focussed on the ethics of innovation, dovetailing into policy work on robotics standards and regulation (e.g. regulation for driverless vehicles, data-storage, etc.). We agreed that it is vital for policy makers to prioritise close consultation with innovators and businesses in order to keep a finger on the pulse of new developments and their associated risks and opportunities.

Actions

- UK and US to invite robotics stakeholders to Ocean Business 19 Southampton Trade Fair as a first step towards deeper cooperation within the next-generation robotics and Blue Economy spaces.

Key Actions and Next Steps:

- UK and US to collaborate on delivering the third SME Dialogue by the end of the year in the US
- The UK to supply comments on US ecommerce product by the first week of September. (DIT to coordinate)
- The Working Group (UK & US) to consider updates to the Doing Business brochure by first week of September. Agree new content by the end of September to leave October for production.



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 - UK and US to approach respective cyber-security departments/agencies to request links and material for use in e-commerce brochure and SME Dialogue;
 - UK to start putting together provisional agenda for third SME Dialogue.
 - UK and US to collaborate on delivering a Blue Economy theme to Southampton Trade Fair – including an official-level meeting in the margins.
 - UK and US to invite robotics stakeholders to Southampton Trade Fair as a first step towards deeper cooperation within the next-generation robotics and Blue Economy spaces.

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Session Lead Analysis/Comments:

Very positive and friendly atmosphere. Very constructive first discussions on structure of an SME chapter. US happy to provide feedback on NAFTA 2.0 discussions.

Will start looking at principles of an SME chapter and SME-friendly provisions throughout a future UK-US FTA in next working group. US happy to do so.



Department for
International Trade

RULES OF ORIGIN

Date: 10 July 2018

Time: 11:00-13:00

Participants:

Name	Department/Directorate
Adam Fenn	DIT- Trade Policy
Neil Feinson	DIT- Trade Policy
Richard Salt	DIT- UK-US Trade Policy
Tim Ward	DIT- Trade Policy
Stuart Gibbons	DEFRA
Rhys Isaac	BEIS
Mojgan Ahmad	DIT- Trade Policy
Daniel Owusu Acheampong	DIT- Trade Policy
Kent Shigetomi	USTR
Brian Woodward	US Dept. of Commerce
Sarah Bonner	US Small Business Administration
Ian Sheridan	US State Department
Kelly Milton	USTR - Geneva - Europe
Sam Rizzo	USTR - Europe

Key Points to Note:

- This was a useful session in which the UK was able to further understand the US approach to Rules of Origin, and the ways in which the US approach both converges and diverges from EU Rules of Origin precedents.
- The UK was able to outline DIT's Trade Agreement Continuity work-stream, and how Rules of Origin will be addressed within this context. The UK also provided a high-level overview of its ongoing Rules of Origin policy development for future trade agreements.
- Officials for the US and the UK agreed on the ongoing value of these meetings and that further meetings, focused on particular elements of existing agreements would be a useful next step. US officials also agreed to share the presentation that they used in the meeting, and other relevant documents which compare US and EU Rules of Origin precedents.

Report of Discussions and Outcome:

1. Recap of last meeting and current state of play (30 Mins)

Introduction (UK): Adam Fenn (AF) opened the meeting with a recap of the previous UK-US Trade Investment Working Group. AF outlined three areas where DIT have been working on Rules of Origin (RoO):



1. Trade Agreement Continuity – DIT are in the process of transitioning around 40 agreements that UK is currently party to via the EU into UK law. RoO are a specific issue in this context, as UK origin will need to be distinctly defined apart from EU origin;
2. New FTAs – DIT are establishing links with domestic industry and undertaking analysis to prepare for new FTA discussions;
3. UK-EU Future Economic partnership discussion – The Department for Exiting the European Union are leading on RoO in the context of Brexit, with the support of DIT and other Government departments.

AF highlighted that UK business currently has a knowledge gap in RoO which needs to be bridged by education and knowledge development. UK also has a large data gathering exercise ahead, especially in areas such as understanding the levels of EU integration in UK supply chains. With these tasks outstanding, there are still some broad objective observations that can be made about the landscape in which a RoO agreement would be reached. This would include: a need to reflect the integrated nature of supply chains; the geographical proximity of the UK and the US, and the likely trade routes this leads to; and the fact that the exact end-state of the UK's future customs regime and associated administrative processes have not been finalised.

2. US Presentation – Comparison between US and EU based RoO (1 hr)

Presentation (US): Kent Shigetomi (KS) presented on the main areas of convergence and divergence between the US and the EU's historic approach to RoO. This included coverage of:

- Differing use of Insufficient working/processing provisions, and provisions that relate to the slaughter of foreign animals in the US to confer US originating status;
- Differing levels of prevalence of value added rules in US and EU agreements;
- Examples of cumulation provisions, such as CETA, which permit third parties to participate in cumulation, subject to conditions;
- How EU and US agreements differ in terms of burden of proof (KS flagged that this was a contentious area in T-TIP negotiations)
- Historic stances on wholly obtained rules.

3. Stakeholder engagement (30 mins)

Interaction and Comments: AF asked for an explanation of the US approach to stakeholder engagement in the context of live negotiations. KS stated that automotive stakeholders from both the US and the EU collaborated to reach agreements among themselves in the context of T-TIP discussions. Sam Rizzo (SR) flagged that the US has established sectoral committees which meet to discuss trade policy matters and create public written reports which feed into US negotiating positions.

Key Actions and Next Steps:

Officials for the US and the UK agreed on the ongoing value of these meetings and that further meetings, focused on particular elements of existing agreements would be a useful next step.

- The US agreed to share the presentation that they used in the meeting;
- The US also agreed to share their comparison between US and EU Rules of Origin precedents.



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Session Lead Analysis/Comments:

Overall a positive atmosphere in the room. As per the last TIWG, US counterparts quite focused on process and existing precedent and it was quite difficult to draw them on underlying policy positions. Moving future meetings to focusing more on specific elements of existing text may help with this.

US counter parts seemed quite worried that the approach set out in the WP was seeking to preserve the UK's existing trade flows, rather than providing greater opportunity for US exporters. The UK approach to TAC seemed to reinforce this perception. This links however to broader messaging on future UK trade policy.

Overall this meeting felt like another positive step towards a negotiation beginning. We were able to learn more about the way in which the US develops its positions and the strength of precedent in the way they work. We were also able to sight them on some high-level objective facts about the UK's view of the negotiation space in front of us.

Personal relationships also moved forward, reinforced by a less formal discussion after the session.



Department for
International Trade

SERVICES: DIGITAL

Date: 10 July 2018

Time: 11.00-14.00

Participants:

Name	Department/Directorate
Rebecca Fisher Lamb (RFL)	DIT- Trade Policy
Chris Woodward (CW)	DIT- Trade Policy
Matthew Cartwright	DIT- Trade Policy
George Radice (GR)	DIT- UK-US Trade Policy
Graham Floater (GF)	DCMS
Harry Lee (HL)	DCMS
Paul Gaskell (PG)	DCMS
Jonny Martin	DCMS
Robert Tanner (RT)	USTR
Thomas Fine (TF)	USTR
Jessica Mazone (JM)	Dept. of State
Diane Steinour (DS)	NTIA/DOC
Krysten Jenci (KJ)	Dept. of Commerce
Emily Kilcrease (EK)	USTR
Kate Kalutkiewicz (KK)	USTR
Ellen House (EH)	Dept. of Commerce
Matt Jaffe (MJ)	USTR
Silvia Savich (SS)	USTR

Key Points to Note:

- The digital session was a productive session in which the UK was able to outline its objectives in the digital trade space for the first time. The objectives were well received by the US, who recognised this was a step forward for the UK, and broadly aligned with their vision for a digital trade package.
- There was an agenda item on data that gave the UK an opportunity to update the US on its discussions with the EU and on its priorities for a future UK-EU data sharing relationship. All parties agreed that engagement between governments on both data in trade and data protection was positive and that we should ensure these conversations are joined up.
- Outside of data, the session did not get into detailed policy discussions given time constraints, however there were discussions on certain areas of mutual interest. This included cybersecurity; WTO e-commerce discussions; emerging technologies; intellectual property and consumer rights.
 - Linked to these focus areas, both sides discussed principles for future work over the coming months. This included mapping core trade areas and peripheral areas of interest;



fleshing out areas of agreement and potential challenge; and further deep dives on specific issues (in particular to increase understanding of legal and regulatory frameworks).

Report of Discussions and Outcome:

1. Introductions

The session began with roundtable introductions.

RFL welcomed the US delegation and explained how a lot of work had happened since the last WG to develop our approach to digital trade. The UK is happy to answer questions on the Chequers agreement, though it is very fresh, and follow-up may be required. RFL stressed that the Chequers statement emphasised that the UK would have freedom to make trade agreements and to have flexibility in the services area. This recognises that there is not a single market in services in the EU. Digital trade is a large part of our services offer and an area of mutual interest between the US and UK.

2. Overview of UK digital trade policy themes (including EU update)

GF gave an overview of recent developments, explaining that the White Paper was due out shortly and that there had been a number of recent Cabinet changes, including the appointment of a new DCMS Secretary of State - Jeremy Wright.

GF explained that DCMS leads digital discussions with the EU in areas for which it is responsible. This includes digital trade, e-commerce, telecoms, data and AV. DCMS and DIT work together jointly on trade with the rest of the world. On the EU side, there are negotiations on EU withdrawal, the implementation period and the future economic and security relationship. Chequers saw collective agreement on the UK's objectives which would be expanded upon in the White Paper.

On the digital trade agenda, GF explained that the UK is ambitious and interested in a global free market where that makes sense. This will be a central pillar of international policy as we leave the EU. We do not want to just go back to existing trade texts, no matter how ambitious (e.g. CPTPP) – we want to go beyond. Similarly, we want to break new ground in the WTO and other international fora. The UK has a very strong services economy, including in the digital and creative sectors. Other services areas, such as our strong financial services sector, open up opportunities across the economy. The UK is at the forefront of many future tech efforts and we want to stay there.

On UK engagement in the international debate, CW reiterated the importance of being ambitious in an area of common interest and flagged that this was a priority across Whitehall. He explained that this session should be open and exploratory with a view to diving into more detail in the coming months. Both parties agreed that identifying specific areas of interest/challenge would be a beneficial way to run the session.

GF referred to previous sessions where the UK highlighted its digital ambitions and thanked RT for running through US priorities. The UK has moved on since then – but still believes our objectives are shared.

RT thanked GF and agreed that the UK should run through its objectives and then US could ask questions.



3. Presentation of the UK approach to digital trade policy

Theme 1: Supporting Economic Growth, Jobs and Prosperity

HL outlined the economic importance of digital economy to UK services (70-75% of services digitally delivered) and highlighted the position of the UK and US as global leaders. UK priorities under this theme include:

- Digital value chains – The UK is the base for a large number of digital companies doing business in the EU. The sector attracted 3bn of investment in 2017, more than France, Germany and Ireland combined.
- Trade facilitation – a keen interest of the UK, which is investing significantly to fully implement the Trade Facilitation Agreement.
- Data flows – vitally important to the modern economy and need to be underpinned by the appropriate protections.
- Regulation of emerging tech – DCMS is establishing an Office for AI and a Centre for Data Ethics.
- Development – Africa and ME responsible for 2% of e-commerce despite being a huge market. Development provides opportunities for both developed and developing countries.

RT thanked officials for the presentation and welcomed the UK approach, noting the large number of shared interests. He described the objectives under theme 1 as really core to the US trade agenda and stressed this was their key area of focus. Emphasised that non-discrimination had long been at the forefront of US digital trade policy.

RT explained keenness to facilitate discussions on these issues but urged caution on labelling as ‘trade discussions’ for domestic reasons. This is not just a digital issue – but services generally. RFL stated UK was happy to be pragmatic, welcoming the opportunity to have these pre-talks and agreeing to refer conversations to other fora as necessary. GF explained that these principles show what we want to do, not a direct FTA text. We have work to do to tease apart non-trade and trade issues.

RT stated that the US has taken a strong position on defining digital products, arguing it helps clarity in this area which has been lacking in the multilateral system. He questioned whether the UK had concerns with this approach given that the EU saw cultural problems (which the US were never convinced prevented the EU from moving forward). RFL explained how the UK had always seen EU-US negotiations from the EU side and are keen to hear US side directly. GF explained he was aware of the dynamics and highlighted that Chequers provides good signals, but EU conversations are ongoing, so we cannot go into details.

RT asked the UK what they viewed as differences between digital value chains and other investment value chains. GF explained that this was a question of investment more broadly, and that there was not necessarily anything specific to focus on from a digital perspective. We do however recognise that digital value chains are different from other value chains.

RT explained he was interested in the concept of bringing development into this space but was keen to hear our thoughts on specifics. He highlighted that measures that helped developing countries also helped developed countries, leading to accusations of broadening digital divide. RT used Indonesia as an example of good practice leading to digital development. CW explained the UK position that trade discussions need to keep development agenda firmly in mind. We should be asking how provisions we could put in a place consider the global perspective. RT asked about the UK role in the Joint Statement Initiative. CW and RFL explained that DIT and DCMS send out officials



from capital and push the EU to be as ambitious as possible. RT and CW agreed that the discussions were positive, and the key question was how to turn this work into action.

On future tech, RT explained how non-discrimination of digital products had been a moderate focus of US priorities in the past, but as cloud computing came to the fore this was increasingly becoming a key priority as non-discrimination was required to keep this sector supported. DS then questioned UK approach to emerging technologies in trade – whether we are looking to act or seeing what happens and what the UK position was on discrimination based on technology. HL explained we are at the start of the journey here, but this question links to the STO we would like to discuss. GF explained that this is less about a current problem and more about a potential future problem. RT Emphasised that the US was engaged in work going on in OECD and that they were interested in discussing joint work through the STO, though details needed to be fleshed out.

RT explained US and UK both clearly want to encourage entrepreneurship but recognise that this can clash with rule-making and we need to consider how to take a balancing approach.

DS explained the need to link up between agencies and connect with OSTP, saying they were happy to have inter-agency discussions at home and come back to the UK to look at collaboration.

ACTION: UK agreed to send through information about data ethics centre and work on AI.

RT stated that other than digital taxation, EU states and US were aligned.

Theme 2: Protecting Our Citizens, Businesses and Society

HL outlined theme 2 – The importance of international collaboration on protection. Underlying objectives include:

- Collaborating on cyber security – both UK and US at cutting edge of market in this area.
- Internet safety and security – UK has recently developed a domestic strategy and wants to build on this internationally. This can be done through empowerment, guaranteeing online/offline parity, working with service providers, etc.
- Intellectual Property – highlighted the particular importance to the digital economy.

RT explained that the US has a strong IP interest, but did not treat it as a separate digital issue with a separate digital agenda. They were keen on a constructive dialogue but argued this should be through an IP lens. RT stated that outside of the US framework, the e-commerce directive was the clearest around. He argued that platforms are an example of bigger interactions between IP and digital - an appropriate balance is required between protections and liabilities. HL welcomed positive comments on the e-commerce directive and explained that this baseline was present in the UK system.

RT was broadly positive on Cybersecurity and felt there was a role for such provisions in trade – the US has been tackling these questions in NAFTA renegotiations – focusing on cooperation and best practice. If you have this, it provides greater certainty. This could be an area where we could go further than before. HL referenced ongoing dialogue on Cyber (with a particular focus on SMEs) between DCMS and DHS. RT welcomed this engagement and suggested that, given broad definition of cybersecurity, DCMS and Commerce should also set up a dialogue.

RT stated that safety and consumer rights was an area where there was a lot to discuss due to differences between systems. EU and US had differences on civil law vs common law, but the US wasn't sure this difference was as strong between the UK and US. The US was keen for further



discussions on regulatory and legal frameworks. CW agreed with need to understand comparative regulatory and legal systems. In terms of specific measures under this banner, we are approaching this openly.

Theme 3: Developing Global Governance Frameworks

HL outlined UK priorities on promoting international global governance standards for digital trade. The internet is global and were it its own economy, it would be 5th largest in the world in terms of GVA.

- Priorities include open industry led standards in areas such as tech neutrality and interoperability.

RT explained he was open to the ideas expressed. On the open internet question, it was felt that we have traditionally been on the same side – the US has historically been sceptical of digital sovereignty arguments.

CW explained that this principle was in part about international cooperation outside of bilateral discussions. HL expanded on this point, making clear the importance of ensuring multilateral discussions have a plurality of voices – not just government to government.

RT mentioned that there were a couple of areas the UK had not specifically mentioned but that were of interest to the US. On measures preventing the forced transfer of source code, we should look to include consideration of algorithms and trade secrets. Again, there is a balance issue between justified enforcement and barriers, but it is important to avoid wholesale demands to provide source code. On promoting access to government data, we should consider what we can do to improve processes, such as by making it available to academics and others to use in a machine-readable format.

4. Data: UK's overarching data protection regime, and Free Flow of Data

PG gave an overview of the UK data protection system and the areas under discussion with the EU. Free flow is fundamental to the future UK-EU relationship on both trade and security. As such, the UK is looking for bespoke deal with adequacy as a starting point that underpins the existing relationship. Adequacy is a useful starting point but maintaining regulatory cooperation would also be mutually beneficial given the leading role the ICO has played in Europe. Procedures could be simplified for EU and UK businesses under a designated lead regulator arrangement, similar to the One Stop Shop. The Data Protection Act has brought GDPR into force in the UK, with a separate instrument for intelligence. Discussions will also consider our international data transfers regime.

PG updated US on progress with issues directly affecting them. On Privacy Shield, the UK interpretation is that this would continue to apply during the IP under the proposed arrangement and this would give parties time to agree future arrangements. Yasmin Brookes in DCMS is discussing this with Shannon Coe in Dept. of Commerce.

GF linked these comments to direct trade issues, stating that nothing outlined necessarily prohibits an agreement on free flow of data with US. There are countries that have adequacy decisions from the EU that have signed up to free flow provisions.

RT explained that obtaining commitments on the free flow of data is a top priority and the US wants to be as constructive and positive as possible on this issue given its importance to the UK/US future relationship. US conclusions on discussions with EU are that there is no legal reason why you can't commit to free flow and have adequate data protection – such as through GDPR.



RT also explained that the US has had some specific concerns with how GDPR is being implemented. The EU has acknowledged GDPR has a global impact and other countries are going to have opinions.

RT stated that the US will want to engage with the UK on the best approach around its future international transfers model, but understands there are still internal discussions in the UK on this. The US are proponents of APEC-CBPR model which is based around individual companies rather than whole legal systems. Adequacy is a flawed system that cannot become a global standard and is very difficult for developing countries in particular to adopt. The UK and US could work together on an inclusive system. KJ explained that the US has been working with Japan, who are seeking adequacy and operate the APEC-CBPR system. A mapping exercise took place mapping CBPR against the EU corporate rules system, and it was discovered that while there were differences, they were not as extensive as one would presume. Some countries have used the same set of information to get both approvals under both systems. PG reiterated that discussions were ongoing in HMG on international transfers and that, across data as a whole, there were two work plans – data protection and data in trade. RFL flagged that HMG approach was joined up, even though the conversations were separate. Continuity is the priority right now and securing this would give us time to discuss future relationship.

KJ welcomed that data flows were a UK priority. They put a lot of stock in Privacy Shield and look forward to continuing to speak with us about ensuring confidence in Privacy Shield remains.

DS asked whether, following EU statements on non-personal data, the UK had a position on 'hybrid data'. It would be useful to understand the impact on companies of unintended consequences of bringing GDPR in to play on hybrid data. PG explained that the UK was not fully across this question but would be happy to take away.

5. Next Steps

RFL thanked officials for the productive discussion and stated that we have a starting list which US colleagues can take away. It would be useful going forward to consider where conversations are directly trade related and where we can usefully facilitate other relevant discussions. We look forward to discussing these themes in more depth in the November session when both countries have considered further.

RT stated that the US has a model for what they want in an FTA and this can be seen in their agreements. They also understand EU positions from TTIP and are interested in finding out more about UK positions so that we can understand areas of agreement and challenge. They are also keen to facilitate discussions outside trade, as useful.

CW welcomed the conversation and that there were no surprises on areas of interest. The WG is a useful forum for developing a shared understanding of regulatory and legal systems. DS and RT agreed on importance of this work and happy to answer questions on their own frameworks when useful.

RFL, CW, RT and TF agreed to consider the outline of next steps for the closing plenary.

Key Actions and Next Steps:

- The UK and US agreed to further discussions to aid further understanding of each other's priorities in specific areas. This is to include identification of shared interests and potentially challenges. Proposed areas of discussion are:



-
- Cybersecurity – focussing on the commercial impact
 - Legal and regulatory frameworks on consumer rights
 - Emerging technologies (also discussed at informal session later in July Working Group).
- The UK is to send information to US colleagues on the work of the Office for AI and the Data Ethics Centre.
 - The UK is to consider its approach to hybrid data and the impact of applying GDPR to this data.
 - US to consider cross-agency, the plausibility of UK-US collaboration on emerging technology.

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Session Lead Analysis/Comments:

This was a very positive session, and the first chance for the UK to outline and discuss our digital trade priorities in any international forum. We were able to emphasise to US counterparts that we had chosen to share them with the US first. While both sides recognised that the positions we set out were high-level and relatively preliminary, there was recognition on the US side that this was the product of a lot of cross-Whitehall work and would serve well as the basis to continue more technical discussions building towards negotiations. The deep dive on data was useful – a high priority area for the US and they were grateful for the chance to focus on it.

The challenge will be in seeing what is possible in the possible FTA, getting into the detail, and where we need to develop discussions across the right elements of the US and UK administrations. At times DCMS went beyond the agreed lines or cleared position, which was manageable but shows the need for further preparation, set policy positions and clarification on roles.

In the margins, USTR leads flagged they were going to push for their model on digital trade – ‘TPP plus’ – as they were doing in NAFTA. They were keen to discuss specific provisions as soon as possible and to get a sense of what was going to be difficult for the UK – they name-checked a number of areas they felt would be likely. We pushed back on getting into text at this stage but agreed that discussing the areas of common interest would be productive. A series of deep dives have been agreed, which should set up further trade discussions well at the next TIWG.



Department for
International Trade

AGRICULTURE

Date: 10 July 2017

Time: 12:00-13:00

Participants:

Name	Department/Directorate
Ceri Morgan	Defra–Global Trade Negotiations
Sinjini Mukherjee	Defra
Russell Stokes	Defra-Legal
Emma McCarthy	Defra
James Dunn	Defra
Mojgan Ahmad	DIT- Trade Policy
Neil Feinson	DIT- Trade Policy
Sophie Brice	DIT- UK-US Trade Policy
Katie Waring	DIT- UK-US Trade Policy
Julie Callahan	USTR
Roger Wentzel	USTR
Kelly Milton	USTR Geneva
Dana Du Bovis	TTB
Lori Tortora	USDA
Anne Kirchner	USDA
Rachel Shue	USTR
Joe Babb	USDA
Joe Weresynski	USDA
Mary Stanley	USDA
Mari Kirrane	USDA

Key Points to Note:

- The US are very concerned at the contents of the Chequers statement. They were “deflated” and see harmonisation with the EU SPS regime as the “worst-case scenario” for a UK-US FTA.
- The US see SPS as the biggest ‘sticking point’ on risk (what they see as the ‘global norm’) vs the EU’s hazard-based approach on mainly pesticides, veterinary drugs and pathogen reduction treatments.
- On transparency and equivalence the UK not remaining in the EU but subject to the EU rules will be more of an issue for the US than the UK just being in the EU, as we can no longer be a back door for US products and no longer influence EU rules. An example the US shared would be if they (the US) lodged a complaint against the UK under the terms of the FTA, the UK would not have the autonomy to address the said complaint under the Chequers proposal.



- The US are interested in areas such as GI's and where there might be some room for negotiation, what they can tell their stakeholders, and on operational areas where we can co-operate (such as certification).

Report of Discussions and Outcome:

Introduction and Discussion of US – Relationship post Chequers

The US (Julie Callahan - JC) opened by noting that they still hoped that a UK-US FTA could be a potential trailblazer agreement.

JC outlined that Chequers and the UK's decision to attempt to align with the EU on Agri-food and SPS is the "worst-case scenario" for a UK-US FTA. For transparency, and equivalence, this would create more of an issue than if the UK remains in the EU, because the UK cannot be relied upon as a critical voice within the EU Parliament.

JC then asked if 100% harmonisation is likely to be the EU negotiation position. The UK (Ceri Morgan - CM) anticipates that this will be the case but stressed that the UK will only be harmonising on the rules that ensure frictionless trade.

Discussion of Continuity Agreements (mainly SPS)

The VEA dominated most of the discussion as a way for the US to probe the UK on SPS issues.

CM asked the US to provide their headline concerns.

The US outlined the concerns as:

- a) Risk-based system is the global standard, but the EU move to a hazard-based system has taken countries by surprise. The recent WTO SPS committee was raised, and the US used the example of African countries and Latin American countries now being restricted in supplying products to the EU. The US suggested that this has created food security concerns, which is one problem area the UK would "inherit". The US think that there are other ways that regulators can approach SPS (in a risk-based way).
- b) Specific examples were given on the EU approach to pesticide legislation.
- c) The recent EU restriction on anti-microbial usage in third country exporters was raised as a significant concern.
- d) The US raised, further to their November presentation, that the un-scientific approach the EU maintains towards Pathogen Reduction Treatments is not appropriate.

JC also asked where the UK will be able to diverge from the EU under our proposals, and how stakeholders were reacting. CM responded that these are challenging areas to immediately respond to, but that we would do so in due course. Stakeholder reaction depended entirely on industry and areas of interest.

The US asked whether Northern Ireland had a flexible SPS policy compared to the rest of the UK. The UK responded that this was not the case, but that Defra would provide further information the following day.



Stakeholders

The Roger Wentzel (RW) asked what the UK's stakeholders were saying on the US, specifically if our importers and exporters are seeing any opportunities in Brexit.

CM said that stakeholder reactions have been mixed and often polarized. Most want continuity so that existing trade can continue, and some want new markets. The Neil Feinson (NF) echoed this, adding that it entirely depended on what industries the stakeholders were in.

The RW pushed on importers again, asking what their goal is (do they want products from the US to then ship to the EU), and would the UK still play a "gateway" role?

CM responded with the example of wine. We import a lot more wine than we export, so continuing imports is important. CM continued with the example of supermarkets, and that there can be different ideas from different stakeholders, so it isn't a simple picture.

What can be done to foster collaboration (regulator to regulator discussions)

Lori Tortora (LT) gave an example of the challenges regulators and exporters face with the EU's certification. Specifically, that the EU site can be out of date and burdensome and can cause issues. A specific case of an exporter who used mollusc shells in their products was raised, with their products stopped at the border because the certificates were too complicated. CM responded that this is an area of operational need, and it is something the UK and US may be able to consider as Chequers develops.

CM finished the session by raising that we have published White Papers and consultations on fisheries, the environment and future farming as well as the recent Chequers proposal.

Key Actions and Next Steps:

We will continue to inform the US of our developing position with the EU and look to identify areas where we can work together (certification as an example).

We took away a couple of questions for the session the following day:

- Stakeholder's engagement and what do our stakeholders want on the import and export side
- What flexibility's do we have on SPS so they can tell their stakeholders?
- The status of Northern Ireland's SPS flexibility compared to the UK.

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Session Lead Analysis/Comments:

This was a challenging and difficult meeting, because the status of Chequers makes movement on SPS unlikely. The US were clear that this was deflating, and full EU alignment on SPS was the worst-case scenario. We anticipate this being fed into the POTUS visit briefing.



Department for
International Trade

REGULATION: TECHNICAL BARRIERS TO TRADE

Date: 10 July 2018

Time: 14:00

Participants:

Name	Department/Directorate
Julia Farrel	DIT – Trade Policy
Henry Alexander	DIT – Trade Policy
Kashan Ali	DIT – Trade Policy
Sisi Omu	DIT – Trade Policy
Alex Rattee	DIT – Trade Policy
Ben Shotnes	DIT – Trade Policy
Ali Kelly	DIT – Trade Policy
Rebecca Schneider	DIT- UK-US Trade Policy
Verity Threlfell	DIT – Trade Policy
Tim Harris	DIT – Trade Policy
Oliver Griffiths	DIT- UK-US Trade Policy
Katie Waring	DIT- UK-US Trade Policy
Ned Mazhar	DIT – Trade Policy
Tim Collier	BEIS
Huw Parker	BEIS
Sinjini Mukherjee	DEFRA
Sarah Clegg	British Embassy, Washington
Silvia Savic	USTR
Cara Lofaro	US Dept. of Commerce
Sam Rizzo	USTR
Christine Brown	USTR
Rachel Shub	USTR
Eric Puskar	NIST
Jessica Simonoff	US State Department
Kelly Milton	USTR
Lori Cooper	US Dept. of Commerce
Anne Kirchner	FDA
Julie Callahan	USTR
Mary Stanley	USDA
Richard Sock	N/A



Key Points to Note:

- The US, whilst recognising that the state of play regarding Chequers and Brexit is still developing, had a number of questions around harmonisation under the common rulebook for Goods, “frictionless trade” and behind the border measures. The US registered a particular interest in EU industrial and agricultural goods that are covered under the New Approach. More specifically, the US also asked what kind of flexibility can be offered under the position set out under the Chequers Statement, and market access for conformity assessment bodies.
- The UK was able to offer some background on some of the products that need to be checked at the EU external frontier, based off a slide produced by the European Commission’s Article 50 Taskforce. The White Paper may provide further information on this.
- The UK posed a string of questions to the US on accreditation bodies. The US informed the UK that UK companies could set themselves up as accreditation bodies for the US market, as accreditation bodies are private enterprises in the US. The US mentioned that if a third country conformity assessment body incorrectly assessed a product, it would be open for litigation and may be delisted from the relevant agency administrative list.
- The UK provided a short presentation on how TBT functions in the UK, which was well received by the US. The US raised that their view is that, even if the UK were taking EU legislation and adopting it into the UK after EU Exit, the UK would still have to notify that measure separately to the TBT Committee. The US stated that this is the same point they make to EEA countries and countries that have signed FTAs with the EU.
- The US gave a presentation on their latest thinking on seven key TBT principles in FTA chapters. Much of their approach is either a reaffirmation of the WTO TBT Agreement or, in some cases, builds upon the obligations of the TBT Agreement. On the issue of standards, there was agreement that the principles set out by the US were not too dissimilar with the UK’s current arrangement on standards, with the exception of “incorporation by reference” and the use of multiple standards.

Report of Discussions and Outcome:

1. Update on Brexit

“Frictionless Trade” and “Behind the Border Measures”

The US had several questions around the Chequers statement and its implications for trade in goods. Areas of particular interest were: clarity on what is covered to provide for “frictionless trade” and what would be considered as “behind the border” measures. The US were particularly interested in industrial (New Approach) and agricultural goods, and whether they would be considered as being subject to behind the border measures. More broadly, the US asserted that harmonisation under a common rulebook for goods would have wider implications for the UK’s trade policy and asked for the UK’s thinking at this stage.

Julian Farrell (JF) (UK) caveated from the outset that it was beyond our ability at the official level to interpret the Chequers statement, but that there were some pointers that the UK could give the US. The UK informed the US of a slide produced by the Commission’s Article 50 Taskforce, which indicates some of the issues, most of which are agri-food or Sanitary and Phytosanitary (SPS) measures, that the Commission believes need to be checked at the EU’s external frontier. The UK stated that checks are extremely rare at the external frontier for most manufactured goods, and that routine checking is done instead on the market.



Conformity Assessment

The US also had considerable interest in conformity assessment, raising several questions around: how the UK is thinking of maintaining access for its notified bodies and flexibility on conformity assessment, particularly for testing bodies outside of the EU.

The UK responded to the US questions on conformity assessment in broad terms. On the issue of maintaining access for notified bodies, the UK noted that the EU Withdrawal Bill rolls over all EU legislation and puts it onto the UK statute book so that there is continuity and no cliff edge at the end of the Implementation Period. The UK explained that as part of the Future Economic Partnership (FEP), it will be seeking to negotiate a situation where UK bodies can continue assessing conformity with EU legislation and vice versa. Whilst the White Paper may say a little more about what the UK is seeking in conformity assessment for both EU and third countries, what the UK was able to say with certainty was that our approach to Trade Agreement Continuity would roll over the conformity assessment agreements the EU has with third countries, including the US, allowing firms to operate as they currently do. The UK expressed interest in exploring expanding the coverage of existing Mutual Recognition Agreements (MRAs) to covering sectors not currently covered by the EU and also deepening areas that are covered, citing pharma as a good example where Good Manufacturing Practices (GMP) and other issues have developed at an international level. The UK stated that continuity is the top priority, after which the UK would be very interested in ideas for improving the operation of agreements with regards to flexibilities, efficiencies and modernisations.

The US countered that their line of questioning was more around general approaches to conformity assessment rather than specific MRAs. The US asked whether, unlike in the EU, there will be scope to accept non-governmental testing bodies. The US further stated that it had particular concerns around localisation requirements. The UK explained that almost all conformity assessment bodies (CABs) in the UK are non-governmental by virtue of being private sector organisations. On the issue of localisation requirements, the UK clarified that the MRA approach means there is no localisation obligations for US test houses which are designated bodies under the US MRA. The UK also contended that there may also be other ways to address the issues raised by the US, including extending MRAs to cover more sectors. Tim Collier (TC) (UK) reiterated that it is important to not speculate too much on what kind of scope the UK has, as it is at the start of a negotiation with the EU. Whilst respecting this, the US made clear they had received instruction by their leadership to press on this point because of what they consider “frank discrimination” in the EU system.

The UK responded to the US line of inquiry with questions of its own on accreditation and conformity assessment. The US caveated their answers by saying that the answers depended on the agency and the programme. On the whole, if a foreign testing house is approved for testing, it would then be able to issue certification in accordance with US law. The US said the best product in this scenario would be toys. Rachel Shub (RS) (US) asserted that the US is looking for the China and India to recognise testing in US territory, rather than just their own. Eric Puskar (EP) (US) further clarified by saying that it is not always the regulator that will accredit, but, given the multiple private sector bodies in the US, private non-governmental bodies will accredit instead.

Though there is no definitive list of US accreditation bodies/systems, the US said that regulators would be able to point prospective foreign testing houses in the right direction.

The US were less clear on how a foreign company could become an accreditation body, only stating that it is possible and that the ones that the US government would use are those that are signatories to the International Laboratory Accreditation Cooperation (ILAC), which would entail a process of peer review and joint levels of assurances.



In the event of a CAB incorrectly assessing a product, the US explained that litigation may be one way in which the matter is pursued. The US also contended that under the most progressive programme, the Consumer Product Safety Commission (CPSC), the CPSC has full authority to delist CABs. The same applies for the Federal Communications Commission and the National Institute of Standards and Technology (NIST). In addition, some programmes have formal five-year renewal processes, but delisting does not have to wait that long in the event of serious breaches. The US were less open on whether this is irrespective of where in the world the breach takes place. RS (US) indicated that some CABs are in good relations with the export promotion arm of their government; those will have a strong awareness of exactly what is happening in accreditation laboratories. SR (US) noted that the large majority of CABs in South America, specifically, are part of well-known international global testing houses, such as Intertek. A representative from the Food and Drug Administration (FDA) explained that processes are slightly different for agriculture; the recent Food Safety Modernisation Act gave the FDA ultimate responsibility for accreditation. As the Act is so new, the US were unable to provide any real-world examples.

2. Recap of March Discussions

Both sides agreed that the above discussions had covered this agenda item.

3. UK Government Organisation of TBT Matters

UK Presentation

As promised in March, JF (UK) gave a brief presentation on how TBT functions in the UK.

Responsibility for TBT policy, including the inward and outward responsibilities of the WTO TBT Committee, lies in JF's team. The UK explained that DIT's Policy Directorate is organised by the chapters of a typical FTA and as such, JF's Regulatory Environment Team's portfolio contains a collection of regulatory chapters, such as TBT, GRP, Regulatory Cooperation, Small and Medium Enterprises, Competition, Subsidies, and State-Owned-Enterprises. The UK highlighted that a broad range of government departments "own" domestic regulations which fall under the remit of the TBT Committee. It distributed a slide that provided a non-exhaustive breakdown of sectors covered in EU agreements and their respective lead departments within HMG. The UK reiterated that DIT will lead on trade negotiations outside of the EU, whilst negotiations with the EU are led by the Department for Exiting the European Union (DExEU).

US Questions and Views

The US' main question to the UK was what kind of regulations those departments on the slide issue that fall under the EU's New Approach legislation. The UK reminded the US that UK does not have the ability to currently notify the WTO TBT Committee if legislation falls within the scope of the single market directive. The UK pointed out that areas where it has notified are those where the EU has not regulated, such as the most recent notification on microbeads. Following this, the US asserted that post-exit, if the UK adopted EU legislation, it was of the view that the UK would have to notify such measures to the WTO TBT Committee, in addition to any EU notification, making sure to include a commentary period and to take those comments into account. The US stressed that this is the same point they make to other "European partners" such as the European Economic Area countries, and countries that have signed FTAs with the EU. The UK said the issue is something it is considering.

4. US Presentation on "Approach to Content of FTA TBT Chapters – Key TBT Principles



The US gave a presentation on what they consider 7 key aspects of TBT chapters in FTAs, which reflect their latest thinking. The US stated that many of the elements in their presentation are built into negotiations for the North American Free Trade Agreement (NAFTA) TBT chapter with Mexico and Canada. The US did say that the presentation as a standalone is not comprehensive but could be considered so if read in conjunction with the US-Korea Free Trade Agreement. Below is a breakdown of the 7 principles the US presented.

Use of International Standards

The US recalled Articles 2.4 and 5 of the WTO TBT Agreement, which encourage the use of international standards as the basis for technical regulations and conformity assessment procedures. The US highlighted that, due to its broad scope, the TBT Agreement does not have a list of international standard-setting bodies, with the TBT Committee instead agreeing six principles of what makes an international standard. The US reflects these six principles (openness, transparency, impartiality and consensus, effectiveness and relevance, coherence and the development dimension) in their guidance to regulators, when they are developing technical regulations. The US underscored a focus on promoting the principles of the TBT Committee's decision and not using additional criteria such as where a standards development organisation is based or whether the organisation is a governmental body. The US claimed one of the issues they find problematic with the EU system is that the EU promotes local and regional standards over international ones. Concluding this section, the US reiterated that they have found that regulators which rely on standards developed in accordance with the TBT Committee's decision are more effective at regulating and facilitate a full and balanced consideration of international experts, therefore making their standards more responsive to market needs

In response to a question by JF (UK) the US said they generally seek to affirm or reaffirm commitments to the WTO in their trade agreements, rather than rewriting the relevant sections of the TBT Agreement.

Avoiding Government Unique Standards

This section concerned making regulators consider existing standards, before creating new ones, recognising that government is not always the most efficient at responding quickly to the market. When regulators do create new government standards they have to report on an annual basis declaring why, as there is a legal preference for voluntary consensus standards. The US explained voluntary consensus standards are voluntary until the standard is enacted and made mandatory; voluntary consensus refers to the process of developing the standard. After incorporation, the standard is "incorporated by reference". JF (UK) noted that the concept of "incorporation by reference" was not used in the UK, where standards were generally voluntary.

Use of Multiple Standards

The US stated government should adopt flexible procedures that allow multiple standards to meet regulatory requirements and that this is a new element in their FTAs. In the US, government is encouraged to consider additional standards that would be effective in meeting the stated objective throughout the regulatory cycle of which there are two main elements. First, stakeholders will be alerted when a draft standard is published and are able to suggest other existing standards that meet the objective. Second, after the regulation has come into effect, stakeholders can request a petitioner review process and suggest additional standards through that process. Under both processes, regulators are required to decide whether the suggested standard(s) meet the measure's objective. The US explained that both processes are also transparent ways of allowing for different ways of showing conformity with particular regulatory requirements. The US highlighted the differences



between their approach and the EU's on the issue, citing how in the EU one standard gives a presumption of conformity. The US claimed that though the EU system does allow for alternative means to demonstrate conformity, they were not aware of any having ever been granted.

Conformity Assessment Bodies (CABs)

Given the discussions of CABs under item one, the US did not dwell too much on this slide. The US reiterated that the core of the issue for them, which they have spent considerable time raising at the TBT Committee, is requirements for in-country testing. The US cited the EU's system as particularly problematic for this, as requirements mandate testing within the EU. The US noted that they were not speaking of MRAs, pointing to countries such as India and Indonesia which have accepted conformity assessments without the need for government-to-government agreement.

Non-Discriminatory Participation

The US stated this principle is "pretty consistent" in their FTAs, and partly comes from their experience with the EU system. The US complained of the difficulties faced by their government experts and private sector in efforts to participate in European standardisation organisations. The US stressed the need to not add criteria to the TBT Committee's Decision and underscored that having more experts participating in the development of standards results in better standards.

Transparency and Timely Notifications

The US inclusion of this principle in its FTAs is a reaffirmation of the TBT agreement, impressing the need to provide 60-90 days to comment on measures notified to the TBT Committee and to allow no less than six months between the measure's publication and its entry into force. The US further underscored the need to notify draft technical regulations and conformity assessment procedures at an appropriate stage when comments can really be considered, highlighting how they have found that if a country waits too long to notify, at a time when legislation is being approved by parliament for instance, there is less chance for comments to have an effect.

The UK stated it has a two-stage domestic process: consultations on draft legislation, after which the government publishes the responses received and its comments to those responses. Upon questioning from the US, Sisi Omu (UK) stated that for the English microbeads notification, the UK notified the measure to the Committee at the same time as the consultation.

Third Countries

The US explained the cornerstone of this principle is to avoid raising de facto barriers with third countries whilst facilitating trade in a bilateral setting. The US stated they have found this to be a problem with some EU FTAs and wider outreach the EU engages in, citing how some EU FTAs, particularly association agreements such as the one with Moldova, require countries to withdraw conflicting standards, effectively forcing partner countries to adopt EN standards, which the US considers to be regional, even if the standard being withdrawn is an international one. To counter this, the US seeks to include a provision in FTAs that does not allow for discrimination against international standards wherever they are created. JF (UK), in response, said it was hard to conceive of a situation where the UK would seek the removal of an international standard.



5. AOB

Max.gov

The US referred to the max.gov file-sharing portal. The presentation that the US gave has already been uploaded to max.gov.

Participation in Standards-Making Discussions

In response to TC (UK) stating that BSI's system does allow companies to take part in standards-making discussions, the US made clear its greatest concern was with the European Committee for Standardization, the European Committee for Electrotechnical Standardization (CEN/CENELEC) and the wider EN system, where to be able to have a vote on standards one must be a national member of one of 33 European states.

Transparency – Where to Find Relevant Standards

The UK queried the US on how to gain a better understanding of the US standards' system, if for instance they needed to pass along information to UK companies. The US informed the UK that there were several places a company could find information on what standards need to be met to import any product. RS (US) stated, that most US regulations can be found in the Federal Register or Code of Federal Regulations. Information can also be obtained from the US WTO notifications, the national gazette, and the American National Standardization Institute (particularly for International Organization for Standardization and International Electrotechnical Commission standards) and NIST, which has a standards information centre. The US also has a list of "incorporated by reference" standards.

6. Closing Remarks

Both sides agreed that discussions were constructive and built upon those held in March. The US said they would be "happy to meet" (e.g. by Video Teleconference) before November, when the next Working Group is to be held.

Key Actions and Next Steps:

- There were no key actions or next steps

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Session Lead Analysis/Comments:

Overall a good atmosphere with a helpful discussion in further understanding the US position for TBT, notably on Standards and Conformity Assessment. However, the US made clear that they had strong interest in what had been published in the Chequers agreement and were keen to understand what the proposed common rulebook for goods would have on the UK-US trade negotiations. Going forward we will need to carefully communicate what the White Paper means for the TBT space.



Department for
International Trade

SERVICES: PROFESSIONAL BUSINESS SERVICES

Date: 10/7/2018

Time: 1300 – 1600

Participants:

Name	Department/Directorate
Rebecca Fisher-Lamb	DIT – Trade Policy
Johanna Michael	DIT – Trade Policy
Elizabeth Mackie	DIT – Trade Policy
Sukhmani Khatkar	DIT – Trade Policy
George Radice	DIT- UK-US Trade Policy
Elizabeth Sutton	DIT – Legal
Paul Smith	BEIS
Gavin Baylis	BEIS
Alexandra Foerster	BEIS
John Carroll	MoJ
Tom Fine	USTR

Key Points to Note:

- The UK introduced its MRPQ non-paper as a basis for starting to think about issues collectively and in reaction to a lot of stakeholder engagement that has been done. The US welcome the UK's non-paper as a basis for making a forward plan. After a good discussion, the UK will amend the non-paper and use it as basis for forward plan.
- The US and UK affirmed commitment to establishing a programme of stakeholder engagement going forwards. There was agreement on a proposal to convene regulators and professional qualification bodies in November on legal services and communicate this to stakeholders early to ensure their attendance.
- The US discussed the range of interest, sensitivities and options available per subsector and where there could be future discussions with the UK.
- There was agreement to join up with the SME dialogue to look at how MRPQs can support SMEs.

Report of Discussions and Outcomes:

1. The UK reiterated messaging from the plenary on taking questions, with a lot of thinking coming out of the White Paper and the UK will be able to answer questions, where possible.
2. The UK outlined that this was the third discussion between the UK and the US on PBS. The UK has considered the US five-chapter model and approach to NCMs, but is not yet in a position to respond on its approach. PBS is an area where we both have an interest but there is a challenge in how this will work in practise. On the US side there is the issue of the state-federal split. We are interested in exploring the potential here and the options to convene our stakeholders. We would like to put together a programme of activity and take this forward. Hopefully we can come out of this with a sense of what is possible in this space.



3. The UK introduced its MRPQ non-paper as a basis for starting to think about issues collectively and in reaction to a lot of stakeholder engagement that has been done. Businesses are keen to be engaged, have a strong degree of interconnectedness already and value high standards. The sectors we have highlighted in the paper are the three/four areas where there are already conversations going on between regulators and business organisations. We would like to use the momentum of these discussions to deepen relationships on both sides and see what is possible. We are struck by how close some of the professions already are. In terms of the Scottish accountancy MRA there is already a pipeline of businesses wanting to utilise this.
4. The UK reaffirmed that this is not about lowering standards, and that we are very clear on where responsibility sits regulators. How can we help businesses do what they are already doing but assist them in streamlining some of their processes? The England and Wales accountancy bodies are trying to do the same thing that was done by the Scottish bodies. It would be useful to be able to support this more widely. We have highlighted legal services as an area of key interest. The UK Law Society is very active, and it is the same for many US bar associations. There are several areas where we channel this support. The built environment sector is also very positive and there is exploratory work being done between architects' associations. Similarly, with the engineering sector there is a single state in Idaho with which there is a mutual recognition agreement.
5. The US thanked the UK for the non-paper and providing this overview. The US has been really encouraged by the work on accountancy and there is a lot of good work going on in England/Wales and in places like Jersey. Regulators want to ensure that licenses are given to those qualified to hold them. They are keen to look at the education on the other side to ensure there is a prescribed level of accomplishment. We are looking at programmes to build skills to ensure professionals are of the right skill level.
6. The US noted that in the US there are no national treatment barriers, and that this is likely to be the case in the UK. This is not necessarily true throughout Europe. Law is the profession that is the most difficult, it is an area where there are geographically based restrictions and laws change from time to time. This could be an area in which to convene with stakeholders on a more regular basis, to begin exchanging information about what they do. The US legal system is highly complex and it varies from state to state, sometimes radically. Understanding how this works and what the different pathways are for states is not easy. We could have a useful exchange of information. It is an area that highlights facilitation of licensure. The US do not use the phrase MRA because they do not think there will be an MRA for legal, but lawyers need to be where their clients need to be. There are lots of techniques that US states have come up with and they will approach it in a very different way. States are beginning to experiment with different ways of providing legal services. Some states are drawing strict guidelines on this, with others experimenting on whether paralegals can provide certain services. The US can provide us with more in depth information on what our states are doing.
7. The UK commented that this was understood on the UK side and that potentially the US had a better sense of this on architecture. The US noted that where it has MRAs it is usually based on who knows who. The UK has a globally recognised standard on architecture. The US was interested in exploring the engineering sector as they had not been so forthcoming previously. The UK noted that improving cooperation in this area would in part be focused on SME businesses who really benefit from this flexibility.
8. The US outlined that there was an increased number of lawyers setting up as consultants which meant they did not have to be qualified as a lawyer under US law. This has probably been our



most successful area. There was a push for fly in, fly out. It made regulators a bit concerned in terms of being comfortable with lawyers advising clients using different types of practices. It could be useful to set up a session to discuss in more detail to discuss fly in fly out, including what states do and what and what the trends tend to be.

9. The UK asked about who should be around a table and how to move this forward. The US commented that they would need to think through who to include, the bar associations would be willing to get involved and it is easy to get access to them as the overarching bodies for state courts. The chief justice of each state supreme court is the chief licensing officer. The judge is essentially the regulator. The US has learnt the lesson of not pushing too far too fast and would be interested in looking at the umbrella organisations that brings together the states. The UK noted that the impression from legal advisors was that doing something with the bodies would be the best place to start. The US was keen to draw the link between what is being done here and what is being done on SMEs. Most SMEs are services not goods. The US suggested doing something with stakeholders in the new year.
10. The US noted that the profession where they are most advanced is audit. In terms of picking this up amongst states, this is an area where licensing quite easy. The UK commented that, in audit, there is a time element to this. Whilst we may have flexibility on services in the future, during the IP we will be bound by the directives of the EU. In terms of a roundtable on accounting it would make sense to have the England and Wales chartered accountants available, as well as the FRC, ACCA and the Northern Irish body. We can see where we are, with different bodies in different stages. The US agreed with this in setting up conversation on auditing in terms of what have we learned from ICAS and what have we now achieved with the ICAEW and positive interactions with the FRC. The FRC are really interested in this, particularly given the regulatory context in the UK and EU. It is increasingly in their interest to not have auditors in position too long, to ensure that the market remains competitive. There should be flow between jurisdictions on firms.
11. The UK highlighted that we would need an appropriate communications and handling strategy. The US stated that there was high level of interest but that we would need to understand where stakeholders are at. The US has MRAs with Australia and New Zealand and would see the UK as a logical next step.
12. The US has also been approached by the nursing profession. They are considering state to state movement of nurses without needing a new license and they are already closely integrated with Canada and Ireland. It is an area that is becoming globalised and used to be a localised profession. It is evolving very rapidly. It is an area where the US have an interest. Various studies show that we are seeing about developments there. There are recognised sensitivities, and the US would like to offer to its profession the opportunity to talk to the UK in a useful way.
13. The UK outlined that we could look at nursing, but this should be further down the list of sectors to review, as possibly will be linked to the Migration Advisory Committee's review that is due in the Autumn.
14. The UK noted that on areas and next steps, we want an agreed forward plan. Is it valuable turning this into a joint paper? The US responded by stating it was committed to doing a roundtable in the fall, in conjunction with the next TIWG at November. This could follow future WGs with architecture, accounting and engineering. These would be roundtable/information sharing sessions. We could try and put together a plan, respecting needs of regulators and where we would need to facilitate. HMG to send a starter for ten after exchange of materials.



15. We will also need to consider what will be possible in a future FTA, with the US stating that TPP and TiSA include similar provisions and capture their preferred approach. They outlined that the possible UK-US agreement might be able to make more progress in areas like schedules or domestic regulation, or transparency. Doing an MRA in parallel to finalising the agreement should be our ambition.
16. The US asked a question about the Withdrawal Agreement. Anyone who is a UK/EU national has a family member/spouse would not fall out of the Withdrawal agreement. If you have qualified in the EU and come to the UK there are questions about how that is covered in future. We aren't looking to introduce residency requirements where they did not operate previously.

Key Actions and Next Steps:

- USTR/DIT agreed to facilitate workshops with professional bodies, regulators and stakeholders to work cooperatively to develop shared professional standards and pathways to facilitating licensing or qualification, where appropriate.
- USTR/DIT to organise a first legal roundtable in Autumn (alongside the November WG) with the aim for future discussions on accounting, engineering and architecture in the following working groups. These sessions will involve convening key stakeholders from legal firms and trade associations from both the US and UK.
- USTR/DIT to use DIT non-paper on PBS (shared with USTR before the WG) to co-author a timetable for forward-looking engagement with PBS stakeholders.

Forward look:

When	Action	Detail
TIWG 4, 10 July 2018	Present non-paper	Outline motivation behind developing the non-paper, offering opportunity for expanding into a joint paper.
TIWG 5, November 2018	Legal services roundtable	Facilitate discussion of UK and US legal services regulatory bodies to share information relevant to each legal jurisdiction on ability of foreign lawyers to provide services. We will consider how to take this forward with industry, including through links to the SME dialogue.
TIWG 6, early 2019	Audit/Accounting roundtable	Roundtable to discuss the experience of negotiating an MRA between ICAS and NASBA and AICPA, and, if an MRA has been completed, the negotiations involving ICEAW. The discussion can also take up possible next steps. Stakeholders in the room should include the appropriate regulatory and professional bodies, as well as industry.



Department for
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TBC	Architecture and Engineering roundtables	Details of facilitating these roundtables should be further established once both countries have had the chance to engage with industry and relevant bodies to gauge interest and capacity.
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Session Lead Comments:

This was a constructive discussion and it was positive that USTR was willing to take actions to push for progress on MRPQs outside the bounds of FTA discussions. It is important to use this momentum to continue to engage stakeholders in a timely and considered fashion, joining up UK and US sides, as appropriate. Resource constrains will make this challenging to deliver.

Focus for the next working group will also need to include a detailed review of FTA provisions related to professional services to scope out the scale of ambition that could be delivered before seeking a mandate for the US negotiation.



Department for
International Trade

INTELLECTUAL PROPERTY: OVERVIEW AND ENFORCEMENT

Date: 10 July 2018

Time: 14:00-18:00

Participants:

Name	Organisation
Maryam Teschke-Panah (MTP)	DIT- Trade Policy
Richard Price (RP)	DIT- Trade Policy
Jeremy Kempton (JK)	DIT- Trade Policy
Sophie Hale (SH)	DIT- Trade Policy
Mark Prince (MP)	DIT- Trade Policy
Sam Gibb (SG) – Scribe	DIT- Trade Policy
Sarah Mahfouz (SM)	DIT- Trade Policy
George Radice	DIT- UK-US Trade Policy
Cordelia Jonathan	DIT- UK-US Trade Policy
Adam Williams (AW)	Intellectual Property Office (IPO)
Tom Walkden (TW)	IPO
Megan Heap (MH)	IPO
Matt Cope (MC)	IPO
Elizabeth Jones (EJ)	IPO
Chloe Surowiec Allison	DCMS
Christine Peterson (CP)	USTR
Ed Gresser (EG – video conference, VC)	USTR
Bill Schpiece (BS)	USTR
Roger Wensell (RW)	USTR
Alex Whittaker (AW)	USTR
Fay Johnson (FJ)	USTR
Miriam DeChant (MD)	US Patent and Trademark Office (USPTO)
Linda M Quigley (LMQ)	USPTO
Charles Eloshway (CE)	USPTO
Susan Wilson (SW)	IP Attaché
Andy Toole (AT - VC)	USPTO
Jennifer Blank (JB – VC)	USPTO
Michael Shapiro (MS – VC)	USPTO
Mark Ye (MY – VC)	USTR
Shannon Nestor (SN – VC)	USTR
Caridad Berdud (CB – VC)	USPTO
JoEllen Urban (JU – VC)	USPTO
Karin Ferriter (KF – VC)	USPTO
Emily Bleimund (EB – VC)	Health and Human Services (HHS)
David Henry (DH – VC)	US - State Department
Steve Aitken (SA – VC)	Intellectual Property Enforcement Co-ordinator (IPEC)
Matthew Kohner (MK – VC)	IPEC
Joe Wereszynski (JW)	USDA



Key Points to Note:

1. Overall positive and highly detailed discussion covering the work undertaken throughout the TIWG programme to date, STO updates and a session focusing on priority areas for the Enforcement section of the IP chapter in an FTA.
2. Short term outcomes
 - SME Dialogue - Positive feedback, agreed that IP panel provided useful stakeholder insight. Agreed that the next SME Dialogue will not feature a specific IP panel but could have IP speakers join other policy/sector specific panels such as Digital.
 - Joint Economic Study – Agreed to have a highly progressed draft by end of Summer 2018, with the aim to publish in Autumn 2018 (potentially in line with TIWG 5). Agreed to continue fortnightly working-level VCs with monthly steering-group VCs.
 - IP Toolkit – Agreed to collaborate on initiatives for distribution at trade shows, working with DIT USA based teams (ITI), USPTO and IPO attaches. IPO are also hosting a US roadshow in June 2019, we agreed to work with USPTO on this too.
 - USTR offered a visit to the US National IPR centre at TIWG 5 – we accepted.
 - US proposed a joint webinar to provide further education on IP rights – we agreed to explore further.
3. Enforcement
 - Online Infringement – UK presented, giving a clear overview of our world leading approach in this area. US particularly impressed with the relationships UK IPO have built with Google and Bing on website blocking. Scope for further collaboration here.
 - US presented a non-paper on fighting illegal online content. Focusing on the Digital Millennium Copyright Act (DMCA) – US pushing for Internet Service Provider (ISP) Safe Harbours, highlighting that DMCA has been a feature of their FTAs (varying levels of detail) and posed questions on UK stakeholder views on DMCA and the use of DMCA as a measure in UK Code of Practice on Copyright and Search.
 - UK set out approach to online IP enforcement and availability of access to justice for SMEs. Noted that access to justice was a key topic in SME Dialogue. Questions from US around history of the court, why it was set up and sought clarity about the various courts that are on offer for IP cases (small claims track, IPEC and High Court)
4. Trade Secrets
 - Short discussion on the implementation of the (EU) Trade Secrets Directive and what it meant for UK. US pushing Criminal enforcement, we clearly outlined that criminal prosecution can take place via other means (Fraud Act, National Secrets etc).

Report of Discussions and Outcome:

Sub session 1: Overview – TIWG progress to date and STOs

1. MTP (UK) provided an overview of the progress since TIWG 1 (July 2017) in Washington D.C. Since the initiation of the TIWG programme there has been a series of substantive IP discussions including:
 - TIWG 1 – First meeting, providing an overview of each other’s systems, highlighting areas of mutual interest for US and UK in IP including SMEs and Enforcement and agreeing to work together on STOs.



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- TIWG 2 – Discussed Illicit Streaming Devices, which led to further bilateral conversations and work between UK IPO, USPTO and FBI. Discussed each countries' approach to Trade Secrets, GIs and Innovative Pharmaceutical protections. Agreed to work together on the Joint Economic Study, IP SME Toolkit and to setup an SME Dialogue.
 - TIWG 3 – Further discussions on Trade Secrets, Innovative Pharmaceutical Protections, combating illicit IP content online and ongoing changes to Copyright legislation and future changes to UK and US IP systems. Launched the SME IP Toolkit at the inaugural SME dialogue.
2. It was agreed that Session 1 would review the work undertaken to date and the progress made during numerous VCs and calls in between the working groups. The main areas of focus for the first part of Session 1 were:
- Recap of the SME Dialogue (9th July 2018)
 - Progress on the Joint Economic Study (JES)
 - Overview of the STO workplan, highlighting next steps for each workstream.
3. It was agreed that the second part of Session 1 would focus on continuing to develop a mutual understanding of each other's domestic IP policy and the corresponding implications for trade policy, focusing on:
- Enforcement - online Infringement
 - Enforcement - a discussion about USTR's non-paper on fighting illegal online content
 - Enforcement - access to Justice.
 - Trade Secrets – an overview of the UK's implementation of the Trade Secrets Directive.

CP confirmed this was in line with US expectations.

4. **SME Dialogue** - MTP (UK) outlined that the UK found the IP session of SME Dialogue to be constructive and highlighted that there was positive audience engagement from businesses and industry organisations. MTP (UK) explained that UK is interested in gathering feedback and agreeing next steps for the dialogue. All agreed that the SME dialogue provided positive engagement, reaffirmed the demand for resources that both governments can offer and the importance to SMEs of being able to access all the resources available to them. All agreed that further thought should be given to how we can improve the toolkits to ensure that they are most beneficial to the target users and that there is a need for more education for SMEs in this area. SME views expressed at the dialogue included comments regarding the online/digital platforms and the opportunities and challenges for SMEs as trade becomes digital. There were several questions and comments around cost and access to justice issues, which supported the planned discussions for the IP session on Enforcement and Access to Justice.
5. CP (US) confirmed that the US recognised the same themes from the SME dialogue. CP explained that cost is not an easy question to answer and that this is an issue that US government is asked a lot. US surveys of SMEs have highlighted with respect to protecting IP their major problem is cost, however IP rights are private rights and although there is a wish that the US government would go to other countries and that US IP attachés would represent smaller companies in IP issues, this is not the case and is not something that is being proposed. CP highlighted that online databases and being able to protect IP rights online can reduce costs. International agreements also cut costs and allow companies to focus geographically on where they want to protect their rights.



6. TW (UK) highlighted that the SME Dialogue showed that it is clear there is support for both US and UK IP systems and that internationally they are both highly respected. A future US-UK IP chapter has chance to set precedent at a high-level for other countries. TW (UK), MD (US) and RS (US) agreed that education is key, exchanging and making information clear/accessible for SMEs who do not have time to search out information is an area where we can add value. We agreed to discuss further how mutual business outreach schemes and each country's engagement strategy can be used to complement one another. We agreed to think further about how to protect companies who go abroad to countries other than UK and US.
7. MP (UK) explained that IP teams from both the US and UK have made a significant contribution to the SME Dialogue, holding panels at both SME Dialogue 1 and 2. We agreed not to host an IP panel at SME Dialogue 3, but to maintain involvement in the dialogue and contribute to other panels in the future (e.g. Digital). The date of the next SME Dialogue was to be confirmed by the US & UK SME teams (Expected Nov 18, NYC)
8. CP (US) proposed a joint webinar to reach companies remotely (not just London/Washington D.C.) which can be recorded and put online for others. UK agreed that this is a constructive idea. Building upon the SME dialogue which provides policy insight, the webinar could be used to provide more prescriptive information for SMEs on how to register and protect IP.
9. **Joint Economic Study** - RP (UK) highlighted that there have been several working-level and steering-group video conferences to discuss the Joint Economic Study (JES). The JES is being undertaken in collaboration between USTR, DIT, USPTO and UK IPO.
10. Section 1 of the study highlights the importance of IP to the UK and US economies. Section 2 will examine the threats to IP shared by both countries. The JES is designed to highlight current strengths and potential areas for improvement as IP continues to grow in economic and social importance. There has been good progress on Section 1 and all agreed to continue progress on the drafts of Section 2.
11. SH (UK) provided a snapshot of the project to date and next steps. Following TIWG 3, USTR gave an initial proposal as to how the JES could proceed which was largely agreed. DIT subsequently produced the Terms of Reference (ToRs) for the project, which were agreed and are held on the Max system. USTR drafted an overall introduction to the study, this has largely been agreed, there is scope for further refinement once the consolidated sections have been finalised. USTR are taking responsibility for combining the UK and US drafts into a consolidated Section 1.
12. Progress on Section 2 is less advanced, USTR have shared their draft and the UK draft of Section 2 is under internal review by DIT and IPO. The UK are taking responsibility for combining the UK and US drafts into a consolidated Section 2. It was proposed to have the introduction and both sections finalised by the end of summer 2018 which would include a conclusion (for which the UK is responsible).
13. It has been agreed between all 4 parties (USTR, DIT, USPTO & UK IPO) that Section 1 will be centred on 5 themes:
 - o Innovation and the IP system
 - o IP intensive sectors; creative industries
 - o IP intensive trade in goods
 - o Trade in IP services
 - o Investment in R&D, intangible assets and IP filings.



14. EG (US) agreed with this summary and confirmed that USTR will combine the introduction with the consolidated Section 1 draft. USTR have shared their Section 2 on the MAX portal system. EG (US) stated that the JES is progressing well but recognised that there is still considerable work to be done to have a full draft finalised by end of summer 2018.
15. CP (US) provided an overview of the US support for JES. CP (US) stated that this work will be helpful for the US and UK as leading, innovative economies publicly stating the importance of IP for their individual economies, for the mutual trading relationship, and to send a message to stakeholders and other countries to incentivise them to improve their IP regimes.
16. Mark Ye (USTR) described some recent analysis undertaken by USTR on UK patent filings by US residents and vice versa, which found high levels of filing in each other jurisdictions. This supports the trade theory that the strong systems and rule of law in the US and UK facilitates increased investment in R&D in each country.
17. MTP (UK) agreed and added we want to be producing evidence-based policy making given that the UK will be developing trade policy for the first time in 40 years and having a sound analytical base is important. Another key point was to ensure that evidence and analysis remains the basis for long-term trade policy development and implementation.
18. MP (UK) commended the collaboration undertaken so far to produce the JES and reaffirmed the work plan: to continue the working-level and steering-group video conference calls until publication. MP (UK) proposed moving the provisional publication date to autumn/fall 2018. CP (US) agreed to the publication date and suggested that the first draft be prepared by the end of summer 2018. All agreed to proceed on this timeline.
19. CP (US) indicated the terms of reference would need updating to reflect the new timelines. She also explained a feature on the MAX system which allows users to co-edit documents which will streamline the drafting process. MTP (UK) highlighted that this economic study is the first of its kind and it is concentrating on issues that have been discussed at previous TIWG's and she thanked everyone who had been involved. CP(US) echoed MTP's comments and thanked the respective economic offices for their work in collaborating closely with policy colleagues.
20. **Other STOs** - MTP(UK) started the review and discussion of the remaining STOs that had been agreed at previous TIWGs. The IP toolkit has been one of the group's key deliverables and the next steps for the SME dialogue have been agreed. The JES item should be updated on the STO tracker.
21. MP (UK) DIT created a (A3) checklist to track the STO that have been agreed. It is a high-level overview and in some cases is short (for example IP Attaches sharing contact details and attending shared events). The STOs have encouraged collaboration and developed strong working relationships, for example through information sharing between IPO Enforcement team and the FBI. All agreed that it is important that this type of work continues.
22. CP (US) invited UK counterparts to visit the IPR Co-ordination Centre to coincide with TIWG 5 (this will require clearance with US agencies). MP (UK) accepted. AW (UK) said the IPO see USPTO colleagues at the WIPO general assembly and this is another chance to discuss issues. The IPO regularly meet with USPTO at WIPO, this will be added to STO checklist. MTP (UK) stated opportunities to enhance and deepen dialogue (e.g. WIPO/TRIPS) should be further examined and it is worth recording those opportunities for further bilateral engagement.



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23. RS (US) emphasised that both governments undertake significant stakeholder outreach and more conversations should be undertaken to discuss how we can collaborate and combine our promotional efforts. CP (US) suggested that IPO/DIT colleagues join the US roadshows, which have a session about protecting IP abroad and a presentation about the UK would be worthwhile. Ben Hardman (US) would be the best person to contact. AW (UK) raised that in July 2019, the IPO are doing a roadshow in the US with the Chartered Institute for Patent Attorneys and this is another opportunity to connect with US government colleagues. RS (US) thought this was a good idea and said that the full US roadshow agenda is online with dates and locations. (Action - RS to share the link with this group)
 24. CP and RS (US) emphasised that there are export centres covering the US and they know the local industries/IP intensive industries so are worthwhile connecting with. The co-location of US agencies helps improve the knowledge on offer. MD (US) said distributing the brochures and access to resources directly to people at the export centres would improve distribution. This is all tied in to the Respect for IP STO workstream which is designed to promote sharing knowledge for IP. RS (US) pointed out that identifying outreach resources is not just about improving distribution but also ensuring our online material is tracked so we know what information is online and available for companies. MH (UK) said when advertising IP toolkits and other resources on these roadshows we should also test if the information being given is valuable to end users and we should seek feedback to see if there is anything further than can be added.
 25. CP (US) raised that a key point from the SME dialogue was cost and how to control it when pursuing IP protection. The provision of resources which list the cost effective and Pro Bono help on offer from public, private and government would be a good starting point to tackle this issue.
 26. MTP (UK) proposed that engagement and outreach be included in the STO checklist. Furthermore, it was agreed to explore the possibility of having the STO checklist online for review and comments (potential on the Max portal).

Sub session 2: Enforcement (Parts A, B & C)

27. **A) Online IP Enforcement** - MP (UK) introduced the sub session focusing on Enforcement and set out the agenda. MP (UK) confirmed that the slides would be circulated after the meeting. (Action – SG to put the slides on the Max system)
28. MC (UK) introduced the first topic which is online infringement and the UKs preferred approach, through legislation and voluntary actions. Online infringement is seen as a significant challenge for IP protection that needs to be tackled through a multi-pronged approach and we cannot rely on legislation without the tools to implement it.
29. The UK operates an integrated approach to enforcement combining: public education and attractive legal alternatives for consumers of content. The UK's tactic is referred to as the carrot and stick approach and a key objective is making the online world safe for businesses and consumers. For online IP infringement, Copyright is the most significant area, however there are also trademark/designs infringements (online vending) and websites selling counterfeits.
30. MC (UK) indicated progress has been made in delisting infringing websites. Nominet is the UK's online registry and their terms and conditions prohibit criminal activity of all sites using the .uk domain. US asked if this is a Nominet code of practice, MC (UK) clarified it is in their terms and conditions but not currently legislative. The target is to have 100% clean listing of sites on Nominet. MC (UK) described the process followed once an infringing website is detected by law enforcement who report it to Nominet, who in turn notify the registrant and work with the registrar



to get the site removed. In the last year, 16,000 domains have been suspended mainly via PIPCU referrals, but other agencies report sites – most have been removed for copyright/trademark infringement.

31. Operation Ashiko is a joint-initiative between PIPCU and Nominet and forms the bulk of takedown requests for trademark infringing websites. From 2013 – May 2018 51,283 websites were suspended, with criminal property seized valued at c.£13.6 billion.
32. MC (UK) highlighted these domain take-downs are done voluntarily by Nominet but there are also statutory provisions. This is commonly used when the site is outside the UK and when registrars do not respond to requests. Internet Service Providers (ISPs) are requested to block infringing websites and after initial consultation they have been co-operative, operating a streamlined process. It is an expensive procedure as a lot of evidence is required to progress through the courts. There are limitations to injunctions, as they can be circumvented via proxies or by changing addresses. Injunctions have evolved thanks to the Premier League who require quick injunctions. They have a standing order for the season and highlight infringing websites which are then quickly blocked. A new order has been granted to cover next season (2018/19). The Premier League have a weekly list which is updated throughout the season which blocks in real time. CP (US) asked if injunctions have had a deterrent effect. MC (UK) said that the greatest influence is on consumer behaviour. When a website drops off in first few minutes of a stream consumers need to find a new link which can be difficult, when this occurs repetitively consumers tend to move to a different source. There is a block notice on the page but currently no redirection to educational links (this is under consideration). It also does not provide links to a legal stream but provides a list of legal alternatives.
33. MC (UK) in the Cartier International case the courts blocked access to websites infringing trademarked goods. The court decided they had the power despite no existing statutory power and this was upheld all the way to the (UK) Supreme Court. The courts laid out the legal tests that had to be fulfilled before an order was granted i.e. the remedy must be effective, dissuasive and not unnecessarily costly. The Supreme Court revisited the issue of costs and decided ISPs would not have to bear the full cost of implementing a blocking order. It is too early to say what impact this will have, as it is specific to the trademark context. The US asked if this might help in the copyright context? MC (UK) said that the judge didn't think it will provide a direct precedent in the copyright context.
34. MC (UK) then presented the code of practice on copyright and search. Search result targets are set (based on DMCA notices) for search engines to encourage them to demote from search results those websites known to infringe. Rights holders provide a list of search queries which are tested on search engines to see which infringing sites are shown. Engines have a target to pass the test e.g. x number of sites on first page which both Google and Bing passed. Work is being done to see how users would search for copyright infringing sites as there is a disconnect between search engines who know how people search and rights users who would give search queries that are not used by people (but do return many infringing websites). The IPO are now working with other industries to feed into this process e.g. publishing and film.
35. Get It Right from a genuine site campaign is a UK industry initiative split into two parts:
 - They look to educate, featuring outreach that is jointly funded by Government and industry.
 - They operate a 3-strike approach where ISPs send warnings to those who infringe online. There is no escalation, but the process has been effective as people who realise they are



being monitored tend to change behaviour. The warnings also contain information to redirect them towards portals with legal access to services.

36. The Online Copyright Infringement tracker is a self-evaluation research piece into copyright infringement online that examines consumer behaviours. It found 15% of online material was infringing, this has been relatively consistent with the previous infringing levels, but they are seeing a drop as legitimate streaming is taken up. Poor access to content is often the second most cited reason as to why people infringe. However, 1 in 10 are 'hard-core' infringers who actively pursue infringing content.
37. **Online IP Enforcement questions** - US asked for further context around the Norwich PharmaCol order? Does it apply only in copyright proceedings? MC (UK) clarified that it can be used across all rights, but it is mostly in copyright. It comes from a patent infringement case where the court required manufacturers to release details of third parties involved. In the case of copyright, whilst the ISP can be considered an innocent party it can be ordered by the court to give up details of infringers e.g. which terminal used the IP address when the infringement happened.
38. CP (US) asked if this work in civil or criminal law. This is a contentious area as it has been used to obtain contact information to then send letters to addresses requesting they pay, otherwise court procedures will be brought against them (commonly used in the adult film industry). There hasn't been a scenario going to a criminal court and if you challenge these letters they normally stop.
39. CE (US) asked what the background on the process is for the UK search engine practice. It was a long process starting in 2014 with roundtables between Google, Bing, Yahoo and Alliance for IP who discussed how to tackle IP infringement and how to remove infringers from engines search results. The Digital Minister was involved and keen to ensure the process continued to move. There was other legislation going through to which this agenda could have been added to and the possibility of legislation meant parties were more focussed. It took time to work out what the problem was, research to see the prevalence of infringing sites and how people found these websites (e.g. autocomplete). Everyone agreed with the ambition of making these sites hard to find but the looming threat of legislation helped move it along.
40. The US asked if the threshold was 30% of sites on search results infringing? MC (UK) indicated there are a range of targets and the exact figures are not published but generally search engines were told there should be fewer than X% on their front page of search results with X being low percentage, usually equating to 1 result on front page. EG (US) highlighted that this is a unique opportunity given UK government's relationship with the ISPs to undertake studies to assess the thresholds and interventions which could change consumer behaviour. Randomised experiments where they make changes to one group and compare to control group to examine behavioural differences could provide valuable insight. EG (US) asked if the UK government could implement similar types of experimental studies to evaluate the different interventions and impact on behaviour as the US do not have such relationships. MC(UK) said such studies are being undertaken to examine behaviour, such as: simple searches or those that nobody clicks past first page. There is a group of consumers who use direct, targeted search terms to look for pirated material and this is the group to be investigated.
41. CP (US) asked if the search terms are examined purely from the repertoire of stakeholders or are technology tools used to produce terms also examined. MC (UK) said that currently it is just repertoires, but the inclusion of eBook software and circumvention technology is being examined.



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42. CP (US) asked about the feedback from stakeholders. MC (UK) said the music industry is very pleased and they now understand what information needs to be sent to get an infringing site removed. The film industry is slightly less happy with the outcome: there was initial success but there is concern that regardless of the threshold targets for search engines the nature of film means some links do not get many DMCA notices so will not show up in search engine testing.
43. MP (UK) asked whether there have been similar calls from US stakeholders for this initiative. CP (US) stakeholders are positive about this programme. There have been several requests about how search engines can assist in demoting but less about experiences of The Code.
44. MP (UK) asked if there are any US agencies working with other search engines (not Google and Bing) to create similar initiatives. CP (US) thought there may have been an agreement with one search engine but nothing on the broad scale of the UK's agreement. There was not any pending legislation that could bring people together to discuss such an initiative. MC (UK) highlighted that the way Google and Bing algorithms work has enabled these search reviews to be rolled out worldwide so other countries do not need a similar agreement (Key point – UK system providing global benefits). These algorithms can consider cultural differences that result in different searches. CP (US) raised this is an interesting practice along with Get It Right.
45. **B) The ongoing fight against illegal content online – US experiences [Non-Paper]** DMCA legislates for direct infringement and secondary liability infringement. DMCA looks to address concerns regarding ISP's serving as deep pockets in online infringement cases and having to pay for user infringement. Congress' goals for enacting DMCA was to eliminate liability for ISPs who were behaving reasonably to remove infringing users, provide procedures to remove/block those infringing and identify those who infringe. Safe harbours limit liability for ISPs if they live up to a certain standard and there are other defences for copyright infringement.
46. Safe harbours provide monetary limitation on ISPs for users infringing activities. ISPs must meet general conditions and adopt, implement and inform subscribers of their policy to terminate users for whom they've received repeated notices of infringing. Users can qualify for such treatment even in they have not been judged to have infringed.
47. There are 4 infringing activities:
- Transitory Communications
 - System Caching
 - Information residing on networks at direction of users
 - Information location tools
48. The EU eCommerce Directive covers the first 3 activities. The DMCA provides detailed guidance compared to the EU Directive about how safe harbours work. Transitory communications occur when there is transmission of material passing through the system/network where transmission is started by someone other than the ISP and recipient is not selected by ISP. The material is made available online not by the ISP and the ISP is a conduit for passing the information. Additionally, the content of information is not modified. Systems caching applies to the intermediate and temporary storage of material posted online which is auto stored on ISP system if storage is carried out on technical processes. There is a distinction between the first 2 activities: the former applies to the passing through and storage of information whilst the latter is temporary storage that speeds up access to the websites provided.



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49. The last two categories have the same conditions for ISPs to qualify for safe harbour limitations: that ISPs do not know that the material infringes, do not know where material came from and if they acquire such knowledge they are quick to act and remove/block access. The ISP cannot financially gain from the material and they must comply with notice and take down.
50. There are elements of a DMCA notice which must be met and be provided in writing to a designated agent, these include:
- The physical/electronic signature of someone who can act on behalf of the owner
 - Identification of the copyrighted work that has been infringed
 - Identification of material that is infringing and that it is to be removed
51. The information provided must allow ISPs to identify the correct material. Basic contact information of complaining party is to be included and this party has good faith belief that they are being infringed. Once the notice is sent, the ISP blocks access to material if they want to avail themselves of safe harbour, a counter notice can also be sent.
52. When the ISP satisfies the needs for safe harbour protection they will not then be liable for infringing activities undertaken on their website. If they do not meet the needs, then costs will be determined under copyright law. The DMCA is 30 years old and there are debates about its need to be updated to consider developments in technology. There are some stakeholders who are dissatisfied with section 512 as the current size of the internet and number of take down notices received lends itself to a 'whack a mole' process and they want to see this provision overhauled. ISPs are satisfied with the DMCA but less so with volume of take down notices and some who abuse the take down notice system.
53. Kevin Amer (Copyright office) is studying the effectiveness of section 512 through written comments from the public and round tables for stakeholders. There have been 90,000 written comments, which highlights the level of interest. The issues that have been described include concern around content for technology/music communities as well as the volume of take down notices. Content providers have developed automatic detection tools to identify infringing materials on sites which automatically produce a takedown notice, this has resulted in erroneous/improper notices due to this automation and is seen as a big issue. The (US) Copyright office are producing a publicly available report, which will propose possible policy recommendations.
54. The US noticed that DMCA was mentioned in the IPOs work with search engines, and asked if is it used as a guide in the UK. MC (UK) said the work with search engines used DMCA, but there is no safe harbour qualifying process similar to DMCA process which is prescriptive. US asked if there will be changes to this process. Regarding entities such as entertainment websites, when does it count that they have knowledge of infringing content on their site? Does it need to be a person or does an automated measure to detect and filter content count? (Action - UK to take these questions away and respond via email/VC)
55. The US have been hearing from stakeholders about the UK's provision for the DMCA process. MC (UK) said it has been through parliament and sent back for amendments. It was broadly supported as rights holders feel this is the way to go. The technology side are content but there is a misunderstanding of what the provision is going to be and who will be affected. The UK were happy with the text that went to EU Commission.



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56. CP(US) then spoke about the DMCA in a US trade context as DMCA has been feature of US FTAs. USTR get their negotiating objectives from Congress and are asked to offer a standard level of IP protection like that in the US. This is not to say that this is consistent (e.g. a one size fits all approach) and FTAs have had various levels of details e.g. notice/counter notice provisions in side letters. There is room for discussion to make it work for everyone.
57. MP asked for some recent examples of different US FTAs that have worked. CP (US) said that TPP was an anomaly and was not supported by a large number of US stakeholders. There was criticism of the notice feature, which was grandfathered in from the Canadian system. There has been a shift in stakeholder views on ISP liability, initially rights holders supported the position but now ISPs support the current position.
58. MP (UK) asked if many of 90,000 (Section 512 consultation) comments are from consumers as the UK want to think about getting holistic stakeholder input including consumers. US stated that the vast number of respondents came from both producers and consumers of IP.
59. LMQ (US) presented on the seizure of website domain names, payment services advertising and marketing. There are other mechanisms through which the US can target infringers including: the seizure of website domain names, a project by the National IPR Co-ordination Centre led by Homeland Security Investigations (HIS) which targets entities who distribute counterfeit goods via the internet. By seizing domains, the point of sale for criminals is eliminated. The IOS seizure banners and public press events held to coincide with seizures serve as tools to educate the public about the perils of counterfeiting. This initiative has moved international by linking up with Europol.
60. There are voluntary initiatives that focus on payment services which are undertaken by the private sector e.g. Rogueblock. It is a collaborative effort between the International Anti-Counterfeiting Coalition (IACC) and payment industry to create a streamlined and simplified procedure enabling members to report online counterfeit sellers directly to credit and financial companies, targeting their ability to receive online payments. Portals provide information on how to access government agencies and credit card companies to remove illegal sellers receiving payments.
61. IACC also identifies high value targets for take down and removes duplication efforts (where other agencies may have the same targets). They have produced a simple report to target infringing accounts which if appropriate is sent to the credit card company for further action. The outcome of all submitted reports can be reviewed online.
62. Trustworthy Accountability Group (TAG) and its Certified Against Fraud programme which looks to rid the legitimate supply chain from malware, tackling advertising on fraudulent websites. Currently this software can place legitimate advertising on fraudulent websites. TAG encourages companies to abide by Certified Against Fraud guidelines to reduced invalid fraudulent traffic.
63. LMQ (US) presented on initiatives to combat counterfeit pharmaceuticals (this is a significant issue in the US, but further research is required to determine it prevalence in the UK. USTR are also keen to explore this in a further stage of the JES).
64. In January 2018, the US Department of Justice created the Joint Criminal Opioid Darknet Enforcement (J-CODE) team. The team coordinates various federal agencies to disrupt illegal online drug sales. The first major action of J-CODE was the launch of Operation Disarray, a four-day, nationwide effort to expose and arrest online traffickers and customers of illegal narcotics. The Operation also raised awareness of the dangers of these illegal marketplaces. Eight people



were arrested, 160 interviews of online buyers and sellers were conducted, and nineteen overdose deaths of persons of interest were identified.

65. The National Association of Boards of Pharmacy (NABP) operates a verification system for the “.Pharmacy” top-level domain name. Only verified, legitimate pharmacies may use the .Pharmacy domain name, and must comply with NABP strict standards and policies. Combined with educational campaigns, the unique domain name assures consumers that the site from which they are purchasing their medication is safe and free from counterfeit and illicit drugs. EnCirca, a private domain-registrar based in Boston, Massachusetts, owns the .Pharmacy license from the Internet Corporation for Names and Numbers. NABP, however, vets and monitors Pharmacy website registrants. EnCirca will grant Pharmacy domains only to those who comply with and are authorized by NABP. The Centre for Safe Internet Pharmacies (CSIP) is a clearinghouse that provides consumers with an online pharmacy verification tool. Consumers can enter the pharmacy’s website into CSIP’s search engine, and CSIP will return a response on whether it is a legitimate pharmacy with trusted products.
66. MC (UK) asked if there is a similar system in the US to the Canadian’s Project Charge Back for those who get money back spent unknowingly on counterfeit goods (which provides a strong incentive for consumers to report counterfeiting sites). The US team were not aware of anything, but they are keeping an interested eye on Charge Back.
67. MC (UK) explained the UK has a similar intervention to TAGs initiative (paragraph 55), the Infringing Websites List, but the complexity of the supply chain results in advert brokers not knowing where adverts will end up. MC asked if similar feedback has been seen by the US. Can brokers stop adverts cropping up as supply chain is so complex? LMQ (US) agreed that the problem is universal due to the way the supply chain works but the US targeting procedure is still a valuable tool even if it doesn’t work 100%. CP (US) confirmed that it is something the US are hearing and there is concern as companies do not know where and when their own adverts appear on illegal websites.
68. MC (UK) asked how much of the payment service initiative was cross border. LMQ (US) responded that because of the nature of the internet it is cross border but in terms of bringing in companies across borders, this is less frequent. MC (UK) enquired about the seizure of domain names outside the US. Such an effort would require co-operation with overseas enforcement. LMQ (US) responded that many websites move along when contacted by law enforcement, but generally the US focus on US sites although there is close collaboration with Europol to expand their reach into other countries and this co-operation can further expand given the success that has been seen.
69. CP (US) provided background on the Stop Online Piracy Act which was a proposal to introduce site blocking. It drew a lot of criticism and resulted in an internet blackout. A similar proposal did not have the same backlash in the UK. CP (US) was interested in UK stakeholder views on site blocking. MC (UK) stated there is a small but loud free speech lobby group who campaigned against it especially the lack of transparency to challenge blocking orders, but the public were not as interested. There are smaller number of blocking orders mainly because these orders are expensive. However, the complaints of the lobby groups have been considered e.g. sunset clauses if sites change their behaviours.
70. RS (US) asked if there has been a proportionate increase in opposition to site blocking with an increase in the number of blocking orders. MC (UK) said that currently the total number is low so it is difficult to judge although there was a brief spike when the Premier League got a new style



of blocking order, but opposition was still muted, nothing on same level as Anti-Counterfeiting Trade Agreement (ACTA).

71. MP (UK) pointed out that the Premier League work might have carry over to working with NFL and NHL for future collaboration. EJ (UK) added that the case brought forward by the Premier League was support by European football leagues and other sports from across Europe e.g. cricket/rugby.
72. CP(US) asked if enforcement authorities can seize domain names. MC (UK) stated that they do but do not normally as Nominet removes them first. They do not want to have the responsibility of these sites remaining on their books.
73. **C) Access to Justice.** EJ (UK) described the UK's court system for hearing IP disputes. IPEC is the specialist IP court in England and Wales. Scotland and Ireland have a different court process but the same legislation. The Patent County Court did not do its intended job and costs did not originally come down, so changes were made to ensure affordable access to justice was provided in the UK. Such changes included: capped costs, with cases worth over £500,000 going to the High Court; time caps on hearings; and judges ensuring the process is as simple and streamlined as possible. A review of IPEC showed it was filling a gap and having a positive impact.
74. Small Claims Track (SCT) is set up to hear cases with a value of £10,000 or lower. SCT mainly deals with copyright disputes (e.g. photography case study that was presented). In all scenarios the courts encourage mediation rather than legal proceedings as this reduces costs and time even further. SCT case studies are relatively few but they often are copyright damages ranging from £50-£10,000. It is a small, low value process but it is effective. RS (US) asked if the case numbers are small because the SCT is not well known? EJ (UK) said it is well known especially through the Photographers Association. The courts have been asked for data to see if the SCT is acting as a deterrent as this is an area of IPO interest.
75. Alternative Dispute Resolution is another path that can be taken. There is guidance online to encourage this process e.g. in family disputes ask for family members to resolve. The IPO offer mediation, the average mediation length is 6 hours and costed accordingly. IPO mediators can travel or offer offices as appropriate, thereby ensuring that this service is not limited to major cities only.
76. IP Pro Bono has been set up as there are cases where individuals did not have the necessary legal background to represent themselves appropriately but cannot afford legal advice. This is a collection of leading IP organisations providing advice and legal IP support. There is online information on IP insurance including the products available and where they can find them. The introduction of fixed costs in IPEC have led to lower insurance premiums as insurers realise costs will not spiral. There is a section on the UK Government website about IP crime and enforcement for business which provides guidance.
77. CP (US) asked if the IPEC/Patent County Court was based on a court elsewhere. EJ (UK) responded that there are two levels of courts: High court and County court which is for lower level cases. The Patent County Court originally sat in the lower Court, however changes in 2010 meant it is now in the High Court so there were more remedies available for both high and low-level IP cases. The judges at the time were influential in pushing this through. The Jackson review examined whole justice system, highlighting that it was very costly for individuals/businesses. The recommendation was to construct a specialist listing for IP in lower courts. There is currently one judge who sits in court and some deputies, it is a small but effective court.



78. CE (US) sought clarification around what disputes the IPEC handles i.e. only disputes that lie within the threshold. EJ (UK) said this was the case. CE (US) asked if these are the only remedies/damages that can be offered e.g. injunctive release available. EJ (UK) clarified that it is only the SCT where remedies are limited. There is a specialist patent court within the high court and the current IPEC judge has sat in High court to hear cases.
79. EJ (UK) stated that the dispute resolution process is staffed by the IPO and there are a small number of cases per year. The interest in the US is around ADR and patents. There is little appetite to use ADR vs litigation procedures and fair to say that there is similar appetite in UK although, UK judges suggest ADR where possible.
80. LMQ (US) asked if the judge helps limit scope of the case, and what was the procedure. EJ (UK) stated there are civil procedure rules set out which apply to IP cases, the judge will be strict in what has been submitted in case management and if it is not applicable he will not allow it to keep to the 1-2-day time limit and avoid arguments going off on a tangent.
81. CP asked if non-UK residents can use this system. EJ (UK) Yes and felt that this information could be included in the next toolkits.

Sub session 3: Trade Secrets

82. **Trade secrets.** MP (UK) proposed that we provide an update on our implementation and then go straight to questions. CP (US) asked for clarity around what the biggest changes to trade secrets are.
83. MC explained that when analysing the directive, it is very close to UK law and the changes are mainly procedural e.g. time limits and protections. There is little that touches on the definition of a trade secret or illegal behaviour. Stakeholder views when the implementation was proposed were that they did not think implementation was necessary, but the IPO disagreed as there could have been a breach due to the technical amendments made. There has been no feedback since the amendments have been made (June 2018).
84. CE (US) stated that the breach of confidence term is a core element to the theft of a trade secret and asked if this means that there has to be pre-existing relationship between possible defendant and plaintiff. The thinking here is in relation to a third party who knowingly receives information from the employee, and whether they are liable as well as they may not have an existing relationship with the employer from whom the secrets have been stolen. MC, EJ (UK) said that this would be best followed up offline. (Action – To be discussed further via VC)
85. CE (US) asked, having implemented the trade secret directive, whether the UK anticipated maintaining implementation in the UK after EU exit. MC (UK) responded that it is not possible to say categorically but there is no plan to change and there is not any desire to unpick once we leave.
86. CE (US) asked about the possibility that criminal action could be included in trade secrets. MC (UK) said this is not something that has been called for and we do not envision it being asked for in the future as UK stakeholders are satisfied operating under civil law in this area. There are some criminal provisions e.g. fraud or hacking which offer criminal sanctions but main matter is economic threat and the theft of a trade secret holds which is appropriately dealt with in the Civil court.



87. CP (US) asked how the regulations interact with case law. Can regulations override case law? EJ (UK) answered that regulations make some changes to statute but a lot of case law continues to apply unless it is significant different to the regulations. However, we do not think there is anything that applies here.
88. CE(US) asked what would happen should a sub-contractor working on a MOD project give confidential information to another country. MC (UK) responded that there are separate provisions which allow for prosecution and could be called up under the Official Secrets Act. Both trade secrets and national secrets would be used.
89. MP(UK) stated there are areas where criminal can override civil law, an example is the computer misuse act which was raised in Washington. CP(US) highlighted that in TPP there was trade secret amendment which would allow for cyber security updates. Stakeholders especially those in manufacturing wanted to include a specific criminal liability for trade secret theft.
90. CP (US) asked whether there are procedures to maintain the confidentiality of trade secrets during trial. MC (UK) answered that yes, these cover publication of judgements i.e. redactions in place.
91. MP (UK) – Action to set up VC to discuss trade secrets rather than wait for next TWIG.

Key Actions and Next Steps:

- **Short term outcomes:** the next SME Dialogue will not feature a specific IP panel but explore the possibility of IP speakers joining other sector specific panels such as Digital.
- **Joint Economic Study** – Agreed to have a good draft by end of Summer 2018, with the aim to publish in Autumn 2018 (potentially in line with TIWG 5). Agreed to continue fortnightly working-level VCs with monthly steering groups.
- **IP Toolkit** – Agreed to collaborate on initiatives for distribution at trade shows, working with DIT USA based teams (ITI), USPTO and IPO attaches. IPO are also hosting a US roadshow in June 2019, we agreed to work with USPTO on this too.
- **USTR** offered a visit to the US National IPR centre at TIWG 5 – We accepted.
- **US** proposed a joint webinar to provide further education on IP rights – We agreed to explore further.
- **Access to Justice:** When next reviewing IP toolkits, highlight the availability of the specialist IP courts to non-UK residents.
- **Trade Secrets:** A discussion to be had about the liability of third parties receiving information from the employee who stole trade secrets in relation to the third party's relationship with the employer who was stolen from.
- **A wider video conference** to discuss trade secrets.



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Session Lead Analysis/Comments:

- Constructive atmosphere and recognition that there is a well-established working relationship between the core IP teams at USTR and USPTO, and DIT and UK IPO. Particularly highlighted through the STO outputs: IP Toolkit, SME Dialogue and Joint Economic Study programme.
- This session presented the opportunity for the UK to set out our stall and really highlight the benefits of the UK Enforcement system and laying the groundwork for an ambitious Enforcement section of the possible future IP Chapter. The combined stakeholder input from the SME Dialogue played neatly into our agenda and enabled the UK to push strongly for support for SMEs and to push back against US offensive positions such as ISP Safe Harbours.
- We are now at the stage where we are on the verge of negotiations. There is room to have further discussions on areas of specific detail via VC and we will pursue this prior to TIWG 5.
- For TIWG 5, we do not recommend further discussion of the detailed areas already covered. We will use TIWG 5 as an opportunity to provide a first overview of a range of issues that have only received light touch attention such as Copyright and those which have not been addressed altogether including, Trademarks and Designs.
- Our focus now needs to be on policy development including for the US mandate in the autumn before we have further substantive discussions.
- Particularly commendable work was undertaken by the IPO Enforcement team and DIT Analysts to make this session a success.



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GOOD REGULATORY PRACTICE AND REGULATORY COOPERATION

Date: 10 July 2018

Time: 16:00–18:00

Participants:

Name	Department/Directorate
Kate Maxwell	DIT- Trade Policy
Julian Farrel	DIT- Trade Policy
Diana MacDowall (Scribe)	DIT- Trade Policy
James Connell	DIT- Trade Policy
Alison Kelly	DIT- Trade Policy
Kashan Ali	DIT- Trade Policy
Tim Harris	DIT- Trade Policy
Rebecca Schneider	DIT- UK-US Trade Policy
Kim Wager	BEIS
Rachel Shub	USTR
Christine Brown	USTR
Julie Callahan	USTR
Sam Rizzo	USTR
Silvia Savich	USTR
Cara Lofaro	US Dept. of Commerce
Erik Puskar	US National Institute of Standards and Technology
Anne Kirchner	US Food and Drug Administration
Lori Tortora	USDA
Mary Stanley	USDA
Kim Tuminaro	US State Department
Rosalyn Steward	US Small Business Association

Key Points to Note:

- A positive and productive session. The US ran through the GRP principles they would be seeking in a possible future UK-US FTA, in line with NAFTA 2.0 and TTIP in particular. We were able to reassure them that our Better Regulation disciplines would meet all of the principles that they raised.
- The working group agreed to discuss areas of more ambition in relation to the GRP chapter, at the next TIWG.
- The UK agreed to share HMT's Green Book: Appraisal and Evaluation in Central Government, which is the Treasury guidance on how to appraise and evaluate policies, projects and programmes.
- The US undertook to share its draft TTIP text on GRP, subject to legal consent.



Report of Discussions and Outcome

Both Teams agreed that it had been a positive meeting in Washington in March. Rachel had agreed to make a presentation on US GRP issues at the July Working Group meeting in London:

1. The US indicated that the comments in the slide pack should be considered DRAFT rather than indicative of an official government position as the pack was prepared to aid discussions in the Working Group rather than being presented during formal discussions about a trade agreement with a partner. It highlights priorities the US has raised during discussions with potential partners over the last few years. Texts for agreement will be framed within the parameters of particular partnerships. The pack does give an indication of the US ambition for future agreements.
2. In terms of preferred texts, KORUS has transparency requirements, but TTIP wording (US text) is the best template against which to measure future ambition.

What GRP means

3. The US uses the term “Good Regulatory Practice” specifically within the trade arena which complements WTO provisions in the GATT/GATS/IP Agreement.
4. It is not limited to manufactured goods. The US believes that other countries are more likely to automatically implement obligations under agreements that include a GRP chapter setting out high-level principles.
 - A GRP Chapter sets the foundation for regulation across all sectors during the regulatory lifecycle. It links to good outcomes in national trade and creates a level playing field for exporters but does not dictate or expect any specific outcomes e.g. publishing information on the intranet instead of obscure hard-copy publications
 - GRP requirements complement OECD, on e.g. SPS or TBT
5. The US has been working on GRP in a variety of fora for over 20 years including APEC, the WTO TBT Committee (initial years), in the World Bank (which refers to GRP as good governance) and acknowledged the OECD’s 2012 recommendations.
 - GRPs promote good economic growth and jobs. The US does not try to replicate principles and language of OECD documents but chooses the most important principles. A lot of organisations have produced work and thinking on GRPs.
6. In OIRA’s view, the main elements of GRP comprise:
 - Evidence-based decision-making: including Regulatory Impact Assessments (RIAs), cost benefits analysis, risk assessment, retrospective review (PIRs)
 - Transparency: publication of key info, notice of changes, opportunities for participation and to allow outsiders to test government logic
 - Co-ordination: “whole of government” approach, produces predictability for businesses
 - Objectives are to produce efficient, effective regulation.
7. The US aims to foster GRPs, to avoid unnecessary restrictions on competition and prevent overlap or duplication between proposed existing regulations. This helps prevent creation of inconsistent regulatory requirements, and ensures regulators consider regulatory impacts including on SMEs as well as promoting compliance with international obligations (including standards). US government legal requirements mean that departments and agencies should avoid creating unnecessary blocks to trade.



8. The US does not take a prescriptive approach as to where GRP sits in trade agreements but considers it important to have mechanisms in place to accomplish these objectives.
9. JF (UK) advised that the Better Regulation Framework (revised February 2018) addresses these principles in the UK.
10. He explained that the Regulatory Policy Committee (RPC) is the UK's independent Watchdog committee which validates all RIAs. Departments and Ministers cannot proceed with legislative proposals unless the RPC is satisfied that the RIA is robust. Policy decision-making responsibility remains with Ministers at all times, but the RPC can and does challenge the underlying evidence e.g. if the estimates of costs appear random, the RPC is likely to challenge the quality of the analysis. HMG makes collective decisions on legislative measures – no decision is taken in a silo. No Minister can independently propose legislation to Parliament – the proposal must have received Cabinet Committee approval before it proceeds. Proposals are circulated and agreed at Official level before coming to Ministers.
11. KM (UK) noted that we are alert to the need to identify and include effects on trade and other issues in future write-rounds for Cabinet Committee approval.
12. The US has a wide range of government and business guidance. Some principles are included in trade agreements – information quality (evidence base), paperwork reduction/use of surveys, development of technical requirements, guidance on testing, conformity assessment (TBT), use of international standards. There is US government legal direction that guidance should avoid creating unnecessary obstacles and it should be written in plain language. This is an area where the US feels it could apply more ambition, with more precision on requirements for guidance in trade agreements.
13. There is also a nominated TBT contact in each US regulatory agency.
14. It is worth noting that OIRA was created under the Paperwork Reduction Act.
15. The US looks to publish advance notice of planned regulation well ahead of the legislative start date. The more that upstream information is available, the more businesses are in a position to question and plan ahead. This is also an OECD principle. US regulatory agencies publish their pipeline of future regulation twice yearly. It includes a brief description of the planned regulation, points of contact for each regulator, sectors affected (identified by codes) and whether they are expecting significant effects on trade or investment.
16. RS (US) asked if the UK has an annual plan of regulation.
17. JF and KM (UK) spoke about the public consultation process for new regulation within the UK, and the annual Queen's Speech at the Opening of Parliament. KW (UK) also raised the principle of Common Commencement Dates in April and October as being a useful guide for business for when regulation will commence.
18. The UK also conducts pre-legislative scrutiny of proposed primary legislation, which includes public consultation on the need for the regulation. UK consultations are published on HMG's single information portal GOV.UK. In addition, government departments and regulators maintain their own lists of specific stakeholders whom they will notify directly when consultations are published.



19. RS (US) mentioned that transparency is particularly important for technical regulations. If exporters know technical recommendations in advance they are able to flag up where changes might benefit the regulation. The US customarily publishes all studies and analysis (or links to the documentation) that has been used as a basis for proposed regulation in the single-portal Federal Register as part of the *Notice and Comment* process. This allows stakeholders to indicate whether there is more recent research/evidence to add information. The US also publishes draft text (that has not yet been officially approved) of proposed regulation to garner views on how difficult it may be to comply with the final law, when it comes into effect.
20. Anyone in the world can comment on forthcoming US regulations. In a recent example a Chinese firm was permitted extra time to stop using a soon-to-be banned pesticide. However, it should be noted that consultation is not a referendum on proposals. But is intended to gather information on the potential impacts. Public comment includes issues in relation to the TBT and SPS Agreements.
21. The US believes that transparency at EU-level could be improved as information is not made public before proposals for regulations are shared with the European Parliament.
22. Where legislation may have a significant impact on trade the time limit for public consultation is at least 60 days, or longer, as appropriate, if the legislation will require businesses to make significant changes to manufacturing processes. The minimum consultation period on new regulation is 30 days. NAFTA 2.0 requires 60 days consultation on everything, subject to consideration on TBT exceptions.
23. Public access to proposals is via a dedicated, single portal, freely-accessible website.
24. The US favours publishing comments as they go along, rather than publishing everything at the end of the process, seeing this as an opportunity for the Trade departments to know what issues are of concern.
25. JF (UK) confirmed that the UK publishes comments received during public consultation alongside a summary of the Government's response on GOV.UK. The response also includes a list of contributors, together with a summary of answers to each of the questions.
26. US regulators are all responsible for upholding the principle of national treatment, allowing interested persons to submit comments, which are published immediately. Comments are evaluated, and when the regulation is finalised, all comments are published with the agencies' views on substantive issues raised during this process.

Expert Advisory Groups

27. OECD reviews encourage the development of an open process for Expert Advisory Groups (EAGs) to comment. Examples include the US-Japan Advisory Committees on sectors including pesticides and aircraft. In order to avoid accusations of direct lobbying influence, Congress decided in the 1970s that EAGs must be transparent and should be a complement to, not substitute for, broader public participation. But EAGs are not considered a compulsory component of trade agreements. Mexico for example does not have EAGs for NAFTA 2.0. When negotiating trade agreements, the US publishes draft agreements to encourage public comment.



Challenges from civil society, NGOs and other institutions

28. The US asks for views from civil society – and shares proposals, but sometimes may need to keep papers secret.
29. If the intention behind proposed legislation is to change the existing law, the US government automatically requires regulators to go through the process of public consultation, which means a much wider consultation than simply through Expert Advisory Groups.
30. NB: The FDA has Technical Advisory Groups where members are vetted to prevent conflicts of interest.
31. JF (UK) asked how the public inputs into US Committee meetings. RS (US) confirmed that it is important to provide public access particularly where a Committee may be discussing for example scientific-based concerns. The public is encouraged to provide information or questions ahead of a meeting.
32. JF (UK) said that the picture on advisory groups in the UK varies sector by sector and department to department.
33. KW (UK) confirmed that there is no systematic approach to advisory groups within the UK, but where they exist, it is expected that processes are open and information from the meetings published on GOV.UK
34. The UK is considering future stakeholder engagement arrangements, including consultation on new FTAS. Reports from EAGs are usually put on record through the process of Parliamentary questions and answers although we do not always publish the outcomes of advisory group meetings.

Regulatory Impact Assessments (RIAs)

35. In common with the UK, the US requires proposed regulation to be subject to a Regulatory Impact Assessment process (RIA) – an assessment of evidence-based decision-making. The US does not complete RIAs on minor regulation. Generally, US RIAs should include consideration of feasible and appropriate regulatory and non-regulatory alternatives, anticipated costs and benefits of selected and other alternatives. Consideration of impacts on SMEs and potential steps to minimise. A full RIA is published alongside the final regulation.
36. JF (UK) confirmed that these issues resonate strongly with the UK and parallel UK IAs.
37. In the US experience, most countries carry out RIA “lite” assessment processes. Despite this, the US does not prescribe how RIAs are carried out and where they should sit in a trade agreement.

Notice and Comments process

38. The US finds that there is high public participation in the consultation process, because regulators and agencies publish their deliberations and consideration of comments, at the same time as publishing the final regulation.
39. Public participation encourages those who are interested enough to pay for additional studies because they are confident that the data will be considered and utilised. The Executive’s final



action is to publish a Memorandum of how information received from the public was reflected in the regulation This produces benefits upstream as part of the *a priori* process.

Implementing finalised legislation

40. The US legislative process does not incorporate Common Commencement Dates (CCDs) but ensures that any legislation will not be implemented for at least 30 days, which allows regulators time to implement changes. The Government will consider arguments for introducing regulation early.
41. The US recognises that there is room for more ambition in relation to implementation, but any final proposal must be shown to be based on earlier evidence, clearly setting out how the finalised regulation fits the requirements set out at the start of the process.
42. There is also recognition that guidance on facilitation of different compliance dates for SMEs would be useful, particularly amplifying this point in a trade agreement.
43. The process of review and determining whether regulations in effect are in need of modification or appeal are exemplified in the current US Two-for-One review. This places an onus on regulators to consider the effectiveness in meeting initial, publicly-stated objectives, any changed circumstances, new opportunities to eliminate unnecessary regulatory burdens. They must also consider the impact on SMEs (which account for 98% of US businesses).
44. KM (UK) reflected on the similarity to the UK's Red Tape Challenge activities and drew parallels with a domestic REFIT system.
45. The US recognises that retrospective review also allows agencies to prioritise which regulations should be amended. Many US regulations have built-in review clauses, which may place certain obligations on regulators. Links to SPS/TBT requirements in trade agreements must also be considered.
46. Suggestions for improvements to regulation can be made at any time by anyone. Regulators will consider comments from a single person or business entity, as well as other groupings. Issues raised might include reasons why the regulation has become ineffective at achieving the stated objective, if it has become more burdensome than necessary or fails to take into account changed circumstances, or it relies on incorrect or outdated information.
47. Government activity updating old regulations allows companies to petition for specific key standards e.g. ASTM Textiles versus ISO Textiles, which can be used as a tool for introducing flexibilities into new regulation. US agencies will publish these requests on the Federal Register and ask for comments.
48. Consideration of changed circumstances also link with TBT and SPS. The US has ambition to include suggestions for improvements in a GRP Chapter.
49. Trade agreements should lay out the basic elements of information provision about regulatory processes but not set out hard and fast rules. The US considers it important that trade agreement parameters are out in the public domain as quickly as possible.



Regulatory Co-operation

50. US-EU *Regulatory Cooperation* was outlined in a 2002 Agreement between the US and EU. It sought to introduce a generic approach to methods of co-operation, encouraging agencies to minimise unnecessary regulatory differences with regulatory counterparts, and to facilitate trade or investment (but does not specifically require harmonisation). The non-exhaustive list should also include
- Encouraging Government Departments to check proposals with regulators
 - Seeking Parties' co-operation on early research to define ways of joint development
 - US sees co-operation as being between governments but is careful of using the term to draw consequences
 - Common approaches to labelling
 - Sharing compliance information
51. Current US FTAs provide for sector-specific co-operation which already happens on a day-to-day basis between regulators with established and ongoing relationships. FTAs are not intended to take management of existing relationships over, but to encourage regulators to look for TBT issues.
52. The US encourages working groups for specific sectors. In common with the WTO TBT Agreement, each of the FTA chapters have co-operation principles written into them. For example, TTIP would have required the setting up of a TBT Committee, an SPS Committee, a Services Committee, etc. The US believes that any institutional elements should be addressed by those experts who know about those issues. Regulatory Co-operation should not be handled in a top-heavy way and it should work to make regulators' lives easier.
53. GRP co-operation is where guidance should be provided to encourage regulators to talk to counterparts, with the aim of providing a list of things that they could consider to help reduce unnecessary differences. In TTIP, the US proposed more of a stakeholder process for raising issues between the parties, which it felt was missing from the EU side.
54. TTIP envisaged separate GRP and Regulatory Co-operation Chapters. The establishment of a Regulatory Co-operation Committee is not meant to become a huge administrative burden on the Parties. It was intended as a way for having a separate agenda item on co-operation for the Ministerial meetings. A Cooperation Committee would have provided an overview of co-operation undertaken by the other TTIP Committees and to collate an overview of what activities have taken place. It was not intended to create an alternative infrastructure on co-operation.
55. The TPP Regulatory Coherence Chapter came about as an "iterative" development of trade policy as and when new Parties joined discussions. The co-ordination and oversight elements are there but not the transparency requirement which the US required. It is voluntary and not subject to dispute resolution mechanisms.

Dispute Solution Mechanisms (DSMs)

56. KM (UK) asked whether GRP Chapters will increasingly be subject to dispute resolution mechanisms (DSM).
57. RS (US) said that NAFTA 2.0 is very generic but addresses concerns about GRP violations on a case by case basis. The US is not expecting a single violation of responsibilities to trigger legal



challenge, but dispute arrangements can be used where, for example, a government goes back on all transparency arrangements.

58. JF (UK) asked whether transparency provisions in TPP are along the lines set out in in this slide pack. RS (US) suggested that a GRP Chapter should be more explicit on certain issues, for example timeframes for responding. Any FTA will still require a chapter on due processes and administrative procedures. General publication of laws is not necessarily a good fit in a GRP Chapter.

Other points discussed

59. RS (US) indicated that she did not think any of the GRP process should conflict with UK obligations to the EU.

60. JF (UK) explained that better regulation principles had been part of HMG practice for decades, and the UK has the tools, techniques and instruments in place already, which are also applied when the UK implements EU law. The UK consults on EU draft regulation proposals and publishes a draft IA for such proposals. EU regulation still allows EU Member States choices about who assumes legislative responsibility for the regulation and who will be responsible for administering and enforcement. EU Directives are flexibly drafted to make allowances for individual Member States' different domestic systems.

61. For the next Working Group meeting, RS (US) suggested discussing areas where a possible FTA could display more ambition; for example, publication of a bibliography of evidence-based scientific studies on which a piece of regulation had drawn; disclosing how the civil service is to be accountable, and not pressured by, industry; and areas where we see opportunities for more scope.

62. JF (UK) promised to share HMT's Green Book. We would be happy to have further discussions before the next TIWG meeting possibly by digital video conference if helpful.

Actions agreed and confirmed by follow-up email with USTR:

1. The US undertook to share its draft TTIP text on GRP, subject to legal consent.
2. UK agreed to send US a copy of the HMT 'Green Book'
3. Next Working Group meeting should return to areas where there is possibility for more ambition on a GRP chapter.

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Session Lead Analysis/Comments:

US in presentation mode, with UK in listening mode. Very friendly exchange to better understand each other's systems and regulatory environments.



Department for
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LEGAL GROUP

Date: 10 July 2018

Time: 16:00–18:00

Participants:

Name	Department/Directorate
Victoria Donaldson (VJD)	DIT - Legal
Michael Bartling (MB)	DIT - Legal
Annabelle Malins (AM)	DIT- Trade Policy
Andrew Hobson (AH)	DIT- Trade Policy
Sam Hazelgrove	DIT- Trade Policy
Joanna Moody	DIT- Trade Policy
Sophie Brice (SB)	DIT- UK-US Trade Policy
Richard Salt	DIT- UK-US Trade Policy
Jeremy Hill (JH)	FCO
Emma Payne (EP)	DExEU
Meg Trainor (MT)	DExEU
Harriet Nowell-Smith	HMT
Shirley Rhone	HMT
Russel Stokes	DEFRA
Colin Macintyre (CM)	DExEU
Alexandra Whittaker (AW)	USTR
Matthew Jaffe (MJ)	USTR
Kelly Milton	USTR - Geneva
Brian Woodward	N/A
Andrew Rance	N/A
Jessica Siminoff	US State Department

Key Points to Note

- US interested in whether, practically, the UK or US can table text or negotiate during the Implementation Period (IP) given the concurrent EU negotiations.
- Further detail was sought on what the Chequers statement means, including whether specifically referring to a “free trade area” for goods with the EU and not services has some underlying meaning.
- US colleagues remain interested in seeing and understanding how the UK will capture and implement EU regulations prior to, and during the IP, and how US regulators can maintain oversight of this process.



-
- To commence negotiations under TPA requires a (public) notification letter to Congress 90 days before negotiations begin. A public consultation takes place during this period. Prior to formal notification, USTR also consults extensively with Congress and key congressional committees.
 - The US would prefer to avoid chapter-specific objectives in a possible future UK-US FTA, as they consider that this has an impact on the interpretation of the agreement by a dispute body.
 - US looking to discuss some further understandings/agreements on agriculture which had not previously been flagged: (1) Blair House agreement on oilseeds; (2) the understanding reached on rice; (3) side letter on community exports of pasta.

Key questions posed by the US lawyers:

- Will the “free trade area” for goods referred to in the Chequers statement be recorded in a trade agreement, a customs union like Turkey or an EU-style Economic Partnership Agreement that just covers goods?
- The Chequers statement focuses on goods but is there the anticipation on there being an agreement including services (or something other than goods)? If so, would it be in the same legal structure or something different?
- Is the value of trade between the UK and EU and between the UK and US primarily in goods, services or a mixed bag?
- The Chequers statement refers to tariffs and a frictionless border. Could the UK identify what behind-the-border items on which the UK will retain discretion and on which it will continue to be consistent with the EU?
- What will happen about forward MFN clauses in EU agreements?
- Could someone challenge the Withdrawal Agreement before CJEU?
- Why isn't the Withdrawal Agreement going to be a mixed (competence) agreement?
- Will the UK be part of the customs union during the IP? Is there going to be a notification to the WTO?
- Is the December 2020 date for the end of the IP firm or is there a possibility that it will be extended? 18 months is one thing but to extend it by another year and it becomes 30 months.
- For agreements the UK negotiates during the IP, is there a process being set-up with the EU to authorise the UK entering those agreements into force during that period?

Report of Discussions and Outcome

1. Welcome and Introductions

Introductions

- VJD: US and UK participants introduced themselves as per the participant list above.

The following itinerary was proposed:

- **Trade Promotion Authority (TPA)**

USTR process for country-specific negotiations under TPA; Requirements (information or otherwise) from partner countries



- **Process for agreeing Objectives section of a Free Trade Agreement**

Pre-negotiation scoping exercises and link to objectives text; Sequencing of negotiations of objectives, interactions with chapter discussions

- **Transparency and Institutions**

Routes for promoting transparency; US approach to transparency through institutions and rules of procedure

- **Exceptions**

US approach to the form and location of horizontal exceptions

- **International agreements and the implementation period**

Opportunity for US to ask any questions following up on 27 June legal meeting on international agreements and the implementation period

2. Trade Promotion Authority (TPA)

Led by Sophie Brice (UK) (SB)

- SB: The UK is aware that there is TPA political level discussion regarding when one can move to formal negotiations, but it would be helpful for the UK to understand the 90-day process for notifying Congress and liaising with stakeholders. What occurs prior to the formal notification and commencement of the 90-day period?
- MJ: The US can start trade negotiations at any time, but before you have TPA (rules process for Congress; changes process by which Congress deliberates on FTAs) you have to undertake the 90-day notification process. Prior to that, USTR engages with Congress. USTR has its own congressional office and engages with Congress every week about the possibilities of what might happen. USTR also shares draft notification text with Congress as part of the discussion prior to formal notification. Once the letter goes to Congress, USTR has the 90-day period to listen to Congress and invite comments about the proposal. It also receives input from the public and then has a hearing. These processes are all part of the TPA formalities. Even as part of the TTIP working group, before the formal notification was given these informal discussions and processes took place.
- SB: The UK and US discussed in March what congressional conversations took place. We are interested in further exploring what these conversations and processes look like. What sort of time frame is there between informal discussions, including on the notification letter, and notification? What are USTR's internal processes before it feels comfortable putting a formal TPA notification before Congress? Does this come out of working group official level discussions? Does it come out of political level discussions?
- MJ: Nothing is done without the Ambassador's direction. Take the Brexit deadline hypothetical, at the latest the discussion with Congress would have to start before December to be in a position to have TPA approval prior to March 2019. One has to take account of Thanksgiving at the end of November and Congressional recesses (e.g. in December).
- SB: In terms of who you share the letter with at Congress, is this shared with committees; people etc?
- MJ: At a minimum it would be shared with the Senate Finance Committee and the House Ways and Means Trade Subcommittee which have jurisdiction over trade. The Agriculture Committee is another priority House and Senate committee to share the draft letter with.



- SB: To what extent are draft letters and their content prepared on the basis of discussions had with partner countries or premised on the expected 'asks' of the foreign partner?
- MJ: The US would not be talking to the UK to prepare this letter but would instead refer to previous draft letters pertaining to other agreements.
- VJD: Are there any legally required elements of notification?
- MJ: I don't think so. There just has to be a notification, but it would be based on objectives and the TPA legislation. Those are reflected in the letter itself.
- VJD: Is it a lengthy document?
- MJ: Approximately 3-10 pages (average of 6-7 pages). It is signed off by the Ambassador and addressed to the Chair of the House Ways and Means Committee.
- SB: In terms of partner country input, is it more at a political level (i.e. a discussion between the Secretary of State and their equivalent confirming that both countries are ready to enter into negotiations)?
- MJ: Correct. It would be embarrassing if the partner country rejected the suggestion that negotiations be commenced.
- VJD: Dan Mullaney referred to the Senate Advisory Group on Negotiations and the House Advisory Group on Negotiations committees this morning. Do you speak to them before or after issuing formal notification?
- MJ: They are not committees, but advisory groups of the Senate and House. They are spoken to during negotiations, but not prior to issuing formal notification.
- VJD: What are the contents of the hearing? Are these legal requirements?
- MJ: It's a public hearing. Once we've received comments, USTR and inter-agency panellists hold a public hearing in which the public can make presentations. The hearing can take anything from 1 to 3 days (TTIP took 3 days). AW noted that there's a Federal Register notice that goes out to inform the public of the hearing date.

3. Process for agreeing Objectives section of a Free Trade Agreement (FTA)

Led by Annabelle Malins (UK)

- AM: The UK is interested to understand the US's approach to the text of FTAs, rather than the substance of the text. The UK wishes to use this to inform the UK's policy approach. In particular, we are interested to understand the US's approach to developing objectives, and how that then informs the core text of the particular agreement.
- AH: DIT has been looking across various US texts and the inclusion of text / chapters listing objectives. We have noted that US FTAs sometimes include objectives sections and sometimes they do not. We would like to understand these differences of approach. For example, in the US-Chile FTA and NAFTA there are a set of objectives which appear in the text proper rather than the preamble. Why is this?
- MJ: The preamble is one of the last chapters negotiated in an FTA. It's best to wait until the agreement is finalised to include these things. However, the US doesn't like to use objectives too readily. With respect to dispute settlement, one issue is whether the arbitration panel will try and include the objective as a means for interpreting the relevant provision. Accordingly, the US tries to avoid the inclusion of objectives as such language can be slightly dangerous as it may not give an accurate reflection of the textual meaning. However, the US tries to come up with draft



guidelines for things like where definition sections should be located; how should paragraphs be structured; US English or UK English? Because you have multiple negotiating groups, you try to streamline the process and avoid different groups adopting differing approaches. One of the rules the US puts forward is that the parties do not include objectives. By contrast, the EU often tends to include objectives, particularly because the EU likes to publish objectives to address transparency issues around trade negotiations.

- AM: Accordingly, you do not expect to have objectives in particular chapters?
- MJ: Correct. The only thing to add is that, given the TPA, you do see the objectives in the legislation. One of the things USTR must do is demonstrate that it has met the objectives published under the TPA. This must be done to ensure USTR has complied with the TPA legislation.
- AM: With respect to the joint guidelines you mentioned, are there norms that the US works from?
- MJ: Yes. There are also other things which are helpful, such as surveys of definitions, committees, exceptions (etc). These are the things you want to keep track of. For example, if a definition appears across two or more chapters, it will be included in the definitions section. Once the agreement is done, it will go through the legal scrub process. These drafting guidelines help to make the legal scrub process more streamlined.

4. Transparency and Institutions

Led by Annabelle Malins (UK)

- AM: The UK is looking at how transparency can feature in trade agreements, and how the US approaches this issue in FTA text to support the utilisation of the agreements themselves. It would be useful to get a general view on how we could incorporate transparency provisions.
- AW: You've probably looked at multiple FTAs and will have seen how the US has approached this issue. Older US FTAs tend not to include these chapters, but newer agreements include transparency and anti-corruption provisions. You will also find transparency provisions in specific transparency chapters, but also included throughout other chapters (e.g. regulatory chapters). The idea is to ensure that both parties understand each other's processes when creating regulations which can impact trade.
- AH: It would be helpful to understand why the US texts are structured in that way, and how you make sure transparency provisions are included in the relevant sections of the agreement?
- AW: With respect to where the provisions are located, transparency provisions have overarching elements. For example, dealing with administrative proceedings and ensuring there's a public process carries across several chapters so these matters are included accordingly. Some obligations may only apply to one sector / chapter (e.g. regulation and comment), and therefore such obligations are only included in that specific chapter.
- MJ: As for why the US has taken this approach, it's more of a historical process. Earlier agreements do not include anti-corruption provisions. They only included four key elements. Anti-corruption provisions grew out of the Government Procurement Agreement (**GPA**) chapter which included a basic requirement to investigate anti-corruption. Gradually, it grew until now where there is a transparency and anti-corruption chapter in US FTAs. With respect to the regulatory chapters, the US pursues WTO+ provisions, especially with respect to sanitary and phytosanitary measures (**SPS**) and technical barriers to trade (**TBT**). In these chapters, transparency appears but it is more of a detailed process. The US produced slides for the TBT session this morning which the UK should have a look at on this issue.



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- AM: Are these provisions built on a statutory basis in terms of the way in which transparency is expressed in the agreement?
 - MJ: It is not something that is specific to the US, but the US system is structured to include these obligations. The US system is structured in a way that the legislative branch gives laws to the executive branch. The US found that in the EU process, stakeholders could not easily participate in the executive branch process. Therefore, the EU's revised approach is somewhat based on the US's approach to regulatory matters.
 - AW: The main thing is to ensure that the public is involved prior to finalising the regulation. This is particularly seen in environmental regulations, where citizens, business and NGOs have input throughout the regulatory process.
 - AH: The EU trade committee procedure rules have been changing over time. What is the US's standard approach to institutional rules and procedure and where are these set out in its FTAs?
 - AW: The US creates trade commissions for each FTA and has been relatively consistent in its approach to the creation of institutional bodies.
 - MJ: The digital trade session today involved a discussion on the similarity in approaches and the desire to be progressive and assertive in this area. The reason is that when someone comes up with an FTA, other countries read it. There are provisions in the transparency section as between the TPP and CETA which flow across. The US intends to be forward looking as there exists a tendency to copy FTAs.
 - AM: That also touches upon the issue of transparency in negotiations and stakeholder engagement planning. Are there specific US requirements about how the UK would need to handle joint text? What are the US's processes for sharing text? Do you have constraints on how joint text is shared?
 - MJ: The US does not mind the UK sharing its (i.e. UK) text, but it objects to partners sharing US text. Once a draft is released, it can build up expectations and make it difficult to compromise. As of today, the US would insist that US text remain confidential.
 - AM: Do the existence of external US advisers covered by Non-Disclosure Agreements mean that the text is, in practice, shared externally?
 - MJ: The US has a process with the Departments of State, Commerce and others in which it formulates text. It is then shared within USTR and then given to the persons on the agreed advisers list. These advisers are subject to non-disclosure obligations. The text is also shared with Congress and the relevant congressional committees. Once it has been shared with all these stakeholders, it is then tabled with the partner country.
 - MB: Looking at transparency and other provisions, such transparency is beneficial when you first suggest text. How is transparency managed throughout the negotiations, recognising it could become trying if one has to go back and forth with stakeholders on the text?
 - MJ: USTR does not do an update throughout the negotiations. This is not because USTR objects to it, but it objects to statements being imputed to the US. During TTIP the EU gave general updates about what was discussed, but it did not discuss details. It is very difficult to give full updates, even where a chapter is closed, as these provisions can be re-opened. Until a conversation is finished, you don't have disclosure. You may also not finalise a conversation on one chapter where there will likely be trade-offs with other chapters.
 - MB: Within the US government, is text sharing an ongoing process or do USTR just deliver an agreed policy and only provide the text when it is progressed to a certain point?



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- MJ: US agencies are constantly engaging with USTR. The extent of inter-agency text sharing during negotiations is also negotiation dependent. It will often be very helpful to have other agencies engaged in the negotiation process. It may be that something new comes up which changes the text and, where this occurs, USTR will go back through the inter-agency text sharing process. The revised text will also be shared with Congress and cleared advisers.

5. Exceptions

Led by Andrew Hobson (UK)

- AH: What is the rationale behind the US's general and specific exceptions approach?
- AW: It depends on the agreement. The US tends to have a robust and comprehensive general exceptions list, and a few chapter-specific exceptions but it depends on the subject matter. However, when negotiating an agreement, you may realise that it needs chapter-specific exceptions (e.g. IP, financial services).
- AH: The US's proposed TiSA text contains national security exceptions at the horizontal and vertical level. Why is that?
- AW: I would need to review the agreement to determine why. You would need to analyse the effect of the general exceptions to understand why a specific exception was included.
- AM: Are there any statutory restrictions on the exceptions language in FTAs?
- AW: The words are very important. Similar language is deliberately used to address this issue.

6. US Questions: International agreements and the implementation period

- MJ: Is the UK leaving the EU?
- EP: Yes. The Chequers statement confirms the UK will leave the EU.
- AW: Regarding the Chequers statement and the phrase "free trade area for goods", is the expectation that the UK will have an FTA with the EU that covers goods, or is it a special customs area (e.g. Turkey) or an EPA that just covers goods?
- EP: The UK will have more detail to provide the US when the White Paper is released.
- AW: Is there some anticipation on the EU agreement including services, and will this be included in the legal structure proposed?
- EP: What is clear is that the UK is looking to strike different arrangements on trade in services with the EU and would be seeking regulatory flexibility in that area.
- AW: In terms of the value of trade with the EU, is it primarily in goods or services? What about the global outlook of UK trade?
- EP: We can provide this to you, but the balance is on services.
- JH: The language in the Chequers statement is carefully chosen. On customs, this has to be developed. It talks about a facilitated customs arrangement. We would strike different arrangements for services.
- AW: When I read the term "free trade area", one thinks of something more comprehensive than just goods, but instead something including services and other commitments so using that moniker is different to other free trade areas.
- EP: Adding to the Chequers Statement's language, it is referring to a free trade area for goods.



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- VJD: In respect of the customs union statement, the UK will retain the ability to set its own tariffs, so it takes the UK outside of the customs union arrangement of having a common external tariff.
 - MJ: My understanding is that the UK would collect UK tariffs for goods coming into the UK, and the EU tariff for goods bound for the EU. Is that correct?
 - VJD: That is correct, with more detail to come.
 - MJ: I understand that duties will be collected at the border, but the UK will retain authority over behind-the-border measures (e.g. SPS). What behind-the-border measures is the UK retaining discretion over and what measures will require consistency with the EU regulations at, and behind, the border?
 - EP: The UK will revert to the US on this issue.
 - AW: One issue flagged in the first meeting was that, depending on the future EU-UK trading relationship, the EU's EPAs / FTAs contain MFN forward clauses. It would be interesting to see how that is reflected in the UK-EU relationship and arrangements with other countries.
 - AM: We will note that down as another area to follow up on.
 - MJ: For all intents and purposes, will the UK be treated as an EU Member State (**MS**) during the Implementation Period (**IP**)? How does this impact the UK's ability to negotiate trade agreements during the IP?
 - JH: The legal position is that the UK will leave the EU, and therefore legally it will not be a MS after March 2019. However, the Withdrawal Agreement treats the UK as if it were a MS. The main provisions of the Withdrawal Agreement ensure that the whole of the EU acquis, including treaties, applies to the UK during the IP. As discussed recently, the EU's international agreements will bind the UK.
 - MJ: Accepting that this interpretation is technically correct, could someone challenge the Withdrawal Agreement before the CJEU?
 - JH: It is hard to speculate. However, both the UK and EU are confident that the Withdrawal Agreement has a solid legal base in the provisions of Article 50 of the TFEU and the Withdrawal Agreement will have been approved by the Council and the European Parliament. It will also have been ratified by the UK as well.
 - MJ: Could there be matters / competences which fall outside the EU's exclusive competence?
 - JH: Article 50 is accepted by the MS as being a special legal case which enables the EU exclusive competence to do everything related and required within the framework of one agreement rather than having to execute composite agreements.
 - CM: Article 50 provides the capacity to do everything necessary to enable a MS to leave the EU. The UK is confident that this is a wide legal basis and sufficient to enable it to agree the Withdrawal Agreement without engaging MS shared competence.
 - MJ: The US is just concerned to avoid itself being a third party to proceedings before the CJEU. It is noted that previous FTAs have been the subject of rejection and delay by MS parliaments, such as Belgium.
 - JH: The issue noted in respect of Belgium and CETA would not apply here as the MS do not have the capacity to reject the agreement as it's within the EU's exclusive competence.
 - MJ: Accepting that, there may still be some concerns that such MS parliaments would challenge the characterisation of the Withdrawal Agreement as an agreement in respect of which the EU has exclusive competence?



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- JH/CM: There's been no suggestion from the MS parliaments that the Withdrawal Agreement is likely to be contested, particularly noting that approximately 75% of the Withdrawal Agreement text was agreed at the March European Council.
 - AW: It is clear the UK is leaving the EU; will it still be part of the EU customs union during the IP?
 - JH: There's been no change to the UK's position. The position during the IP is that the UK is tied into the EU's relevant treaty arrangements, with some minor exceptions, which include the EU customs union, Single Market and other EU treaty provisions. The UK will implement this by introducing a new law after the Withdrawal Agreement is agreed, known as the Withdrawal Agreement Implementation Bill (**WAI Bill**). The WAI Bill will seek to apply the Withdrawal Agreement in domestic law.
 - MJ: What is the possibility of the IP not ending in December 2020 and being extended by 12 months or so?
 - EP: Both the EU and UK are clear that the IP will end in December 2020, as demonstrated in Chequers statement. CM added that the text contains no provision on extension.
 - AW: The Chequers statement contains a reference to a customs arrangement on goods. Given this, could the UK then enter into an FTA with a third country covering goods, services and other areas?
 - VJD: The UK will be able to secure trade agreements with other countries, including potentially acceding to the CPTPP. We will hopefully know more when the White Paper is released. Looking again at the Chequers statement with respect to services, the statement provides that the UK will strike different arrangements for services recognising that the EU and UK will have different levels of access to each other's markets. A later provision notes the need for regulatory flexibility on services, given that the EU and UK will have different levels of access and that the arrangements will not replicate the EU Single Market.
 - JH: When in Washington last we discussed the Withdrawal Agreement and the broader context of US agencies' processes. It would be interesting to hear if you have progressed that.
 - MJ: The answer is yes.
 - AW: The comments we made at that meeting are still true, but we are working through this. The US received a document on the existing EU-US agreements and noticed that three agreements pertaining to agriculture were not included in list of omnibus bill agreements (i.e. oilseeds, pasta, MOU on rice). We will raise these agreements tomorrow in the agriculture session.
 - JH: On the IP, the UK and EU's concept is that all international agreements will continue to apply. That includes formal international agreements and non-binding arrangements with international partners (e.g. MOUs, exchanges of letters). As between the UK and US, there are a number of arrangements that fall into this category. How those agreements are captured is being discussed with the EU as the notification wording has to be quite careful. It must capture some agreements which have some level of formality, but not only those having legal effect. So, insofar as these three agreements are covered by this process, the UK intends to capture them in the EU's notification to third countries. Second, it should be noted that what the EU writes in its notification is not the only thing which makes the arrangements functional. As the UK will be bound by the EU's regulatory regime during the IP, these EU regimes will ensure the UK's continued compliance with such agreements. Third, insofar as the US takes a regulatory decision on the basis of the EU's arrangements which is intended to have effect in US domestic law, the US will need to ensure within its system that it has the domestic legal basis to be able to implement that regulatory decision during the IP. That is not something which can necessarily be resolved by the EU notification approach.



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- AW: We agree that regulatory certainty is essential.
 - CM: The fact that the UK is bound by EU acts and bodies (see Article 2, Withdrawal Agreement) will hopefully provide some comfort on these points.
 - AW: We note that point, but the US's omnibus approach to ensuring continuity of these legal arrangements requires certainty from its domestic regulatory perspective.
 - MJ: We also noted agreements No.35 and No.42 regarding Bulgaria/Romania and Cyprus/Czech Republic on the list of existing EU-US agreements. These seem to deal with EU enlargement, so we are not sure why they've been included on that list.
 - MT: The idea behind the list is to capture all the bilateral EU-US agreements, not just those the UK would want to transition during the IP. The second list refined the scope to treaty-based agreements. These two types of agreement are being caught as the UK is taking a holistic approach to the list, rather than suggesting all the listed agreements would be transitioned after the IP ends.
 - MJ: Article 124(4) of the Withdrawal Agreement confers on the UK the ability to negotiate international agreements during the IP. Do you think the UK will have capacity to negotiate an agreement which could enter into force prior to December 2020, and will there be any processes in the EU for addressing this?
 - EP: During the IP, the UK would not bring any agreements into force. The IP would be limited to transitioning agreements. However, the UK is committed to negotiating bilateral agreements so they can enter into force post-December 2020 or in the event of a 'no-deal' scenario. Continuity will be delivered through the approach discussed with you.
 - AW: Secondary legislation is needed to transition EU regulations. It would be important to the US to see that to ensure that the UK's secondary legislation list mirrors the EU's legislation.
 - JH: To clarify the mechanism, the WAI Bill will allow the UK to transpose EU law during the IP to apply to the UK in its new status. This would be on the basis of applying both the existing acquis and any new EU legislation which enters into force during the IP.
 - AW: Does the WAI Bill give the UK Government the authority to implement the required secondary legislation?
 - JH/CM: Yes. The WAI Bill will be presented later in the year.
 - AW: The WAI Bill is less important from the US perspective than the secondary legislation list.
 - MJ: Negotiating a UK-US FTA will be affected significantly by EU-UK negotiations. Assuming that UK-US negotiations start in March 2019, to what extent can the UK and US negotiate an agreement concurrently with the EU and UK negotiating its future relationship? Can text on chapters for a UK-US FTA be tabled during the IP? This is a practical consideration as there is some motivation for this agreement in the US.
 - SB: There are complications in having ongoing negotiations in some areas, although it may be advantageous in some other areas. This clearly something which will have to be worked on.
 - MJ: Could you table text during the 18-month IP process for the US to review?
 - SB: The UK can negotiate and conclude FTAs during the IP.
 - CM: From a legal perspective, Article 124(4) of the Withdrawal Agreement grants the UK the legal authority to do so.
 - SB: There will be areas within the negotiations that will be at different stages during the process. It won't be a universal answer.



7. Concluding remarks

Given by VJD (UK)

- This has been a very helpful discussion. It helps us to get to know each other better so that both parties can be well advanced when the UK leaves the EU.
- We are making good progress, and it has been very helpful for the UK to have the benefit of the US experience. It's also useful to learn about how the TPA and engagement process operates in the US.
- AW: Thank you for this opportunity and for the clarification on the Chequers statement. We look forward to continuing these discussions. We're happy to schedule a VTC in the future on outstanding issues.
- VJD: Once the White Paper is released, we could also arrange a future VTC.

Action Items:

- US offer of VTC for further questions on TPA.
- UK offer of VTC following the White Paper.

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Session Lead Analysis/Comments:

This was a productive session conducted in a cooperative manner. In addition to generating useful information for the UK as it plans for future negotiations and develops its policy on core text for FTAs, the session contributed to the building of a good working relationship with USTR counterparts. Our three objectives for the session were met. These were:

- Clarify the process for USTR notifying Congress and any requirements from partner countries in this process.
- Advance our understanding of the US approach to core text areas of transparency, institutions and exceptions.
- Provide an opportunity for USTR to ask any questions following up on the 27 June UK-US legal meeting on international agreements and the IP, and for the UK to reiterate key points from that meeting.

The explanations provided by USTR regarding the process for launching country-specific negotiations under TPA identified the steps that would be taken, and the timing that would be needed for the US to be in a position to launch negotiations immediately following Exit day. The discussion also clarified that although the UK would not need to provide formal input into the notification that USTR must provide to Congress 90 days prior to the launch of negotiations (i.e. in December 2018 for negotiations to be launched in March 2019), USTR would not send the notification unless there had been high level, firm political confirmation that both parties were ready to proceed to negotiations.

The core text team solicited helpful information regarding US preferences on the use and placement of objectives clauses in FTAs, as well as on the process for agreeing any such objectives. Good information was also obtained on US practice regarding transparency, although, as we expected,



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the US was somewhat less forthcoming in sharing its strategy and preferences on exceptions clauses.

The US asked many questions relating to EU exit, in particular regarding the implications for a future FTA of the Chequers statement and the customs arrangements contemplated therein. USTR lawyers nevertheless recognised that many of their questions could not be answered in advance of the release of the White Paper on the Future Economic Partnership and accepted that the discussion would have to continue at a later date.

Following the closing plenary, AW and MJ suggested to VJD that they would like to revisit the issues of devolution and the geographical scope of a future FTA in a future Legal Group session.



Department for
International Trade

ECONOMIC GROUP

Date: 10 July 2018

Time: 16:00-18:00

Participants:

Name	Department/Directorate
Richard Price (RP)	DIT - Trade Policy
Catherine Barber (CB)	DIT - Trade Policy
Jeremy Kempton (JK)	DIT - Trade Policy
Tom Knight (TK)	DIT - Trade Policy
Nikos Tsotros (NT)	DIT - Trade Policy
Peter Antoniadis (PA)	DIT - Trade Policy
Craig Entwistle (CE)	DIT - Trade Policy
Jack Kennedy (JKn)	DIT - UK-US Trade Policy
Yasmine El-Tourgman (YT)	DIT - UK-US Trade Policy
Connor Russell (CR)	DIT - Trade Policy
William Shpiece (BS)	USTR
Fay Johnson (FJ)	USTR
Sushan Demirjian (SD)	USTR
Roger Wentzel (RW)	USTR
Joe Wereszynski (JW)	USDA
Ian M. Sheridan (IS)	US State Department

Key Points to Note:

- Bill Shpiece and Richard Price discussed through the full agenda for the economic session of the working group. **The atmosphere was friendly and collegiate**, with opinion flowing between both sides.
- **DIT outlined the structure of the economic ‘Information Pack’** to be published alongside the upcoming Call for Evidence, while giving sight to USTR of the other HMG analytical products (EU-Japan & CETA IAs) with which it would be possible to roughly gauge the content of any future, potential scoping/impact assessment, in lieu of a definite structure.
- **Several takeaways were noted by the chair** (Richard Price), such as sharing and continuing dialogue on best practice relating to communicating the consumer benefits of free trade; on how best to communicate trade in value-added data (given limitations and caveats); and sharing potential US firm-level exporter data sources to aid with DIT/BEIS non-tariff measure survey.
- **DIT analysts** (statisticians and economists) and US analysts exchanged views on differing views of OECD TiVA data / methodologies and how best to use this data; and on trade asymmetries, relating to the ongoing efforts of the ONS through the OECD to minimise or alleviate these, as well as continuing collaboration between the ONS and Bureau of Economic Analysis.



Report of Discussions and Outcome:

1. General Introductions and outlines

- RP (UK) opened the economic session by welcoming American counterparts and participants, hoping that the Economic Sessions could become a regular fixture for UK/US government analysts to identify joint areas of work, areas of research interest and advise one another of upcoming analytical publications / pieces of work. BS (US) echoed RP's sentiments on aims, he was in favour of using the Economic Session to exchange advice for best practice of for analysis, agree data exchanges and reach consensus on 'variables' (i.e. inputs for modelling).
- SD (US) pointed out that economic interactions would depend on other sessions of the Trade and Investment Working Group, especially the Goods Session.
- CB observed an institutional distinction: USTR analysts support negotiations while independent economic modelling is conducted by USITC, while in DIT the analysts work in both capacities. BS (US) noted that USTR holds an analytical umbrella group comprised of analysts from USDA, USITC, DoC among others who provide analytical support to negotiations as well. TK explained the institutional setup of the Government Statistical Service – the ONS is the central statistical body but has statisticians embedded within other government departments (such as DIT) who work in their policy area but also are in close cooperation with the ONS.
- On data sharing, BS (US) pointed out that USTR have a system in place for the exchange of secure documents (MAX) that they would be willing to extend to DIT for document exchange.

2. Analytical publications discussion

- CB introduced the 'Information Pack', pointing out that this will be published alongside the Call for Evidence. CB outlined the Call for Evidence: it will set out the government's desire to enter into discussions for a trade agreement with the United States and allow businesses and the public to provide input into the process, giving their opinions and concerns. The Information Pack would have a 'generic section' to inform the public of the facts and benefits of trade agreements (based off the available economic literature), with a subsequent 'country specific section' which outlines the current bilateral trading relationship (trade flows, investment, barriers etc). BS (US) inquired as to whether there would be a formal advisory group to feed into the process at any point, CB replied that there were some plans for advisory groups, which would soon be announced.
- RP affirmed that there would be constant communication from DIT analysts to USTR of publications of this calibre so that there would be no surprises on their side, working backwards with Congressional/Federal Register notice in mind. The Call for Evidence publications are to launch the narrative and prepare the public for negotiations with the US as soon as possible after March 2019. BS (US) explained that the USITC notice to Congress would only contain advice relating to market access issues.
- CB outlined plans for scoping assessments, i.e. an analysis based on computable general equilibrium modelling (CGE). BS (US) enquired whether scenarios based in this would be based on the result of the Chequers agreement. RP clarified that the impact Chequers would have on HMG analysis was still a work in progress but hoped we would be able to give an update at the next Economic Session. JW (US) asked whether this scoping assessment would be published or not. CB described rough timelines for analytical publications (circa Q3 2018 for scoping assessment).
- IS asked whether this analysis took account of phase-in periods (such as staggered reduction in tariff levels). CB specifically mentioned the already-published UK analysis of the then-



Department for Business, Innovation and Skills on the Transatlantic Trade and Investment Partnership, and that HMG analyses such as those for the EU-Japan FTA and EU-Canada FTA were including more distributional analysis (geographical) of the effects. BS (US) mentioned that for the Trans-Pacific Partnership they had also included geographical distribution analysis, which had shown some regions/sectors had declined in the analysis – this was only relative to the baseline scenario and they did not decline in absolute terms (i.e. grew in absolute terms). It was promised that the UK would provide more detail on this topic during the next TIWG session in the autumn. BS (US) asked whether the variables included in the scoping assessment were the standard measures included in trade agreement impact assessments and whether employment is assumed to be fixed. He drew attention to recent work that Joseph Francois has conducted on assessment of employment effects from trade agreements as something to look at. IS (US) queried a political question as to whether anything had been done to examine whether Leave-voters would gain from free trade agreements or lose. CB raised awareness that DExEU has conducted analysis regarding the economic impact of leaving the EU and that DIT analysis will use that as a baseline; CB also stated that there is a peer review process for the HMG CGE model involving academics. RP stated that DIT has been trying to examine the productivity effects of trade agreements and whether US analysts have any advice for measuring these effects. BS (US) responded by saying that a quantitative analysis is only part of what can be done to fully describe the effects of a trade agreement – that, in their opinion, there should be a full qualitative section accompanying analysis to describe those effects which are hard to capture numerically (such as productivity gains).

3. Trade Asymmetries Discussion

- TK introduced this section of the Economic Session explaining that bilateral discussions are key to minimising and reducing asymmetries. He also explained that it was typically multinational enterprises (MNEs) that were responsible for causing differences between reported statistics. TK explained that the ONS views the OECD as a forum to remedy these trade asymmetries by coordinating between member states. While trade asymmetries are issues, these are dwarfed by FDI stock asymmetries. BS (US) asked whether it was possible to break down the FDI data into disaggregated form to identify sectors which were primary culprits, NT responded that this was possible, but exchanges of micro-data were key; something which is difficult to share beyond the EU. BS (US) replied that is also true for the US.
- On this subject – BS (US) stated that for modelling this can be heavily affected by what the inputs are, such as non-tariff barriers (even if trade asymmetries are corrected for). **FJ (US), at this point, said that she will be asked at some point what the ‘real trade balance is’.** NT remarked that the OECD has experimental trade in value added dataset that corrects for trade asymmetries (i.e. there are none). FJ (US) responded with her concerns of the TiVA dataset: that TiVA discounts re-exports. In her opinion TiVA is a black box of a dataset with the process to arrive at outputs very unclear. US stated that they had asked the OECD for a compendium or guide to the methodology to arrive at the TiVA dataset at the last release (2011) but that this had not been forthcoming, they hoped that one would be coming with the next release (next few months). NT confirmed that this compendium was something that other member states of the OECD were pushing for and would like to see as well.

4. Discussion of Trade in Value Added data

- The discussion then moved to the TiVA dataset and its uses for analysis. RP outlined that Secretary of State (Dr. Liam Fox) views trade in value added as fundamental to understanding how global trade works. RP said that he would find TiVA a useful tool to analyse the way in which each other's (US and UK) economies would benefit from a trade agreement. BS (US) then



enquired whether there was an equivalent dataset solely for the EU¹. TK/NT both responded stating that TiVA, WIOD can be used to analyse global supply chains as well as non-dataset sources (such as qualitative reports from companies regarding their own supply chains). NT affirmed, that in his opinion, the OECD TiVA dataset is currently the best option available

- FJ (US) informed the UK that the US currently are in a working group for TiVA data along with Canada, Mexico, and APEC countries. TK stated that the ONS is working to improve the UK's underlying TiVA data (analytical I/O tables) in their timeliness, granularity and gendered data; he also mentioned that the ONS is working with a consortium of universities to improve TiVA.
- CB asked how the US uses data for supply chain analysis if not TiVA data – FJ (US) replied that they usually use data from industry groups that they are in contact with. SD (US) also said that TiVA data had been used against the US during the first meetings of the Doha Round for tariff arguments (that the US should lower their tariffs more than they were willing to due to it 'harming' their value added). FJ (US) also remarked that the current administration came into power with (negative) assumptions of the TiVA data but that her own opinion of the underlying methodology is so low that she is not of the mind to convince them otherwise. BS (US) said that the US would be interested in value-added data but only when it illustrates how much value added the US itself adds.
- RP questioned how best the UK should engage on value added data to land best in the US, BS (US) replied that it would be good to look at the literature in detail, and especially services embedded within manufacturing. RP noted this as a significant takeaway: both sides can look at the literature and case studies and confer later.

5. Discussion of consumer benefits of FTAs

- RP opened this section saying that consumer benefits are something of an open question for DIT at the moment. FJ (US) remarked that this is very difficult to do – though Ed Gresser had attempted to do prior by linking quintiles of consumer baskets and what goods the partner country produces. US (FJ (US) and BS (US)) also stated that there may be interesting case studies of consumer effects available in the wider published economic literature.
- RP asked the US whether there were influential consumer representation groups active in the US (Which? in the UK) that could be brought to bear in selling a US-UK trade agreement. BS (US) responded that they tend not to be influential and are not typically well disposed to pro-trade arguments, BS (US) gave the example that if it was demonstrable that a pair of jeans would drop from \$10 to \$8 due to an agreement, this would not be enough to convince them that it would benefit consumers. SD (US) remarked that the discussion becomes very focused within the congressional district level and that there are very influential lobby groups that can significantly sway discussions.
- IS (US) interjected that it may be useful for the UK to sell the agreement based on the similar level of economic development between the UK and US – noting that during the TPP negotiations the narrative became framed around a 'race to the bottom'. FJ (US) stated that to sell an agreement would require very specific examples of benefits – it may be best to frame consumer benefits at the household level rather than the individual level (at household level benefits become larger). SD also noted that when tariffs are liberalised, benefits tend to filter through to company profit margins rather than a full pass-through rate to consumers.

¹ While the OECD 'TiVA' dataset is eponymous with trade in value added, there are other datasets that provide the same level of functionality such as the World Input/Output Tables and the Global Trade Analysis Project.



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- RP stated a takeaway from this discussion to be a process of swapping best practice analysis for selling consumer benefits to the public.

6. Non-Tariff Measure Discussion

- CB outlined the framework of the non-tariff measure survey that DIT/BEIS will be using to feed into non-tariff measures (NTM) analysis. BS (US) asked whether the entirety of the survey would be available for sharing or not, adding that USITC might be willing to help convert the responses into numerical estimates of NTMs. CB replied that the intention was to publish the results. BS (US) recommended a paper produced by Christopher Findlay (Uni. Of Adelaide). CR (BEIS) asked whether there were any available data sources regarding US firms that export specifically to the UK. FJ (US) replied that Census Bureau or Department of Commerce most likely have this information but would not be forthcoming with sharing (given firm data has confidentiality requirements). She suggested using American Chambers of Commerce and IS (US) suggested potentially trying LinkedIn groups for US exporting companies as alternative avenues for acquiring this data. BS (US) also took this opportunity to draw attention to the fact that USTR did a report some time ago on barriers that US SMEs faced when exporting to the EU – and that USTR would be producing another similar report in the near future, with regards to the UK.

7. Data Sharing

- PA outlined the core principles of DIT statistician's data sharing process; that they are in line with OECD working group conditions, all data is already publicly available (goods data, services data and FDI data). PA drew attention to the fact that HMRC data differs when it treats EU trade data and non-EU trade data
- BS (US) responded saying that this was very helpful – and that he would not imagine any problems with reciprocating the same level of data availability.

Key Actions and Next Steps

Key Actions

- Both sides have agreed to swap a number of papers and economic material between one another, so as to facilitate best practice, knowledge sharing and to give sight of one another's upcoming publications. This fell into the following areas:
 - DIT publications/material: Public Consultation Information Packs / NTMs Business Survey. The US have agreed to share a similar study that will produce results by July 2019.
 - Consumer benefits of trade agreements.
 - How best to use and frame trade in value added data (both methodologically and to lend best with the public).
 - Impacts of trade agreements on productivity.
 - Wider economic literature (Findlay paper on quantifying NTMs / Francois research on labour market impacts).
- DIT proposed a standard package of data sharing to the United States (national goods, services and FDI data). USTR welcomed the offer and indicated that this should be possible on a reciprocal basis.
- Richard Price and Bill Shpiece agreed a VTC halfway between now and the next working group.



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- DIT and USTR indicated their desire to continue the Economic Session at the next US-UK TIWG.

Key Actions / Next Steps:

- Given that this was the first Economic Session and involved a lot of familiarisation, next steps should be to exchange the mentioned material, to lay the groundwork for more substantive discussions at the next economic session.

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Session Lead Analysis/Comments:

- The atmosphere in the meeting was positive and collegiate, with participants approaching talking points as common problems to be overcome. The interpersonal relationship between Richard Price and Bill Shpiece is friendly overall and should likely be leveraged in the future economic sessions.
- One curiosity was the late appearance of Ian Sheridan (State Department) during the meeting; his line of questioning was often out of sync with the overall flow of discussion and once or twice there seemed to be visible annoyance from other members of the US delegation to his questioning.
- A potential risk to be aware of was Fay Johnson's warning that she will be asked, at some point, what the 'real trade balance is'. Given the current US administration's fixation with deficits this could spell trouble for the UK later.
- There was pushback against forms of joint analytical work between HMG and US government, Bill Shpiece saying that he was not able to decide on these issues.
- The meeting on the whole was a success – all agenda items were discussed thoroughly, with key participants indicating a desire to build on this initial foundation and continue at the next TIWG in the autumn.



GOODS

Date: 11 July 2018

Time: 09:00-12:00

Participants:

Name	Department/Directorate
Neil Feinson	DIT- Trade Policy
Andreas Lendle	DIT- Trade Policy
Tom Aitchison	DIT- Trade Policy
Hussein Farook	DIT- Trade Policy
Wayne Caffell	DIT- Trade Policy
Mojgan Ahmad	DIT- Trade Policy
Daren Timson Hunt	DIT- Legal Service
Kathryn Woolaway	DIT- Trade Policy
Katie Waring	DIT- UK-US Trade Policy
Adam Fenn	DIT- Trade Policy
James Kane	Defra
Enrik Noka	BEIS
Piers Davenport	HMRC
Philip Walker	BEIS
Katherine Wright	DExEU
Sushan Demirjian	USTR
Kent Shigetomi	USTR
Kelly Milton	USTR
Alexandra Whittaker	USTR
Roger Wentzel	USTR
Brian Woodward	US Dept. of Commerce
Joe Wereszynski	USDA
Jessica Simonoff	US State Department

Key Points to Note:

- Concerns were raised about the Facilitated Customs Arrangement, in particular US highlighting the importance of maintaining US trader confidence in the arrangement, ensuring that all third countries are treated fairly and the practicalities of implementing this. Outstanding questions on implementation remained over; SPS compliance, the splitting of consignments, the EU's role on Goods destined for the UK and the ability to identify origin and destination to apply the correct tariff.



- US outlined the various mechanisms of stakeholder engagement. Interestingly on public consultation USTR relies on this as a mechanism for linking companies to products (with companies submitting replies with HS codes of most use) and as a resource document to consult throughout negotiations. Further explanation of the cleared advisor committees and their parallel interplay with negotiations was discussed. USTR explained their confidence in representing the views of industry and consumers but admits that this is reliant on having key channels, individuals and sometimes having to proactively reach out.
- The US outlined the core components of a market access chapter based on NAFTA, and pinpointed specific clauses that the US has included in its recent FTAs (Remanufacturing Goods, Performance Requirements for Customs Waivers, Imports of Samples, Import and Export Licensing Procedures, and clauses related to Bio-technology). The US spoke to challenges they encountered in TTIP negotiations and clarified why some of these differences emerged.
- Discussion over the tariff offer exchange process, saw the US highlighting the initial focus to be on exchanging trade data and establishing a common understanding of principles and modalities. US approach to these negotiations is to avoid commitments to percentages by treatment but attempts to put as much as possible into “Entry Into Force” in a first tariff offer. Recognition of the interplay with reciprocity and cross-chapter dependencies in compiling tariff offers was noted.

Report of Discussions and Outcome:

1. Facilitated Customs Arrangement (FCA) (30 Mins)

Presentation (UK):

DExEU explained how the FCA would work and what the Chequers agreement was proposing. Stressing that the detail would be explained in the White Paper which will be released “within days” and that they could not “pre-empt” that paper. Noting that the Chequers agreement highlights the UK proposal that will be subject to negotiation with the EU. In addition, the FCA would see the UK ensuring simple and ease of compliance for the FCA.

Interaction and Comments (US):

US asked the following questions:

1. **US Comment:** US highlighted some key points they wanted to ensure remain the case. That (1) this is easily applied, that the ability to identify the correct tariff is simple in its application. Highlighting that their role is to help industries take advantage of preferential rates and therefore it is important that this is understandable. (2) The US also highlighted their concern that all competitors are treated equally. (3) USTR wants to ensure that US industry remain “confident” in the preferential gains achieved under a US-UK agreement; this means clarity on how the separation of trade would work, ensuring easy and correct identification of the tariffs applied, clear and simple identification of the Rules of Origin that apply and clarity and assessment of the impacts on European distribution from the UK. (4) US Dept Agriculture highlighted that stakeholders had hoped to address restrictions to access of the EU market in a US-UK agreement and that the maintenance of these barriers will receive vocal stakeholder reaction in the US.
2. **US Question:** What about products passing through EU member states en-route to the UK? How could circumvention be avoided? The US referred to the calculation of country of destination and applying the correct tariff as a “Kabuki dance” and seemed unconvinced other EU member states could apply this.



Response: from DExEU was that they would not speak to other nations customs abilities. That further details of the process and implementation will be outlined in the White Paper.

DIT Comment: There seems to be a misunderstanding on the US side that needs clarifying, that wasn't cleared in the meeting; under the FCA EU member states would not be obliged to offer the UK tariff rate and conduct a calculation on the correct tariff rate. Follow up questions by other USTR officials seems to highlight they understand it is a one-way process but worth clarifying (note: The now released White Paper clarifies this).

3. **US Question:** How will the FCA work for shipments that are split on entry, when some parts of the product go to the EU and some remain in the UK? Do you charge UK tariffs first?

Response: from DExEU that the arrangement will be designed for ease and simple application, and where there is a need, a repayment mechanism can be used.

4. **US Question:** Do you foresee there being a difference between bound and applied rates, or is the tariff differential only for preferential access (FTAs)?

Response: from DIT Goods that whilst no decisions have been taken on applied MFN rates, this would apply to applied MFN rates also and that on leaving the EU we will be free to implement our own applied MFN tariff rates.

5. **US Question:** US asked about timelines. Is there a form of public consultation and stakeholder engagement to input into this? When will the UK consult the EU Commission.

Response: DExEU highlighted that there is ongoing business engagement. DIT pointed to the forthcoming public consultation on UK-US FTA (now published) as another forum to highlight any concerns. On discussions in Brussels – DExEU replied that they are keen to get on with it.

6. **US Question:** US Dept of Agriculture highlighted their concerns of complying with different requirements as part of a US-UK agreement. Pointing to issues over certification and SPS. Noting the UK's proposal of a common rule book, whilst easing trade between EU-UK, would cause problems for third countries.

Response: DExEU explained that the rulebook would only be used in so far as to achieve as frictionless trade as possible.

US Comment: USTR lawyers pointed out that this term is incredibly broad "only where they are needed for frictionless trade with the EU", and would need further detail and clarification.

7. **US Question:** US wanted to know further about timelines and when will it be implemented.

Response: DExEU highlighted that this was in step with the political agreement and that details of the technical implementation will be clear by March 2019.

8. **DIT Comment:** DIT closed by recognising the concerns of the US and noting the need for a continued dialogue. All UK parties spoke to their openness to answer questions in the future on this topic.

Next Steps:

- Continued dialogue and discussions with the US on explaining how the FCA will work in practice as more information becomes available.



2. US Stakeholder Engagement (1 hr)

Presentation (US):

USTR outlined the various ways they interact with stakeholders, including the legislative branch. Touching upon three key elements (1) Public Consultation, (2) Cleared Advisory Committees, (3) Political and (4) Other.

Public Consultation

The formal Federal Register notice lays out the objectives and justifications for initiating negotiations. It invites comments. US pointed the UK to [regulations.gov](http://www.regulations.gov) where all submissions are public and where submissions on TTIP can be found.

For tariff negotiations, a key element USTR request, if possible, is for stakeholders to outline their HS codes that are important to their sector. Recognising that this can be difficult to do independently – linking tariff lines to sectors/companies. It helps to flag products and companies to reach out to during negotiations. Maintaining a hard paper copy of responses to be referred to later throughout negotiations is really useful, noting the length of time negotiations go on for – it can be hard to locate digital copies.

The US admits that they only get a few hundred responses that are useable. USTR filter and process the responses themselves but note this is time consuming but adding that being the actual individuals that read the responses is a valuable and useful process for negotiations. They rely on their Public Liaison office within USTR to compile a summary sheet of responses in an excel file – with one-line summaries, this helps to point to the letters and responses that need further reading.

USTR still receives letters during negotiations and have come across last minute stakeholders who disagree with the progress on negotiations. Responses to these letters can include updates on negotiations.

Conflict between businesses and divisions within sectors can emerge, at which point USTR looks for political steer to outline which interests to promote.

USTR noted the advantage of this engagement with Industry (particularly international companies) in order to use international company responses against opposing countries. As such using foreign company responses as leverage in negotiations.

Cleared Advisory Committees

The US described the cleared advisor approach, recognising that they include regional and local authorities. The Trade Promotion Authority necessitates several groups, 14 Industry specific committees, and 3 high level oversight committees. These committees have their own website with limited access for reviewing documents and text. Cleared advisors are expected to act in a personal capacity rather than on behalf of their Trade Association or company. Industry meets in these committees every quarter with Agriculture operating on more formal timelines. Each committee usually consists of 20 members and are all publicly listed individuals. USTR noted that for some committees they have to actively recruit individuals to ensure a balance of opinion – pointing out that companies have less and less people on trade and rely more heavily on trade associations for this role.



Cleared Advisory Committee individuals sit separate to the trade associations, and the individuals have a strong Chinese wall. These individuals recognise their privileged position which they take great pride in, highlighted by their objective advice to USTR on where companies within the association are likely to differ and potentially come into conflict.

Tariff offers, and text are cleared through these committees, before tabling with third countries.

After negotiations have concluded these committees issue a report their view of the agreement which are made public Reports from these committees can be particular harsh in their assessment.

There are a variety of Agri Committees – Grain, Oil, Livestock, Sugar/Sweet, Processed Foods (Which also has a Commerce sister committee). These committees are jointly chaired by USDA (Foreign Agri Service) and USTR.

Political Engagement

USTR noted that engagement by with legislators (Congress) gives an appreciation for politically sensitivities of constituencies. The extent to which this is considered is largely dependent on how vocal they are. USTR regularly presents to Senate Finance Committee, House Ways and Means, Senate Agriculture Committee and House Agriculture Committee.

Trade Promotion Authority also necessitates USTR consult on the impact on fisheries industry (classed as an Industrial Good). This is one of a number of peculiarities left over from the original TPA.

On the whole USTR feels that Market Access very rarely causes controversy, pointing more towards environmental and labour provisions being the controversial, which see NGOs and a much broader set of stakeholders involved.

Other

USTR admitted that locating relevant companies during negotiations is done primarily through trade associations but they have sometimes resorted to “Googling” when it is a niche product.

USTR/USDA/Commerce all noted the informal contact they have with industry, establishing strong relationships with the cleared advisors to be able to engage over a coffee and informally.

Interaction and Comments (UK):

- 1. UK Question:** DIT was keen to understand how assured USTR is of their positions and of the coverage of their stakeholder engagement going into negotiations – do they conduct an assessment of this?
Response: The US is pretty confident that it covers all sectors in its engagement and that they have a good understanding of the interests it needs to represent. However, notes that they do not conduct any assessment. Silence seems to be their best indicator – if they miss anyone out they will likely be vocal.
- 2. UK Question:** Does USTR seek agreement from the committees between every round?
Response: USTR said they brief these committees and congressional delegates at each round – convening these meetings as they see fit. (Note: It is unclear on the whether they would seek clearance from ITAC for every tariff offer.)
- 3. UK Question:** How does USTR interact with political leadership on the responses it receives?
Response: USTR Lighthizer receives direct communications from business and industry, so he is aware. Assistant USTRs also report to him on a regular basis.



3. Market Access Chapter (1 hr)

Presentation (US):

USTR outlined the key components of a Market Access Chapter for the US. Their traditional framework is based upon NAFTA and they are reluctant to drop articles that were used there but are reactive to third party additions. New agreements have evolved to include more elements, but little has been dropped since NAFTA, their concern is over retrospective interpretation of old FTA's if dropped. Recognising that the EU has far fewer elements in their Market Access Chapters, USTR noted that the EU had few reservations about the inclusion of these US articles claiming that any contention was largely over legal language.

Accelerating Tariff Elimination

The EU has traditionally included in its Market Access chapter articles that commit parties to reviewing the speed of tariff elimination through committees. For the US this is not possible due to the legislative limitations, they would need language that enabled this through an “amendment of the treaty”. Whereas for the EU this language would require returning to EU Council, they would have preferred to see any amendment in line with EU Commission’s prerogative of Trade negotiations and not requiring parties to start a new agreement.

Note for DIT Goods - Pick up these comments with the Legal team as part of Policy Positions work.

Customs Waiver and Performance Requirements

USTR recognises this is an article the US regularly ask for as part of the Market Access chapter. This article prevents countries from making import duty waivers contingent on performance requirements. These performance requirements can be export thresholds.

Temporary Admission of Goods – Samples

This article is a left over from NAFTA. Whilst the US is a signatory to the ATA Carnet it has not adopted all of the articles within the Istanbul Convention on Temporary Admission. Under TTIP this came up with EU TAXUD wanting to expand the article to meet the terms of the ATA carnet, broadening the scope – US pushed back on this.

Import/Export Restrictions

The US stated that their intention was for refraining from such restrictions e.g. on devices containing encryption. They do not want to see IT products with encryption being restricted in any way, this is followed up with requirements in the TBT chapter to avoid forcing companies to disclose algorithms.

Remanufactured Goods

US highlighted this to be a growing sector, noting Vietnams limitations on this. US do not want remanufactured goods to be seen as “used” as this leads to limitations. This definition is strengthened through the Rules of Origin chapter – what processing is needed to qualify as a remanufactured good. Requirements tend to be; it must be “manufactured again”, a specific list of products, process to confer origin, inclusion of a factory warranty. US is looking for a global standard of “similar to new”. USTR noted that this definition has yet to be enforced and that it is a specific element that isn't of concern to some nations. They made it clear that they will not water down this



article. (Note that in TTIP the scope of remanufacturing was under considerable review, but they did reach an outcome).

The US see economic advantage in remanufacturing, due to the substantial amount of investment and employment opportunities it brings as a labour-intensive industry.

Import Licensing

As part of the US efforts to improve transparency on import licenses. The US include provisions that prevent partners raising import licensing requirements on partner countries, without prior notification to the WTO or through the FTA.

Export Licensing

Similar to import licensing, the US prevents other nations introducing export licenses unless notified on the grounds of national security. USTR highlighted that on Import and Export licensing this was an endeavour that the EU and TPP promoted, following the failure of Doha round.

Administrative Fees

Requirements of nations to publish their trade related fees.

Committee on Trade in Goods

USTR highlighted what this committee would cover; primarily nomenclature updates and trade reviews. Under TTIP this was still being worked on due to the legal impasse over how to implement future changes that worked for both legislative bodies of the EU Commission and US Congress, that recognised where both of their executive powers extended to.

Annex – Exemptions from National Treatment

The US highlighted that they seek a national treatment exemption for the Jones Act as some provisions do affect trade in goods issues, this is repeated elsewhere in the agreement – in other chapters. USTR highlighted that they do not seek an extensive list that includes regulatory discretion, stating that this does not count as national treatment exemption. US also question the need to list import prohibitions in this annex.

Annex – Terms of Tariff Elimination

Annex – Tariff Schedules

Annex – Other

This annex is used for product specific requests to improve trade between both parties. USTR pointed to the KORUS agreement and their specific request for Korea to address the Automotive engine displacement tax.



Agriculture

USTR highlighted that they haven't a preference over whether Agriculture is done in a separate chapter or not. Agriculture sector could include articles on Export Subsidies, SSGs, Bio-Technology / GMOs and TRQ administration. Similarly, Agriculture and SPS committees would be established.

General Definitions

USTR stated that should a term be used in more than one chapter, it falls to the general definitions to outline. If only in one chapter, it is defined in that chapter.

A key definition of confusion between the EU and US was "Goods of a Party" vs. "Originating". The EU wanted to include a term "Originating Goods of a party". US were reluctant to accept this phrase as it seems to suggest that the MA chapter only applies to those goods benefiting from preference (originating), whereas the US saw many clauses of the MA chapter applying to all goods regardless – not just those that are "originating" and would thus benefit from preferences.

Another definition of contention included "free circulation in the EU". USTR believed the EU was suggesting that once a good enters the EU, regardless of origin, it becomes an EU good that can be re-exported to the US regardless of any US restrictions on other countries. For the US, value added is needed to be deferred to the good in order to be traded as an EU good and nations retain the right to restrictions.

Note for DIT Goods – Flag to TBT and Regulatory Team.

Other comments

US recognises that there is always a constant discussion over whether elements are more applicable for the Market Access Chapter or the Customs & Trade Facilitation Chapter.

USTR is open to considering new elements to be added, and keen to be a supporter of raising standards for trade. TPP represents their most modern form of a Market Access Chapter.

Interaction and Comments (UK):

1. **UK Question:** Is Bio-technology always in MA chapter or SPS chapter?

Response: Can be both or either.

2. **UK Question:** Why address spirits protected terms in market access chapter not intellectual property chapter?

Response: This is because the matter is viewed in the US as a labelling matter for which the Treasury (Federal Bureau of Alcohol, Tobacco, Firearms and Explosives) is responsible, not an intellectual property right as such and the US see it as a restrictive trade practice.

3. **UK Question:** How do you perceive the process for market access chapter discussions?

Response: USTR foresee the exchange of text and tariff offers simultaneously and do not foresee consolidating text as a major challenge. Recognition that consultation and discussion between parties in advance of any tabling would aid in the understanding of what is being proposed.



4. Tariffs (15 Mins)

Presentation (US):

USTR outlined the key elements that need to be agreed ahead of tariff offers.

Sectoral Split

The US conducts its tariff negotiations in three parts; Agriculture, Industrial and Textiles. USTR stated that they want to minimise the trade-offs reading across these three sectors for the most part, only the end game should see cross-cutting negotiations. At the outset the US would label those tariff lines it sees as belonging to each sector. Note: It remained unclear to what extent this would mean the UK would be asked to split discussions on its own tariffs along the same definitions.

Data Exchanges

A common agreement is needed early on what reference points are nations using, Free on Board / Customs Value / Customs Insurance Freight? Under TTIP the EU used “dutiable value” which doesn’t include imports under inward/outward processing. All data exchanges to be based upon 3 years of trade, the US ask for Rest of World trade as well as bilateral trade. USTR will only ask for import data, recognising its superior coverage – however they will check this against their own export data for internal purposes.

Buckets/Baskets of Tariff Offers

The US approach tariff discussions using 4 categories:

A – Entry into Force (which could be further split into “MFN zero” and “other”)

B – 5 years (Note: These are examples. It could also be 3 years, 7 years, etc.)

C – 10 years

U – Undefined. This relates to sensitive products and where reciprocity and chapter dependency is needed. (Textiles have RoO dependencies, Agri has TRQs).

Important for a common understanding of what U means, for the US this doesn’t mean those products would not be liberalised eventually – but instead those products that will need to be treated sensitively. Also, for staging purposes both sides need to agree to what 5 years mean? Is it 5 equal cuts, or the first cut after five years?

USTR is open as to whether this is done as a whole, or by sector, or smaller chunks. USTR is opposed to any opening modality that places a % by baskets, for example a commitment of 90% in category A. USTR feel this is too binding and not meaningful – too quantitative and pointless. Would rather improve the offers at each stage but ensuring the EIF basket is the largest. Tariff negotiations are aided by openness about what the UK/US would be defining as sensitive as early as possible. USTR make all tariff offers contingent on satisfactory outcomes across the agreement and other chapters.

On agriculture and TRQs, the US approach is to place an offer next to all lines even if that includes a substantial number of lines being “U” – potentially meaning TRQ. USDA highlighted that this is an initial starting position and go from conservative to liberal, what starts as a TRQ may be subsequently liberalised. Note: Overall, the US approach appears to be more ambitious in that it sees full liberalisation (after a number of years) as the ideal outcome. This is also evident from recent US FTAs.



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Next Steps:

- Recognising that time cut this short, and agreement to come back to Tariffs and process over lunch and perhaps at a later date.

Key Actions and Next Steps:

- Continue dialogue on the FCA.
- Follow up the discussion on Tariffs process and data exchange.

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Session Lead Analysis/Comments:

- USA clearly highly concerned about the technical implementation of the FCA and the quality of any UK offer on goods as a result.
- Otherwise a cordial atmosphere, with the session heavily dependent on the US showing and presenting their best practice, experience of TTIP and traditional processes. US very open to answering UK questions.
- We gained useful intel and steers on the practical processes that we and the US will need to undertake as we move into the negotiations phase, and in particular it has started to flag some of the key areas where we need to decide whether to carve out our own approach or follow the US precedent.
- A large showing from UK; DIT, Defra, BEIS, HMRC and DExEU.
- USA keen to get into the substance of discussions on issues and UK positions.



Department for
International Trade

INVESTMENT

Date: 11 July 2018

Time: 09:00-16:00

Participants:

Name	Department/Directorate
Lola Fadina (LF)	DIT- Trade Policy
Matt Ashworth (MA)	DIT- Trade Policy
Louis Bickler	DIT- Trade Policy
Michael Drewett	DIT- Trade Policy
Chrysoula Mavromati (CM)	DIT- Trade Policy
Ben Rake	DIT- Trade Policy
Sukhmani Khatkar	DIT- Trade Policy
Jack Kennedy	DIT- UK-US Trade Policy
Jaya Choraria	HMT
Rachel Hahn-Morris	BEIS
Lauren A. Mandell (LM)	USTR
Emily Kilcrease (EK)	USTR
Janet Shannon	US State Department
Raimonds Pavlovskis	USTR
Tom Barlow (TB)	US Dept. of Commerce
Sofia Vickery (SV)	US State Department

Key Points to Note:

- This was an open discussion which went into much greater detail than the previous working group on the substantive rules of investment protection, Investor-State Dispute Settlement (ISDS) and stakeholder engagement. In particular, the US gave more detail on their rationale for investment protection provisions in their previous treaty practice. The tone of the discussion was positive throughout.
- There were questions on how the UK planned to approach negotiations – with a Model or otherwise. The UK was also pushed on where policy thinking had progressed to and were asked to provide indications on core provisions. The UK made clear that its position was evolving, and policy development was ongoing.
- The US talked through specific details in investment protection provisions, particularly on the prohibition of performance requirements, expropriation, denial of benefits and on the scope and definitions of investor and investment.
- When discussing ISDS, the US expressed again their concerns around the EU's proposals for the Investment Court System (ICS). The US made clear that, if the UK were to pursue a form of ICS in the investment chapter, this would have the potential to significantly impact investment and wider FTA negotiations with the UK. This appeared to come from senior levels of the US



administration. In response, the UK indicated that where there was ISDS in future agreements, the objective would be to ensure a system that was effective, efficient and that could work in a bilateral context.

Report of Discussions and Outcome:

1. Welcome and introductions

Lola Fadina (LF) and **Lauren Mandell (LM)** noted the close ties between the UK and the US and the commonalities in their high-level objectives for investment, though there might be different approaches in getting there. The discussions were aimed at building on the constructive conversations at the Third UK-US Trade and Investment Working Group (TIWG 3).

2. UK to update on policy development progress

Matt Ashworth (MA) - None of the core principles in investment policy are new to the UK. The UK has an existing stock of over 90 Bilateral Investment Treaties (BITs) and is engaging with new developments across a number of international organisations in the field of investment. Ministers have agreed high-level principles for investment for both substantive and procedural areas of investment policy. The substantive areas include promoting Foreign Direct Investment (FDI) and Overseas Direct Investment (ODI); providing a level playing field to foreign investors in the UK and UK investors abroad by providing investment protections; reaffirming the Right to Regulate (R2R); and ensuring the ability of the UK to exercise its diplomatic interests. This would be achieved through protections against discriminatory, arbitrary and manifestly unfair treatment. The UK also wants to keep abreast of recent developments in policy, particularly in looking at options for preventing so-called 'mailbox companies' from treaty shopping, where this was sensible. On the procedural elements, where ISDS is included in investment agreements, the UK would seek provisions that are effective and proportionate – this is in line with the UK's position at the UNCITRAL Working Group III discussions. The details of these policies will be crystallised over the next few months to be ready to negotiate once the UK leaves the EU.

LM – Will the UK be developing a model text? Or has thinking not yet reached the stage of thinking about what the end product of the policy development looks like?

MA – We are still addressing the content of the policy development. The UK is not looking at text so much at this stage and is focusing more on desired outcomes and core principles. The US is right that the UK has had a model in the past and would think about this in the future.

LM – Will your approach include both BITs and investment chapters in FTAs?

LF – The UK is taking views on the most effective ways of conducting investment agreements and wants to ensure that our approach is suitable for bilateral and broader agreements.

LM – It is interesting to compare the UK's policy development to US policy positions. The UK's principles have lots of overlap with US policy, though, of course, the devil is in the detail. The US shares the UK objectives of protecting investors whilst ensuring that regulators have the full ability to protect the public interest. On UNCITRAL and ISDS reform, the US considers the question of whether or not to reform the system to be 'quaint'; the answer to the question is that every negotiation presents an opportunity to reform, and this is a constantly evolving space. Were the US to have a deal with the UK, you could expect to see this reflected in the need to strike a balance between protecting investors and protecting the right to regulate.



3. US talk through select investment issues in the Model BIT

Expropriation

LM – This article addresses both direct and indirect expropriation. While a definition of direct expropriation is relatively simple, it is harder to define indirect expropriation. This question has come up in NAFTA cases and is why the US added Annex B to clarify this. It is also important to draw a distinction between expropriation and non-compensable regulatory takings. The US reflects these distinctions in Annexes to their agreements, when defending cases that have been brought against the US, and in non-disputing Party submissions under Chapter 11 of NAFTA and the CAFTA. Quite often there is a misconception that we ban expropriation – this is not correct; we introduce disciplines to expropriation. Expropriation is legitimate when it is a) for public purpose; b) non-discriminatory; c) on payment of prompt, adequate, and effective compensation; and d) in accordance with due process.

LF – How useful are these submissions in influencing tribunals?

LM – The US views the ability of states to comment on treaty interpretation as fundamental. The US has helped to shape tribunal interpretations and public perceptions of investment by signalling to business, stakeholders, civil society and tribunals how these provisions should be interpreted. In our domestic and international practice, public purpose is viewed very deferentially, and the US would expect tribunals to be deferential to this. This should obviously be balanced with the continuing need to protect investors overseas as well.

MA – One of the areas civil society groups are concerned about is indirect expropriation. How do you engage with civil society on this?

LM – Expropriation has received the most scrutiny from the civil society community. There are concerns that governments are reducing the right to regulate. However, when you look at the jurisprudence, there are few successful claims of indirect expropriation (*Metalclad v. Mexico*, 1999). The US sees expropriation as an extraordinary act and is very rare. It is also possible to throw the question back and ask whether the government should be restricted from expropriating in certain circumstances. Stakeholders may not have confidence that a tribunal will interpret expropriation in the right way. We point them to non-disputing Party submissions and to our Trade Promotion Authority and ask them to look at the end result. The determination of whether there is expropriation requires a case-by-case, fact-based analysis that looks into: i) the economic impact of the government action; ii) investment-backed expectations and iii) the character of the government action.

Performance Requirements (PRs)

LM – Governments of all types and sizes employ PRs, and so the US sees prohibitions on PRs as a relevant discipline (*Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, 2007). The US PR expands on the TRIMS Agreement. It includes a closed list of requirements – these are things like domestic content rules that disrupt supply chains, or requirements to transfer technology. Whilst not necessarily a NT issue (as the PRs could be non-discriminatory and apply to domestic investors), PRs of this sort make it more difficult for foreign investors to operate their investments. At the same time, there are a number of tailor-made exceptions (e.g. non-conforming measures), which should be read together with the main provision to fully understand the scope of the rule.

MA – How does the PR article work in the context of agreements with developing countries?



LM – The US starting point is that developing and developed countries have an interest in ensuring robust domestic industries. Prohibitions on PRs do not prohibit governments from taking a wide range of measures to promote domestic industries – on subsidies, for instance. In the developing world, one of the most important issues is the need to train human capital. US PRs exempt training of staff, in response to this issue.

LF – To what extent is your global treaty practice around setting global norms or is it more country specific?

LM – Both. The US has seen a variety of governments engage in PRs that distort investment flows and not just in East Asia. Some of the US PR clauses are specifically designed to combat Chinese (CN) practice, and we'd view negotiations with a government like the UK as a chance to build a common platform to address the threats posed by CN. Negotiations with the UK on an FTA are a chance to broadcast the message that performance requirements are not acceptable, particularly technology localisation requirements. The US is keen to be even more aggressive on these than it has in the past.

Definitions

LM – The US draws a distinction between investment and covered investment. The term 'investment' is an all-encompassing one that covers both domestic and foreign investments and informs the meaning of the scope of 'covered investment'.

- **Investor:** The US is clear that it is protecting investors in any form, including SOEs and foreign governments. We see the open approach as fundamental to our economy, with exceptions for things like national security. This also includes pre-establishment, so any concrete steps towards making an investment count. The US thinks it's important to have investment protection pre-establishment because having only post-establishment protections cut off the ability of foreign investors to access certain parts of the economy.
- **Investment:** This includes any kind of asset. The term 'asset' is the best we've come up with yet that doesn't have a more loaded connotation. Not every 'asset' is an investment: it must be owned or controlled, directly or indirectly, by an investor, though these terms are deliberately undefined and allow a case-by-case assessment. In non-disputing Party and defensive submissions we have attempted to clarify this. Definition is not a closed list. We believe having a closed list would be arbitrary. Moreover, assets should have the characteristics of an investment which include 'commitment of capital or other resources'; the 'expectation of gain or profit'; and the 'assumption or risk'.

Denial of Benefits (DoB)

LM – This article allows parties to choose who should have the benefits of this treaty and is not a mandatory mechanism for excluding certain investments. The effect of this is to deny certain investors access to the treaty protections and prevents access to the dispute settlement provisions and states bringing related ISDS claims. This is when a) the investor is controlled by a non-Party with which the US does not maintain diplomatic relations; b) the company is owned or controlled by an investor of third country subject to sanctions; c) a shell company is owned or controlled by an investor of a third-country; and lastly d) a shell company is owned or controlled by an investor of a host-state. The article is elective because the US would not want to prejudge any scenario - countries may need flexibility to accommodate changes in a sanctions regime, for instance. The US wants to be able to deny benefits at any time, subject of course to any applicable arbitration rules. The US does not see any downsides to having flexibility to deny benefits.



CM – Under this approach it is still possible for a US-owned company that has substantial business operations in the UK to sue the US. What is the underlying policy rationale, and have you received any criticism (e.g. from civil society)?

LM – This was one of the main hurdles we had to deal with internally during the TTIP negotiations. Civil society would argue that TTIP offers yet another way for US companies to sue the US. Our response to this is that if it is about a *bona fide* investment that fully operates in (for example) the UK, then this will be regarded as a UK company, irrespective of its ownership.

MA – What are the advantages in having a separate DoB clause, rather than excluding these issues as part of the definitions article?

LM – The EU in CETA has proposed an approach under which shell companies are excluded from the scope of the treaty under the definition of investor. This seems fairly novel. The US assessment of the EU's approach is that this is designed to sell to the public, and that this helps messaging to civil society. There is also potentially a substantive point in that it takes the discretion out of the hands of the tribunal – if a tribunal decides that the decision to deny benefits was taken too late. From the US perspective, having a standalone DoB clause enables flexibility, and this is particularly relevant for the current administration. Even if the claimant was potentially a mailbox company, the government would not want to send signals that it would discourage investments from companies of this sort.

Fair and Equitable Treatment ('FET') / Minimum Standard of Treatment ('MST')

LF – It would be good to have a discussion on the different approaches taken by the US and the EU on FET.

LM – To be frank, we've asked the EU the following on the closed list approach: is this intended to be an approach that is more defensive minded or offensive minded? When US investors look at this list, they see opportunities as the list provides terms that a tribunal would interpret according to the Vienna Convention on the Law of Treaties without any guidance. We believe that this would afford protections to investors beyond those under the MST. Tribunals that have judged the CIL norm have agreed that this is a very narrow obligation and a very narrow window to prove a violation. For TPP we added a number of clarifications to say that it was the claimant's obligations to prove a breach under CIL/MST. When comparing the two approaches, the obligations of a closed list appear broader than the CIL standard. The US is open to conversations with treaty partners to ensure that there are sufficient safeguards to make sure that the tribunal gets the CIL standard right. Now, there are circumstances where the US has not agreed with the tribunal's judgement, but we do not think that the CIL standard is really that open to abuse or misinterpretation.

4. Discussion on ISDS/NAFTA

LF – We would be interested in your views on ISDS provisions, especially given the ongoing negotiations and in light of views expressed on the Hill and from stakeholders. We appreciate that this is ongoing.

LM – The current administration's views are different from previous administrations. Certain Cabinet members (including USTR Lighthizer) have questioned the approach to ISDS. In NAFTA it is known that we proposed an opt-in model which would allow treaty partners to make a choice as to whether to allow investors to bring ISDS claims. Thus, even if the current administration is not comfortable with allowing ISDS, future governments may very well be. The NAFTA 2.0 negotiations are ongoing, but I can say that we do not yet have a view on ISDS in future FTAs, including in a US-UK FTA. It is the US view that the ISDS provisions in NAFTA 1.0, in the Model BIT and in TPP are effective,



modern and suitable and we think they strike the right balance. If in a future US-UK negotiation we have an investment chapter that includes ISDS, I cannot say if there would be an opt in opt out model or not, but we do think that any sorts of provision would be similar to those in NAFTA 1.0 or TPP.

LF – Is this a question of a sovereignty argument outweighing the core principles in TPA or is it more about balancing the two?

LM – We take the view that the opt-in approach is consistent with the objectives outlined in TPA. Opt-in ISDS is a political choice as much as it is a legal choice. On the stakeholder engagement piece, we have spent a lot of time on the hill working out whether or not this is acceptable. If we opened discussions with the UK, you would also have access to staffers and potentially to members of congress as well.

LF – Some stakeholders are asking whether we would even need ISDS between the US and the UK (or the US and the EU). We would be interested in your views.

LM – I do not think we have made an assessment on that. There are views on both sides. During the TTIP negotiations this was a common argument from stakeholders. But there is an argument that, even with governments that have high rule of law standards and good track records, there is still a heightened risk to foreign investors. It is also important to have a floor below which standards should not fall. Besides, US investors can sometimes face treatment that we would find surprising, so you may well want this. Then again, both the US and the UK have similar, common law legal systems, integrated economies and good track records so there would be others who would take the opposite view. There is also a strong argument in favour of ISDS between two developed countries, in that you signal to other negotiating partners that you don't 'pick-and-choose'.

LF – What do you consider to be the benefits of having ISDS with Canada?

LM – I cannot be too open as the negotiations are ongoing. However, our investors would say that US investors have brought and won more cases under NAFTA against Canada than they have against Mexico. If you look at the whole history of the NAFTA, you can see cases where there were no adequate remedies under domestic law and were in breach of the NAFTA. US investors have sued Canada more than any other country, but then again, the US has been sued more times by Canadian investors than any others. The US has not been fully satisfied on the evidence of the benefits of investment chapters and ISDS. Then again, we do not have a lot of data to work from. The positions we have taken in the NAFTA negotiations have been in response to how we have fared in other NAFTA countries, in terms of investment flows, offshoring and job loss and changes in the US economy. One could make the argument that the concerns are heightened with border states. Then again, these are decisions that would need to be made at levels higher than mine.

The EU's ICS has attracted a lot of attention. The US government is not keen on the EU's position, to put it mildly. Ambassador Lighthizer has been briefed on the ICS and has taken the view that the chances of having a successful discussion on ISDS would be significantly impaired if the UK were to propose a form of ICS. This would also have wider implications on a future US-UK FTA.

5. US Approach to Stakeholder Engagement

LF – We are keen to get a sense of how the US engages with stakeholders and to learn from your best practice on this.

LM – For the US, trade and ISDS/investment issues are front and centre for stakeholder engagement. There are three kinds of places where we engage: on ISDS proceedings; policy



positions in our model BIT; and consultations in advance of negotiations. We have formal advisory committees where USTR appoints individual representatives from business and civil society. These committees have the ability to read the text and advise on positions. USTR are required through TPA to engage with members of Congress and their staff. We are also required to publish our negotiating objectives before negotiations open, and to update them to reflect changes in the US positions. There is also a great deal of engagement with different interest groups and firms in advance of negotiations, in developing our model BIT and on individual investment disputes. Though this is limited by the need to keep negotiations confidential.

LF – Do these groups have a sufficient understanding of the policy to provide useful information?

LM – The challenge in general is not so much that stakeholders are not well informed, so much as each group wants everything - firms want full market access without limitations, civil society want no ISDS, etc. Groups are very reluctant to prioritise, which creates a very challenging dynamic. In unsuccessful negotiations you never work out where groups want to be, and everyone ends up hating the published text.

6. Conclusions

LM – There is value in including ISDS in an investment chapter. The causality is not provable, but even if disputes do not proceed to claims, the presence of a backstop is invaluable in resolving things – including the possibility of Posts reminding a host state of their obligations.

LF – This was a useful conversation. Clearly there is a lot of detailed conversation we will need to have as we move forward. We are still in policy development mode and though we have previous treaty practice, we are yet to come to a view on a new model.

Key Actions and Next Steps:

- Both parties to consider if an intersessional discussion before the next TIWG would be appropriate.
- UK to continue to update US at further TIWGs as its investment policy develops.

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Session Lead Analysis/Comments:

- The atmosphere in the room was relaxed and constructive. This was the most in-depth discussion with the US on investment policy to date. The UK was able to move the conversation into greater detail and the scope of the discussion reflected the UK's progress in developing its investment policy since the last TIWG.
- The US asked for further details on the UK's policy development at several points throughout the discussion. They will be expecting a more detailed and developed update at the next TIWG.
- There are many potential levels of overlap between the US and probable UK positions. The US referenced a large amount of case law during the discussions. The UK will need to continue to explore this in terms of policy implications for the NAFTA cases the US has faced, and the cases that its investors have brought against other states.
- The US messages on the ICS were unsurprising, if forceful. The US was clearly aware of likely UK positions on pre-establishment and were interested to see whether the UK position on CIL and FET would move from current BITs to the EU approach.



Department for
International Trade

SERVICES: TELECOMS

Date: 11 July 2018

Time: 10:00–12:00

Participants:

Name	Department/Directorate
Rebecca Fisher Lamb	DIT- Trade Policy
Chris Woodward	DIT- Trade Policy
George Radice	DIT- UK-US Trade Policy
Harry Lee	DCMS
Mike Hill	DCMS
Henry Shennan	DCMS
Laura Warren	DCMS
Alex Walford	DCMS
Rob McGruer	Ofcom
Jessice Manzone	US Dept. of State
Matthew Jaffe	Associate General Counsel (US)
Thomas Fine	USTR
Robert Tanner	USTR
Diane Steinour	NTIA/DOC
Ellen House	USTR

Key Points to Note:

- The UK provided a detailed outline of their telecommunications domestic regulation, which included future telecommunications infrastructure, the European Electronic Communications Code (EECC), 5G and mobile roaming. The US asked questions and welcomed the information sharing, providing some, although limited, reciprocal explanations.
- There was recognition from both sides of a need to share and understand even more about their respective regulatory systems. The US were open to arranging intersessionals both in-person, where possible, and via VTCs to have further detailed discussions.
- Both sides agreed that this initial exchange was useful and that the aim in the run up to and at the November working group should be for detailed deep dives into areas where we both see potential, including more detailed reviews of the US system.

Report of Discussions and Outcome:

1. Discussion of UK Future Telecoms Infrastructure Review (FTIR)

HS (UK) provided an overview of the future telecoms infrastructure review, which is about to be published. Starting with coverage, he explained that for fixed telecoms government focus has been on superfast broadband (24mbps) and have been successful with over 95% of premises covered.



This is noticeably better compared to other countries. However, basic mobile connectivity is not as far-reaching, with only 80% coverage, including issues on train lines. The UK has four major mobile operators, but there are many regions where there is only one operator. Members of Parliament (MPs) often get consumer complaints about coverage; improving this is a key priority for DCMS.

Barriers for providers:

Openreach is the largest incumbent; however, there are a growing number of smaller network providers. Virgin Media covers 40% of the UK and coverage is improving. Yet, superfast will likely not be fast enough for most consumers in the next five years, and so the UK is looking to ultrafast. The UK's national ambition is to have superfast fibre on 15 million premises by 2020 and a nationwide network (95%) by 2033. Fibre connectivity is currently provided primarily by Openreach, supplemented by other operators such as Virgin and CityFibre. The FTIR sets out the government policy framework needed to deliver that target. The government has made good progress with Openreach in enabling greater access to their ducts, which could be considered a non-tariff barrier. Ofcom have also said that Openreach must make it easier for rivals to install fibre on its telegraph poles and underground tunnels.

RT (US) commented that the US does not have similar legislation that obliges access to poles and asked whether other utility providers allow access to their infrastructure, similar to the US where electricity companies provide access to their poles. HS (UK) confirmed that EU regulations facilitate utilities providing access to TelCos and some power companies are looking to open their infrastructure.

However, HS (UK) noted that wayleave, access to buildings and access to Openreach's passive network structure are the key barriers for operators. Some countries, such as Spain and Portugal, compel incumbents to provide fibre access, but the UK works on the basis of promoting competition. The UK government provides financial assistance where commercial operations are not viable. RT (US) believed that they had similar issues in the US. Presumed consent sounds like a good idea from a TelCo perspective but could be too aggressive for the US legal system. He suggested that he could connect the UK with colleagues in the FCC and New York to follow-up with detailed information. DS (US) added that they have an executive order that allows access to federal lands to lay the cable.

Government programmes:

HS (UK) explained how Broadband Delivery UK is running tenders to support local authorities to facilitate broadband rollout in their areas with the aim of delivering superfast broadband, but it has had a side-effect of promoting competition. RT (US) inquired about the source of the funding, which HS (UK) explained came from taxation. RT (US) found that interesting; they have applied similar policies in the US over the past ten years, including a grant programme under the Department of Agriculture for last mile connectivity. There is also currently a strong congressional interest in broadband rollout and mapping empirical demand against whether there is a sole provider in the area.

Next steps:

RFL (UK) asked whether it would be useful to arrange another discussion once our strategy has been published, and whether the US could share more about how their system operates. RT (US) said that he was happy to facilitate, and that the US was interested in more information about the UK's system. Agreed this would be the focus on a future discussion to understand the US system.

2. Discussion of European Electronic Communications Code (EECC)



Overview of UK interaction with the EECC:

LW (UK) provided an overview of how the UK interacts with the EECC. Much of telecoms in the UK is derived from EU legislation. The current framework consists of four European directives. When established the EECC had six principles: 1) technology neutrality; 2) competition; 3) member states should make sufficient use of spectrum; 4) regulation free from interference from commercial interests; 5) removing barriers to the single market; and 6) a flexible and deregulatory framework. On the final principle, the framework operates on an ex ante basis. This means that Ofcom does not need evidence of bad behaviour in order to regulate telecoms markets (which would be ex post). Ofcom instead reviews telecoms markets currently every 3 years. Where Ofcom finds that an operator has significant market power, then Ofcom can impose regulation where they feel that there is sufficient evidence that competition problems may arise. Ex ante regulation should be removed when it is no longer needed.

LW (UK) went on to say that the Commission proposed a new European Electronic Communications Code Directive in September 2016, consolidating the four directives. It broadly aligns with the principles of the current framework, with a few key differences:

- Increased focus on investment in fibre & 5G networks: this includes a move away from technology neutrality. There are new regulatory tools to incentivise investment, but also reduced flexibility for MS over spectrum management.
- A level playing field, or ‘same service, same rules’: The European Commission introduced this new policy objective, which intended to bring over the top (OTT) communication services into scope of telecoms regulation. After much negotiation, the EU has agreed a ‘service blind’ approach which will only bring OTT services into scope of consumer protection rules if they connect to the public switched telephone network or, for those services that don’t, possess the relevant characteristics. For example, customer contract rules will only apply if the service offers a contract.
- New powers for Governments to regulate: over spectrum and end-user rights
- Harmonised retail price caps on international calls and SMS between EU Member States. This intervention informally known as “intra-EU calls”.

In June, the EECC was politically agreed by the EU. It will be formally adopted by the EU in October-November 2018. At this point, the clock will start ticking on a 24-month deadline for Member States to transpose the EECC into national law. The exception to this is intra-EU calls, which will be imposed directly on Member States via an EU Regulation by May 2019. Subject to the final agreement on EU Exit, the transposition deadline will fall within the post-Exit Implementation Period, which will oblige the UK to commit to EU transposition deadlines between March 2019 and 31 December 2020.

US position on EU legislation of Over-the-top (OTT) services:

RFL (UK) inquired, based on the potential regulation change post-2020, what the US thought would be a good future approach. RT (US) responded by saying that the US had been following the EECC closely, and have had a few conversations with other MS. The US have concerns about OTT services, but RT (US) commented that it looks like the UK are taking a pragmatic approach and found the concept interesting of applying similar rules where there is some overlap between traditional telecoms services and non-traditional. RT (US) explained the US perspective. Initially OTTs were completely outside the scope of telecom regulation but due to extraneous issues such as safety and security, the FCC has imposed certain conditions (such as emergency calls) on OTTs that link to Public Switch Telephone Network. However, the US does not see any value in imposing all regulations on OTTs, as the entire regime does not make sense for the modern service.



Incentivising investments:

RT (US) asked how the EEC incentivises investments. LW (UK) explained that it reduces the frequency of Ofcom market reviews from three to five years, which provides more stability in investment. The code also introduces mechanisms to reduce the way the regulator can impose regulation, imposes transparency on access, offers forbearance for fibre networks if they offer co-investment opportunities. It also provides power to regulators to identify geographic areas where there is low interest in investment. The regulators can invite operators to invest, with the incentive that they will be the sole operators in the area, providing security.

DS (US) commented that operators are displeased with the move towards regulatory flexibility and spectrum licensing and asked whether the spectrum licensing regime facilitates UK operators to go out of the UK. LW (UK) explained that regulators have to provide a minimum of 20 years investment certainty, which doesn't actually affect the UK as they offer indefinite certainty for mobile broadband. Many UK operators have operations in the EU, and they would not want to discourage them.

TTIP discussions with EU:

RFL (UK) asked on the US's TTIP discussions with the EU. RT (US) explained that it was a challenging discussion. The US has the same pro-competition basis as the EU. However, there is a difference between agreeing on the accomplishment of end-goals and what is included in a trade agreement. The US has made different decisions to the EU, such as rules on unbundling parts of the network and the pricing around dominant suppliers and services. Yet, it is difficult to get into that level of detail in a trade agreement. The EU asked the US to execute similar regulation to what they were imposing, but the US saw that this was beyond the scope of a trade agreement. RT (US) suggested that the EU could have been more 'humble' in the way they dealt with telecoms trade agreements, and that he has never seen a trade agreement that attempts to co-regulate. However, the US sees the importance of providing regulators with the right framework. RT (US) noted that he could go into further detail at a later date, which was welcomed by the UK for a future discussion.

3. Discussion of 5G

Overview of UK approach to 5G:

MH (UK) gave an overview of the UK's strategy and testbed programme. The UK government published the strategy in March 2017; it looks at a number of policy areas such as spectrum, regulatory regime, stimulating the market, and removing barriers. The UK also has the 5G Testbeds and Trials Programme will create the right conditions for commercial investment in 5G infrastructure and services and build the ecosystem. There are two funding strands, the first is a 5G Innovation Centre at the University of Surrey, the University of Bristol and King's College London. The second is a competition in industry to come up with innovative ideas, with six different projects selected in different industries. The programme is also investigating 5G commitments in rail and security. The government is working closely with the National Cyber Security Centre on security. The next steps for the UK is to find a partner for large scale trials of 5G in dense urban environments and following from this the UK plans to undertake a large-scale testbed in a rural setting.

MH (UK) went on to explain that the government has also funded the creation of the 5G Innovation Network (UK5G) via Cambridge Wireless to boost and strengthen the development of the 5G ecosystem in the UK. This is a non-profit, mostly funded through organisations paying a subscription. The UK is also working with catapults, which are funded by the Government and help transition ideas to services (similar to incubators). RT (US) commended the work and offered to facilitate further



discussion with experts. DS (US) added that the regulatory body is interested in the UK's plans in this area, adding that the US also has civil libertarian issues.

Spectrum allocation:

RT (US) asked whether there is enough spectrum and what the future allocations are. RG (UK) explained that (Ofcom) EECC has identified certain bands for 5G. CEPT has a working group. Primary band is 700 MHz with some considering 26 – 28 GHz bands. Allocation could be mid-2020. DS (US) responded that the US has two new initiatives in looking at the default position. They are experimenting with leasing, as the US have a lot of government users in higher bands. They are in formal discussions with EU regulators.

Next steps

RFL (UK) suggested that the UK and US could exchange further detail in this area. RT (US) agreed and added that the US want to understand the reasons for investing for US companies.

4. Discussion of mobile roaming

Overview of UK's position on international mobile roaming:

AW (UK) explained the principles around EU surcharge-free roaming. Mobile data connectivity is important to the world economy. It is predicted by 2020 that there will be 5 billion smartphones 5bn smartphones and 20.4 billion IoT devices around the world. Mobile has become the main ecosystem of the tech industry: smartphones are now the principal way that people go online and access the internet, while Apps now account for over half of internet use. For example: half of Facebook's base is mobile only. Most tech companies have adopted a 'mobile first' approach and for the coming years this trend seems stable. This shift towards 'mobile first' has had a substantial economic impact that goes beyond the digital sphere. In the US, e-commerce and online ads revenue have increased 15-fold since 1999, with mobile now accounting for over half of eCommerce traffic and over a third of its revenue.

More broadly, internet advertising is now over quarter of the global total advertising market. This shift towards a mobile economy has only been made possible because of the huge improvements in the reliability and capacity of cellular networks as well as the general decline in the cost of data. 3G and 4G Networks have made it possible for the app economy to develop. 5G networks will bring a new wave of bandwidth-intensive applications and the deployment of IoT services.

Overall these infrastructure improvements have made it possible to serve users with abundant data at cheap prices. Surcharges on international mobile roaming significantly lower levels of connectivity consumption. Operators report a significant difference between consumers connectivity patterns nationally and their connectivity patterns while temporarily visiting another country. These differences seem to be mainly accounted for by the surcharges faced by consumers, with surcharges faced by customers highly variable from one operator to the next. For Pay as you go customers, one of the UK MNOs charges its consumers travelling in the US £0.01 for using 1 Mb of data, another charges £7.20. That is 720x more - for exactly the same service and some of the MVNO's charge even more. The cost of provision does to some extent vary between operators, as some are able to commercially negotiate better wholesale rates. Overall though, retail prices are either not reflecting cost of provision, or the present structure of the wider telecoms market is such that the dynamics of negotiations on wholesale rates are not working sufficiently well.

On this basis, the UK concern is that these surcharges on mobile roaming are increasingly impeding economic activity of people when they cross borders and that this is having a negative effect on the



development of the digital economy, in particular the development of services targeted at temporary visitors. For example, if a consumer is out of range of Wi-Fi and would like to book an Uber in the street, they might be put off doing so if this means paying an additional charge for mobile roaming.

The realisation that market dynamics are at the moment insufficient to produce reasonably competitive Wholesale prices led the EU to introduce regulation for mobile roaming services. Since 2007 surcharges have progressively been brought down, and in June 2017, all surcharges for calls, SMS and data were abolished, which is known as 'Roam Like at Home' (RLAH). Since the charges were abolished within the EEA: more than five times the amount of data has been consumed and almost two and a half times more phone calls have been made.

RT (US) noted that the EU, although classed as international, operates in a domestic way. The US allocates spectrum on a regional basis and have a competitive experience with roaming. The US evolved from hired domestic roaming rates to no roaming charges through competition. US has 4 national operators who offer surcharge-free roaming domestically. In addition, AT&T offer surcharge-free roaming for all North America and T-Mobile have deals for 200 countries. Therefore, the EU approach may be successful due to different regulatory tools but does not suit the US. RT (US) emphasised that the US approach is to avoid intervention on a federal level or through trade, unless there is an issue. However, high charges of incumbents are an issue that the US has highlighted in their National Trade Barriers paper. [In margins after meeting: the US was previously approached by Australia for a roaming deal].

Continuing, RT (US) explained that the US believes that operators will transfer the charges to other services. For example, the US is concerned about the EU's approach to international termination rates, where they have noticed that providers charge high prices. The US sees this as a direct result of various EU legislation, such as the cap on roaming rates.

Overview of UK's position on national roaming:

AW (UK) explained that under national roaming, consumer could use other networks in areas not serviced by their network. The UK believes that national roaming would reduce the incentive for mobile operators to invest in new infrastructure. This would be particularly damaging in areas where there is no coverage from any provider - there is no incentive to invest capital for a new mast if other operators can simply piggy-back off your investment. The UK considered national roaming in 2014 and opted instead for a licence obligation that resulted in all operators increasing their network coverage and the MNOs locked in £5bn of private investment for UK mobile infrastructure. The UK view is that reducing regulatory barriers such as reforms to mobile planning (as we did in November 2016) and the electronic communications code (reformed in December 2017) will facilitate further the deployment of new mobile infrastructure.

AW (UK) further explained the UK's approach to rural roaming. As part of the work on developing the UK's future mobile strategy, they are looking at a range of policy options that might deliver improved coverage in rural areas, but no decisions have yet been taken. The government has requested that Ofcom, the independent regulator, considers the benefits (and costs) of introducing local roaming in rural areas. As with national roaming there is a risk that this could undermine investment incentives, while it would deliver a poor experience for consumers due to calls dropping during network handover. Some of these risks might be mitigated by wholesale pricing, but the UK is not in a position to declare a position on this.

AW (UK) asked about the US experiences and RT (US) explained that the US does not have nationwide obligation to provide roaming. Most of the current carriers have built out extensively, and until consumers reach very rural networks, there will be three to four carriers, with one or none in



very remote areas. Here the providers are small and fees for roaming on their network are a significant proportion of their business plan. Roaming plans have “reasonable use” restrictions.

HS (UK) asked how operators get access to spectrum. RT (US) explained that there are different maps of the country based on census blocks. Either small or large blocks can be auctioned. Then there is a secondary market of sale or leasing of spectrum. Primary holders can lease spectrum, but a sale requires regulatory approval by the FCC. Rural operators can have spectrum only for their geographical area.

AW (UK) asked whether roaming charges are passed to the consumer. RT (US) explained that the reality is that no charges on the basis of roaming anymore. There may be rules, but it isn't how the carriers operate. There may be restrictions in the contract for the balance of use at home versus roaming, a fair use policy.

5. Next steps

RFL (UK) suggested that understanding the US federal and state regulations was critical for a future discussion, the UK had gone into a considerable depth to share our thinking and welcomed the US input to how we might take this forward in the future. The UK would welcome the US going into this level on depth for their system. RT (US) suggested that mutual recognition of the testing of telecoms equipment could also be an area for further exploration as well as barriers to trade in goods as applicable to telecoms equipment, perhaps through a joint session with TBT leads.

RT (US) added that the UK and US will have to prioritise certain areas in digital. He described the session as a good initial overall exchange of information, and that the US would like to engage in deep dives where both sides see potential.

Action Items:

- Intersessional meetings, VTCs or using the next working group to dive deeper into areas of mutual interest and to understand more about the other's regulatory frameworks.

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Lead Negotiator Analysis/Comments:

A useful, technical session that focused on providing a detailed overview of the UK domestic regulatory landscape. The specific agenda items were led by DCMS sector experts, who were able to provide a good deal of depth to their issues and engage with US counterparts well. It may be worth considering further in future how to ensure all presentations have the trade angles firmly in mind – there were a number of areas where the level of depth exposed areas the US may push us on in the FTA negotiations. The US seemed to find the session useful and engaged on all items. The discussion sets up well the opportunity for the US to reciprocate and give a technical deep-dive into their regulation.

One particular objective for the UK in this session was to test the US appetite for international roaming provisions, and the US were fairly clear that market intervention was not something they particularly supported.

The session did not get into trade provisions in particular detail, and it will be key to ensure we can get into this space by the next TIWG in November. Discussions in the margins following the session between Chris and Robb Tanner were positive about the number of areas that we would likely be aligned, and we began to identify the likely areas where further work would be needed.



Department for
International Trade

AGRICULTURE - VTC

Date: 11 July 2017

Time: 13:00–14:00

Participants:

Name	Department/Directorate
Neil Feinson	DIT – Trade Policy
Mojgan Ahmad	DIT – Trade Policy
Katie Waring	DIT – UK-US Trade Policy
Ceri Morgan	DEFRA
Sinjini Mukherjee	DEFRA
Russell Stokes	DEFRA
Emma McCarthy	DEFRA
James Dunn	DEFRA
Trevor Salmon	DEFRA
Bob Firmin	DEFRA
Kulin Patel	APHA
Sarah Clegg	British Embassy, Washington
Oliver Wyatt	DExEU
Julie Callahan	USTR
Roger Wentzel	USTR
Dana Du Bovis	TTB
Lori Tortora	USDA
Anne Kirchner	ISDA
Alexandra Whittaker	OGC
Joe Babb	USDA
Joe Werezynski	USDA
Mary Stanley	USDA
Mari Kirrane	USDA
Stan Phillips	USDA, FAS (VTC)
Mara Burr	USDA (VTC)
Chris Thompson	USDA (VTC)
Cheri Courtney	USDA, NOP (VTC)

Key Points to Note:

- During the discussion we did, in principle, reach technical agreement on the spirits agreement text. Defra will work across Whitehall to ensure the approach to expression of consent to be



bound and entry into force, is consistent. We have committed to discussing the consent to be bound and entry into force language in the near future in a VTC.

- On the Organics arrangement the US regulators said that they had a preference to carry out their inspection as if we were an independent country. This would provide certainty in a range of scenarios, including in the event of no EU deal, or the Implementation Period. Defra is now considering the language in the equivalence trigger letter.
- On the wine agreement both sides committed to a technical VTC before the end of July. The US expressed a displeasure with the EU's processes that are captured in the agreement, citing length of time and bureaucracy.
- Overall the US are not happy with the VEA, which they see as providing cumbersome processes for recognition of equivalence and outdated. The US expressed a displeasure of EU rules and principles that they believe are enshrined in this agreement but gave a vague commitment to transitioning on a temporary basis if that came with a commitment from the UK to renegotiate in March 2019.
- The US were keen to understand whether four other agreements needed transitioning: Oilseeds ("Blair House" Agreement); Pasta Products; Settlement for Cereals and Rice and; Calculation of husked rice duties. Defra has previously outlined that these are either not needed or are covered as part of our WTO schedules work. Both sides committed to consult further internally.

Report of Discussions and Outcome:

The discussion began with the UK (Morgan) stressing the importance of continuity to reassure our stakeholders on both sides that we can continue to trade. The UK reinforced the scope of continuity, outlining that we are aiming to achieve technical rectification and no more. The UK stressed that the discussion is not about the future relationship but is supportive of that.

VEA

The UK (Morgan) began with an explanation of short form. Defra explained that the proposed short form text has been delayed due to a new version across all relevant HMG agreements, and we will look to share it as soon as possible.

The US (Callahan) outlined that during the recent June VTC, discussion was focussed on APHIS. The US stressed the need for a technical discussion to talk through specifics on animal health as there are no problems on the plant health side.

The US (Callahan) said that they had produced their own simplified text but realised this resulted in only keeping equivalence determinations and removing everything else. The UK (Morgan) reinforced that this text, not shared at the Working Group, likely would not achieve continuity.

The US (Callahan) are aiming for an agreement that provides a simple understanding that all existing recognitions will remain in place for the US. This will remove the 'baggage' of the VEA.

The US (Whittaker) were keen to understand whether our proposals would create both the short-form text and keep the original text as a reference document. The UK (Stokes) highlighted that the UK aims to have a very short document which would reference the earlier EU-US agreement. The US (Callahan) asked for the UK's reasons for continuing the VEA. They believe that the recognitions and necessary legislation is all in place and if the UK regulators need the aspects of the VEA for trade to continue on Day One of EU Exit, it would be useful to understand why.



The US briefly outlined some areas of concern with the VEA. This included: Yes One, Yes Two system of assurance is too convoluted; Joint Management Committee is not working, and that an ad-hoc regulator group would be more beneficial and; transitioning this, alongside Chequers, could lock the UK and US into an EU SPS system indefinitely.

The UK (Morgan) again stressed the need for continuity in response to these concerns, offering a further VTC before the end of July to discuss areas each side has identified as important. The US (Callahan) indicated that, though they do not necessarily support full continuity for this text, they do understand the UK position and signalled a potential willingness to transition the agreement on a short-term basis. The UK (Morgan) indicated that the UK will investigate further.

The US (Callahan) noted that the VEA itself would not provide assurance of Day One continuity because it does not capture the actual recognitions needed. It is in the EU's legislative package, that will be "lifted and shifted" on day one too so we have all that is needed. The US were interested to hear from the UK if the VEA has elements that we need for continuity. The UK indicated that regulators were clear we needed the VEA for frictionless process.

Spirits

The UK (Morgan) opened with a broad recap on the history of our discussions. The US (Wentzel) responded, discussing their changes, including that they agreed to the language on cross-border Geographical Indications. Both sides agreed to the technical text in principle.

The UK (Stokes) broadly outlined that a broader legal discussion on the process of expressing the Parties consent to be bound and the date of entry into force of agreements was needed in the near future. The US (Whittaker) indicated that the text would need a light 'legal scrub' on the US side.

Wine

The UK (Dunn) opened the discussion by thanking the US for their revisions and comments to the text but, as it had only been received a few days prior, the conversation would be quite high level.

The UK (Dunn) asked for further details on some of the US comments, including maximum alcohol volume and simplified approval of wine-making practices. The US (Kirrane) responded that the former was more of a note, but that it would need to be addressed if the UK was to consider joining the World Wine Trade Group. She also briefly walked through the current EU process for recognising new practices, and why that was problematic.

UK (Morgan) asked how much this is related to the operational challenges compared to what' is actually contained within in the agreement and suggested this should be subject to further discussion.

The UK (Morgan) and the US (Wentzel) discussed the value of the trade, with the US curious to understand whether the UK still intended to act as a gateway to the EU. The UK (Morgan) pointed out that this is yet to be determined, but that international stakeholders, including US stakeholders, had raised the importance of the UK's role as a gateway.

The UK (Morgan) proposed that a technical VTC would be useful. The US (Wentzel) suggested that some of the changes the US had proposed were perhaps a matter for future policy rather than continuity.



Organics

The UK (Morgan) opened by indicating that the UK is on the verge of triggering an inspection and wished to clarify the form of triggering.

UK (Stokes) stated that we want to make sure we are not leaving a gap as there are two scenarios. The current draft request letter covers the no deal scenario. The UK explained that in this scenario we would “lift and shift” the EU organics regulations and amend this legislation to make sure it works properly. In an implementation period scenario, most EU law will apply under the Withdrawal Agreement and the Withdrawal Agreement and Implementation Bill will provision for the EU organics regulations to apply. The UK (Stokes) asked what the US regulatory system needs to ensure continuity.

US (Callahan) pointed out that this is a new type of continuity, as the programme has a legal requirement to inspect. The National Organics Program requested that Defra triggers the audit by the end of July, with the intention to be ready in October.

The US (Courtney) suggested that there are two scenarios to consider in the letter; whether the Implementation Period applies, and if the UK is an independent body with the ability to hold oversight and system control; or whether the Commission retains a role. The UK (Morgan) requested that discussion should begin on the content of the exchange of letters alongside the audit process, in order to expedite matters, given the time pressures and that the UK is a trusted trading partner, The US (Callahan) responded that this is not standard procedure, but in recognition of the unique circumstances, discussion should begin,

Both sides agreed that a simple approach is required, and this should be discussed soon on a technical VTC.

Other

The US (Whittaker) brought up four other legal agreements, asking why they had not been identified for transitioning. These Oilseeds (“Blair House” Agreement); Pasta Products; Settlement for Cereals and Rice and; Calculation of husked rice duties. Defra has previously outlined that these are either not needed or are covered as part of our WTO schedules work. Both sides committed to consult further internally.

Key Actions and Next Steps:

VEA

- The need for a regulator-to-regulator discussion on issues on the animal health side.
- The UK will share a short form text, mindful of the US position.
- The UK will let the US know why our regulators need specific parts of the VEA as on the US side trade would continue without it – the UK needs to establish why it would not from a UK regulatory perspective.
- The US expressed a willingness to transition the agreement if we have a commitment to renegotiate in April 2019.

Wine

- The US and the UK agreed to set up a VTC to discuss technical issues.



Spirits

- The UK will seek final approvals for the agreement from the relevant ministers.
- The UK and the US agreed to set up a technical discussion on the consent to be bound and entry into force language and any outstanding legal questions.
- The UK has clarified the process for ratification of agreements.

Organics

- The UK and the US will discuss the language in the letters and notify a point of contact.
- The UK and the US will set up a VTC to discuss the exchange of letters.
- The UK will supply information and data to the US about the inspection by the end of July.

Other

- The UK will need to discuss with WTO colleagues the questions posed on schedules and how trade will work on husk rice and rice, oilseeds and pasta as the agreements are not being transitioned.

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Session Lead Comments:

This was the most cordial agri-food dialogue with the US so far, particularly welcome off the back of a challenging discussion the previous day on SPS focusing on the Chequers Statement. This was partly due to reaching agreement on our first text, Spirits, and partly to the slow building of relationships over the course of the UK-US dialogues.

We need to move quickly if we are going to transition all four arrangements. The US have become more comfortable with working in multiple scenarios for the text, with a view to renegotiating as part of an FTA discussion in the future. We should capitalise on this with a series of technical VTCs over the summer to bank blocks of text on wine and organics and increase regulator to regulator dialogue.

The VEA is far more challenging. It is an old and unworkable agreement, and we need to consider our position carefully with our regulators on the value of it, both in terms of trade with the US, but what any changes to the agreement with the US might do to our trading relationship with the EU, and what a shift in approach might mean for the overall continuity line.

The US also acknowledged for the first time on wine that this might not be the moment to look to change UK policy. This is partly due to our consistent message, and partly due to growing domestic pressures on the US wine industry. We need to land this.

Overall, good progress. We have developed a rhythm to these dialogues and it shows.



Department for
International Trade

REGULATION: MRAs

Date: 11 July 2017

Time: 13:00–16:00

Participants:

Name	Department/Directorate
Julian Farrel	DIT – Trade Policy
Henry Alexander	DIT – Trade Policy
Tim Harris	DIT – Trade Policy
Ali Kelly	DIT – Trade Policy
Ben Shotness	DIT – Trade Policy
Rebecca Schneider	DIT – UK-US Trade Policy
Cynthia Morgan	DIT – Legal
Richard Thompson	DfT
Jon Elliot	BEIS
Rhidian Roberts	BEIS
Gavia Taan	MHRA
Ian Rees	MHRA
Lea Reynolds	DEFRA
Sarah Norton	DEFRA
Meg Trainor	DExEU
Alex Penfold	UK Accreditation Service (UKAS)
Malcolm Hynd	UK Accreditation Service (UKAS)
Jim Sanford	USTR
Ashley Miller	USTR
Christine Brown	USTR
Rachel Shub	USTR
William Hurst	FCC (VTC)
Mark Abdoo	FDA (VTC)
Anne Kirchner	FDA
Ramona Saar	NIST (Conference Call)
Eric Puskar	NIST
Brandi Baldwin	US Coast Guard (VTC)
Brian Woodward	US. Dept. of Commerce
Cara Lofaro	US. Dept. of Commerce



Key Take-Away Points:

1. The US are interested in the policy space that the UK will have in future and where there will be opportunities for the UK and US to cooperate in the future. The US appreciate that this is an evolving process but are interested in working with the UK as the future relationship with the EU becomes clearer. The US set out that they are keen not to waste time and want to know whether the UK will have the policy space to work with them as they could better allocate their resource elsewhere if this is not the case.

In detail:

- The US discussed 'E-labelling' and the 'Medical Devices Single Audit Programme' as two examples of areas they believe the UK may be able to work with the US in the future. Though we will have to wait for further clarity on the relationship with the EU, the UK is keen to engage with the US on these issues at a technical level.
- US presented on the 'outcome' based approach to greater regulatory compatibility which they use in the FTAs.

2. Regulators fed back on their discussions since the last working group. These discussions have proved to be useful and have allowed regulators to flesh out the practical operational issues to ensure the transition of the agreements.

In detail:

- EMC/TTE Annex – UKAS and NIST talked through the accreditation process for conformity assessment bodies in both the UK and US. NIST has set out a number of questions in relation to the future designation process which BEIS/DIT will respond to before the next session.
- GMP Annex – MHRA/FDA went through the list of issues discussed at previous regulator discussions and will continue to discuss at future sessions.
- Marine Equipment MRA – DfT/MCA and the US Coast Guard have agreed to work on an operational note as to how the agreement will function and will share the draft text before the next working group.

3. The UK has been working on a draft "mutatis mutandis" exchange of notes for transitioning the 1998 MRA – the UK offered to share this in the coming weeks. The US stated that they are happy to look at the draft text, but they expressed a concern that in the interests of clarity and transparency a new agreement may have to be drafted.

Report of Discussions and Outcome:

1. Welcome and Introductions – *Julian Farrel (DIT)*

2. Update on wider EU exit & UK approach to continuity – *Meg Trainor (DExEU)*

The UK confirmed the ambition to continue the existing mutual recognition agreements and, at a subsequent phase, to build on these agreements in a future UK-US relationship. DExEU set out an update on the Implementation Period (IP). Under the IP approach the UK will continue to be treated as a member of the EU in relation to international agreements. In terms of modalities, the EU will issue a notification to third countries confirming the IP approach. The expectation is that this notification will come after the agreement in October. Notwithstanding this agreement with the EU, the UK are keen that the existing agreements continue after the IP. As any responsible government



would do, the UK is planning for all scenarios, including a scenario where a deal is not reached with the EU.

Details of the Chequers agreement had been set out in the plenary discussions, however, the UK welcomed further questions specific to the MRAs. The US stated that they will look at the White Paper once it is published. The US emphasised that from both a trading and regulatory perspective they are interested in the policy space that the UK will have in future. They would like to know sooner rather than later whether there are things that can be pursued on a bilateral basis which are compatible with the future EU relationship. The US would rather use its resources elsewhere if there is little space to work together on regulatory compatibility. The UK responded that we must wait until the publication of the White Paper and will be able to discuss once there is more clarity.

The US reiterated their position that they do not want to transition the non-operational annexes.

3. Summary of recent regulator-to-regulator discussions.

EMC & TTE annex discussions (1998 MRA) – Jon Elliot (BEIS, UK) & William Hurst (FCC, US)

BEIS summarised the recent regulator discussions with the FCC, referring to a slide summarising the UK accreditation process produced by UKAS. It was noted by both sides that these Regulator discussions have been useful. Both sides have exchanged useful information. The slides and input from both UKAS and NIST explaining the relative accreditation processes have been helpful. The UK further explained the role of BEIS in the process; as a designated body, BEIS notifies the EU Commission of CABs accredited by UKAS, following any relevant clarifications UKAS may wish to make. In relation to regulatory alignment, the UK stated that we will have to consider the administrative impacts of this in the future, however, this should just be a matter of fixing information flows. BEIS suggested that it will be useful to discuss this in future regulator sessions. The FCC added that they see the continuity of the existing arrangements as relatively straight forward. The US will receive the designation directly from the UK and vice versa.

NIST presented a slide pack and several questions to be answered in future regulator discussions. NIST explained their MRA programme; notified bodies require formal accreditation, NIST uses several accreditation bodies. Once NIST has achieved confirmation that notified bodies are familiar with the processes they designate these bodies to the UK. NIST set out several operational questions to be discussed at future sessions. The UK agreed to take away the questions.

In response to the question of whether there will be any EU specific requirements in future regulation, the UK confirmed that the EU withdrawal Bill is bringing across the Radio Equipment Directive (RED), therefore these requirements will remain the same at the point of exit. In relation to the question on review time, BEIS stated that they could consider shortening the review time. DIT emphasised that the priority should be continuity of the MRA, so regulators should only consider amendments if this does not jeopardise the continuity work.

UKAS briefly explained the UK's accreditation process under the TTE/EMC annex of the MRA. During the process UKAS employs an appropriate team to assess to the relevant standard. Once assessment is finished the organisation works on any areas they need to improve. There are often several deliberations once the CAB shows compliance. UKAS then considers the checklist provided by the FCC. When UKAS is satisfied they publish two certificates of accreditation and pass these on to BEIS. UKAS accredits on an on-going basis. They visit all accredited bodies on an annual basis. UKAS also has independent internal reviews on the work they do and the reports they produce. UKAS emphasised that the system puts in place a management framework; a CAB must



demonstrate their testing abilities. FCC provides checklists for the normal assessment of those bodies.

UKAS confirmed that no part of this internal process will change if the MRA is brought across. After UKAS has accredited the CAB they send this information to BEIS which then submits it to the FCC directly.

The US are keen to understand what kind of a database system will be used to replicate NANDO. This is important for a seamless transition. The UK confirmed that they are in the process of developing a new database.

Actions:

- UK/ US: BEIS and NIST to continue discussions on e-labelling in technical discussions.
- UK: BEIS/ DIT to prepare responses to questions set out by NIST.

GMPs annex discussion (1998 MRA) – Ian Rees (MHRA, UK), Lea Reynolds (VMD, UK) & Mark Abdoo (FDA, US).

MHRA went through the issues log for the GMP annex. On future databases: MHRA explained that all EU member states populate the current databases. MHRA therefore have internal databases used to populate the European database.

MHRA said that GMP is one of the 'common rules'. GMP is not static, there is a need to update the guidance. The UK will continue to be an active participant in the updated guidance which is developed on a consensus basis with PICS. There is an agreement that there is parity between PICS and EU Regulation. On the compilation of community practices: GMP is the standard to which MHRA test against and the compilation is what they work too, this is called 'inventory' in US terminology. MHRA is interested in maintaining this, however, there is an international equivalent through PICS. The lead for the compilation changes is usually the EU and PICS. But sometimes it is the other way around. On the provision of information for marketing authorisation applications: MHRA suggested that a similar situation would continue as under current mutual recognition agreements, this approach focuses on whether the manufacturing site is located there. On the public declaration of conflict of interests: MHRA use an EMA declaration for public interests but also have an internal system. It would be easy to make the current internal system public.

The US were interested in the UK's future relationship with the EMA. The UK government has a stated position to stay closely associated with the work of the EMA. The White Paper may provide more detail on this. MHRA have good operational relationships with the EMA. The UK reiterated that the purpose of the discussion here is to provide clarity that the UK are capable of replicating some of these issues at the national level. VMD confirmed that from a veterinary medicines perspective, the UK are in a very similar position. VMD have strong ties with the EMA now and can replicate much of the operational mechanisms in the MRA.

The FDA confirmed that the summary provided by MHRA was accurate and covered the discussion points. The FDA is keen to discuss more about databases and specifically asked whether any progress had been made on a new joint data system between VMD and MHRA mentioned at the last regulator discussion. VMD and MHRA representatives were unsure on this and promised to go back with information following the working group.



DIT have had a recent stakeholder engagement session for members of the pharma industry, the industry is very keen to ensure continuity. The Pharma industry have seen the number of inspections dropping, the MRA has been beneficial to the sector.

Action:

- UK: MHRA/VMD to check whether progress has been made on the development of a shared database and update FDA.

Marine Equipment MRA – Richard Thompson (DfT, UK) & Brandy Baldwin (US Coast Guard)

DfT summarised the regulator discussion between MCA and US Coast Guard. At this discussion, it was agreed that DfT and MCA would do further work on articulating the operation of the new agreement and how the proposed regime would maintain operational continuity. The UK have drafted some operational notes on this theme and are preparing to share those with the USCG at the next meeting in early August. The UK agreed with USCG to produce an explanatory note on the operation of the MRA and will draft this alongside US Coast Guard colleagues throughout the summer. The UK have been preparing a draft text and plan to share this in due course, before the next working group. The parties have spoken offline about market surveillance and other issues and will continue these discussions at the next regulator session. The US Coast Guard emphasised that the US and EU have long been aligned. Both parties are very committed to a seamless transition.

The US-EU agreement is currently being amended to reflect the new product scope. These changes ought to be replicated in any UK-US agreement. The Commission have said that the approval of these changes is imminent. Having that text finalised and published will help both parties to push forward and start drafting with the US-UK MRA. DfT have heard through MCA colleagues that this technical annex will be finalised by the end of the year.

4. Update on ‘issues for discussion’

Draft Text: The UK proposed transitioning the MRA by using a *mutatis mutandis* short-form agreement. This will include a number of clarifying clauses. This is the UK’s preferred approach and this model is being used across the board. Lawyers have discussed this approach separately. The US had several issues with this approach. First, how the transition phase will be addressed during the implementation period. Second, the US is concerned that the specific changes required are many and complex. For this reason, the US would prefer a revised, new text to ensure clarity and transparency. The UK responded that the reasoning behind the short-form is to transition the agreement in the least administrative/bureaucratic way whilst keeping legal certainty. The UK pointed out that the short-form works off a consolidated version of the text which incorporates the many amendments. But the UK noted that this is not a legally binding document. The UK have been drafting the text and suggested they share this with the US and discuss as they believe that many of these concerns are sufficiently dealt with in the clarifying clauses. The *mutatis mutandis* agreement is about 3-4 pages.

Inactive sectors: The UK position remains that these should be brought across in line with the continuity approach.

References to EU legislation: The European Union Withdrawal Act has now received Royal Assent. This gives the UK legal certainty that EU legislation will be transferred into UK law at the point of EU exit. The UK said that this is not dependent upon a deal with the EU.



Entry into force issues, including transition periods: The UK would like to remove any transition periods for entry into force where they have expired to ensure continuity on exit day. As set out in the draft withdrawal agreement, the UK will act as a member state until December 2020. The UK wants to ensure that the agreement continues to function the day we leave the EU.

List of Conformity Assessment Bodies: The UK has provided links of current CABs for EMC and TTE and are in the process of developing a database to replace the EUs NANDO database. The UK are keen to ensure that CABs which are currently designated will continue to be recognised. We may need a clarifying clause in the agreement to give certainty on that point. The US would like to see a less bureaucratic process in terms of the listing of CABs. The US found that the joint committee does not work very well and contains complex rules pushed for by the EU. In the US-UK context we could streamline this process. For example, the designating process of 60 days – the US would like to use a shorter time-period.

Actions:

- US: USTR to send the current Joint Committee Rules.
- UK: DIT to share *mutatis mutandis* text.
- UK: DIT to send link of the consolidated text to USTR.

5. Other regulatory compatibility issues (USTR)

The US framed this discussion as part of the US' 'outcomes-based approach'. MDSAP and E-labelling are two areas of interest to US stakeholders and regulators. There is also the possibility that the UK could work with the US in these areas if closely aligned with the EU. The US wants to know if the UK can consider these discreet issues and whether the UK can look further in future discussions.

E-labelling: The FCC introduced e-labelling and illustrated the benefits, in particular, e-labelling provides opportunities for additional information to be provided to the consumer. The FCC have been looking at e-labelling on a pilot basis and the US Congress have passed a law to allow e-labelling of devices (products which have a display such as a smart phone/wifi access point etc.) The UK responded that the possibility of using e-labelling is an interesting proposition and a useful tool for manufacturers. However, whilst a member of the EU, the UK are bound by the Radio Equipment Directive (RED). As the UK does not yet know what the policy space will look like in the future, the UK cannot publicly commit to e-labelling in conflict with the RED. However, under Article 47 of the RED the EU Commission must carry out a scoping study to consider the possibility of E-labelling. This is forthcoming. The UK have yet to see the outputs from this. BEIS has a forward looking strategic programme, they have commissioned work looking at how e-labelling might work in the UK. In particular, BEIS are interested in e-labelling from a market surveillance perspective. BEIS would like to talk to the US on this.

Action:

- UK-US: to continue discussions on e-labelling in technical discussions.

MDSAP: Medical Devices Single Audit Programme: The US have been discussing MDSAP with NAFTA partners. They flagged that Canada has signed up and they are currently having discussions with Mexico in relation to joining. The US envision that there can be closer collaboration with MHRA and FDA on an operational level than with the EU writ large. The FDA agreed that MDSAP is an opportunity for greater collaboration once the UK leaves the EU.



MHRA responded that the UK is currently represented by the Commission for MDSAP. The UK and Ireland have observer status at this forum. The Commission has declined to formally participate in MDSAP and have been observers since 2015. However, the UK is supportive of the principles of MDSAP. In the short term, greater UK involvement is unfeasible due to areas of shared commitments with the EU. The priority for the UK is ensuring continuity of existing arrangements with the EU. However, longer term, the UK is interested in this and would like to become more involved if there is policy space to do so. MHRA specified that they would like to continue having dialogue with the FDA on this. The US clarified that MDSAP is not an either-or proposition, the UK could choose to accept both or either, there could be a flexible process. The US is currently discussing these options with Mexico. The UK reiterated that they must see how the EU negotiations pan out but are keen to stay plugged in to this process. MHRA described the auditing process. MDSAP audits are undertaken by third-party conformity assessment bodies, known as Auditing Organisations (AOs). Several AOs (e.g. BSI) are also EU Notified Bodies, and therefore offer 'combined packages' where they provide both MDSAP auditing and CE marking to devices manufacturers, as part of the same assessment process. This practice does not technically constitute a 'single audit', and an MDSAP certificate does not exempt firms from future QMS auditing (as part of the CE marking process) should they switch to a different Notified Body. The US expressed interested in this and would like to learn from the case of BSI.

Action:

- UK: Speak to BSI on MDSAP take-up.

6. Approach to coverage of FTA Regulatory Sectors (USTR)

USTR presented a PowerPoint presentation on the US approach to FTAs. This was in response to a request from the UK at the last working group.

The current approach is to handle policy topics not as annexes to TBT, but rather as sectoral annexes in a separate regulatory sectors chapter, which combined TBT, SPS and GRP aspects for one sector in one place. US stakeholders increasingly are seeking concrete outcomes that yield greater regulatory compatibility. The sector specific approach allows the US to go deeper, for example, in terms of transparency/data protection. The goal is to identify key sectors of commercial interest which produces a 'win-win' in terms of cost savings for companies and regulatory efficiencies for regulators.

The US reiterated that there can be greater compatibility without reducing standards. The US uses a bottom-up process, by gathering input from stakeholders as they are best placed to identify where collaboration has benefits and efficiencies can be made. In terms of regulatory efficiencies, USTR works closely with regulators which is important for implementation, the US drew attention to failed attempts on the inactive annexes in the MRA. There is also a significant consumer benefit. The US emphasised that this work will be driven by confidence in the systems of each party. It will be the regulators who will be implementing the outcomes. It is not just a harmonisation approach. There are several tools available which can be used.

The US summarised the 3 main tenets of the outcome-based approach. This includes; 1. A focus on meaningful outcomes, 2. Evidence-based – involving an evaluation of each party's regulatory requirements, systems and processes, and 3. Achievable – relying on buy-in from regulatory agencies. The US also set out a range of 'regulatory cooperation tools'.

7. Proposed next steps

- Share short-form text before the next TIWG.



8. AOB

- US Legal raised a query about whether the EU Withdrawal Act will bring across the MRA. And if it were to do this why do we need to transition the MRA.
- The UK said that the EU Withdrawal Act will bring across some of the powers of the MRA but this does not solve the problem. A UK-US MRA will still be needed to ensure continuity.

Key Actions and Next Steps:

- UK: MHRA/ VMD to check whether progress has been made on the development of a shared database and updated FDA.
- US: USTR to send the current Joint Committee Rules.
- UK: DIT to share *mutatis mutandis* text.
- UK: DIT to send link of the consolidated text to USTR.
- UK/ US: BEIS and NIST to continue discussions on e-labelling in technical discussions.
- UK: BEIS/ DIT to prepare responses to questions set out by NIST.

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Session Lead Comments:

Overall a good discussion with the US, notably on progressing the MRA and on understanding their approach to sector specific annexes.

The US, however, made it clear that if there was not going to be regulatory space for the UK to negotiate with the MRA (as might be the case under the 'common rulebook') then 'we are all very busy and have other thing to do'. The US said that they wanted to use e-labelling and MDSAP as examples to test if the UK will have regulatory space for a UK-US agreement – so it will be important that the UK assesses the implications of the White Paper and communicate this back to the US carefully. The US also reiterated that they saw MRAs as quite an outdated tool – reinforcing the message that the US were not particularly interested in extending the scope of the MRA into new sectors.



Department for
International Trade

INTELLECTUAL PROPERTY: PATENTS AND PHARMACEUTICALS

Date: 11 July 2018

Time: 13:00–16:00

Participants:

Name	Organisation
Mark Prince (MP)	DIT – Trade Policy
Olivia Wessendorff (OW)	DIT – Trade Policy
Sam Gibb (SG) – Scribe	DIT – Trade Policy
Cordelia Jonathan (CJ)	DIT – UK-US Trade Policy
Oliver Griffiths	DIT – UK-US Trade Policy
Richard Salt	DIT – UK-US Trade Policy
George Radice	DIT – UK-US Trade Policy
Megan Heap (MH)	Intellectual Property Office (IPO)
Nicki Curtis (NC)	IPO
Jason Belia (JB)	IPO
Zac Stentiford (ZS)	IPO
Daisy Ellis (DE)	Medicines and Healthcare Products Regulatory Agency (MHRA)
Rachel Mumford (RM)	Department for Health (DH)
Bilal Sameja (BS)	DEFRA
Christine Peterson (CP)	USTR
Miriam DeChant (MD)	US Patent and Trademark Office (USPTO)
Linda M Quigley (LMQ)	USPTO
Charles Eloshway (CE)	USPTO
Marina Lamm (ML – Video Conference)	USPTO
Rachel Salzman (RS)	US Dept. of Commerce
Michael Shapiro (MS – VC)	USPTO
Mark Ye (MY – VC)	USTR
Shannon Nestor (SN – VC)	USTR
Caridad Berdud (CB – VC)	USPTO
JoEllen Urban (JU – VC)	USPTO
Karin Ferriter (KF – VC)	USPTO
Donald Beers (DB – VC)	Health and Human Services (HHS)
David Henry (DH – VC)	US State Department
Steve Aitken (SA – VC)	Intellectual Property Enforcement Co- ordinator (IPEC)
Summer Kostelnik (SK – VC)	IPEC
Joe Wereszynski (JW)	USDA
Raimonds Pavlovskis	USTR

Key Points to Note:

1. This session provided the UK with an opportunity to provide a comprehensive overview of our approach to patent policy and highlight how this is intricately linked to the UK health system. The UK provided a broad overview of how the UK patent system contributes to an innovative pharma sector and facilitates a balance between generics, innovators and the public whilst stressing the importance of this system for the health sector. A strategic approach combining five



presentations from UK teams presented our system in a very strong light and was well received by US counterparts.

2. As expected USTR and USPTO pushed hard on Grace Periods, Patent Term Extension and Adjustment. With respect to grace periods we highlighted that it is not just a matter of legal compatibility with the European Patent Convention (EPC) (which is not an EU institution), but also of political signalling as the UK are a leading delegation at the EPC.
3. US and UK provided presentations on patent extension and SPCs respectively. US were interested to see the similarities in systems but they ask in FTAs that the patent is extended rather than as an additional IPR sitting above the patent (as an SPC does because EPC allows max 20-year patent length). UK clarified accelerated approval for patents which means patent adjustment is not as relevant for the UK.
4. Regarding Patent Linkage (which is one of the big three defensive areas for us in Patents alongside Grace Periods and PTE/A) – the US appeared to be looking to understand the UK system on the resolution of patent disputes for pharmaceuticals to see if there was room for manoeuvre to accommodate the existing UK system with their trade policy. The US used a new term ‘Expeditious Resolution of Patent Disputes’ (ERPD), which we interpreted as being the same as the Early Resolution Mechanism (ERM is lighter touch than Patent Linkage, with similar objectives). The US would like clarity on the time between notice given to innovative pharmaceutical companies where a generic has gained marketing approval for a patented product, and when the generic will go to market. They would also like clarity on what proportion of cases generics follow the ‘Clear the Way’ (due diligence) process, and what happens when they fail to do so.
5. USTR were very interested in what will be published in the FEP White Paper, particularly regarding the Unified Patent Court and they were looking for reassurance that data exclusivity periods will remain unchanged. We agreed to discuss further once the White Paper had been published. MP suggested this could be done on a more regular basis, by incorporating time in to our existing fortnightly JES VCs.
6. We recognise that several of the most challenging parts of the IP chapter in CPTPP were originally proposed by the US. We sought the US view of the suspended clauses in the IP chapter in CPTPP. USTR confirmed that what was in CPTPP was still a long way from what they originally sought in the IP chapter and that they believe the suspended clauses remain to tempt the US back in. US view is that even the removed IP clauses do not go far enough and would look to strengthen these in the future.

Report of Discussions and Outcome:

Introductions

1. MP (UK) introduced the day’s session, split into 5 UK mini-presentations and 1 US overview of their non-paper. The session with focus on patents with respect to pharmaceuticals and health, topics covered will be:
 - Overview of UK innovation and how the patent system works with respect to pharmaceuticals/health system
 - A UK patent system case study
 - USTR to present their non-paper
 - Data/market exclusivity rules in the UK
 - Supplementary Patent Certificates
 - An overview of the UK Patent Courts



2. CP (US) noted that they have more familiarity with the EU system following TTIP negotiations, but want to understand the UK specific system, and that they would be grateful if the UK could highlight ways their system currently differs, or will differ post-EU exit, from the EU system.

A) The UK's Innovative Pharmaceutical Economy

3. AT (UK) presented the UK pharmaceutical sector and outlined why the UK patent regime was central to this industry. The pharmaceutical sector has an annual turnover of £48.2 billion, it employs over 100,000 people from 2,000 businesses, and it is closely integrated with the UK's national health system. The UK sector has strong links with the international pharmaceutical sector. The strength of the UK science industry is critical to the strength of the pharma sector. These companies are looking to protect their investment in R&D and therefore have a great interest in the UK patent system. The UK government is one of highest spenders on the innovative pharmaceuticals industry, second only to the US on government expenditure in this area. When looking at the life sciences strategy in the wider industrial strategy, R&D is vital, therefore the patent system is key for maintaining and enhancing UK R&D and its foothold in the larger global R&D industry.
4. IP is a major pillar that supports the pharmaceutical sector as it provides a temporary and exclusive right that provides some security to investors for their upfront investment. This facilitates new drug production. IP protection is key for pharmaceutical research as there are high upfront costs and risks.
5. A fundamental principle that runs through the UK IP system is the balance of providing exclusive rights to encourage investment and innovation, whilst recognising there is a health need for these innovative products and therefore a need to ensure that they are appropriately available. The UK takes a balanced approach to our IP regime, considering the interests of generics, public and innovators.
6. As a result, the UK has one of best IP regimes when looking at Taylor Wessing global index: 1st in patents, 3rd overall and 5th for the global innovation index. We have a system that represents a high global standard and encourages other countries to provide IP rights as an incentive for investment into R&D as a source of innovation led economic growth.

B) Case Study on UK Patent System

7. NC (UK) presented a case study of the UK patent system to describe how it works in practice. There are 3 routes for filing patents available within the UK: UK Intellectual Property Office (IPO), European Patent Office (EPO) and Patent Co-operation Treaty (PCT). The focus of the case studies was on the UK and EPO routes as both systems follow the PCT process, the difference is that filing takes place in either the European or UK office.

UK IPO patent application

8. In the UK, the search and examination stages are performed separately. The search is conducted within 6 months of the request to identify prior art. The application is then published after the search and the applicant must request substantive examination 6 months after publishing. CE (US) asked if these were IPO current times or a target. NC (UK) clarified that those are their current times and these times are reducing. CE (US) then asked if there is there a backlog of applications and the number of applicants in the queue. NC (UK) responded that the search is



to be done within 6 months and average time for the whole process is 4 years. NC (UK) did not have the number available but this can be found out.

9. The IPO offer an acceleration option for patents which is free and can come in the form of a combined search and examination completed within 6 months or accelerated publication. It can be requested at any point in the process. Whilst there must be a reason for acceleration, it does not need to be onerous e.g. if investors are interested in the product want to see protection for the idea, or if the creation provides an environmental benefit. About 12-13% of grants have had some form of acceleration and 50% of filings have had a combined search and examination. The average time for accelerated options is 2 years and 10 months from filing to completion. CE (US) asked if an application can be completed within a year. NC (UK) explained there are some elements that cannot be accelerated due to statutory limits (e.g. 3-month third party observation period), but there have been applications completed in a year.

EPO patent application

10. The other route (for the UK) is via the EPO which operates under the European Patent Convention (EPC), a non-EU treaty (therefore no EU exit impact). There are 38 countries including all EU member states, but with extensions this number increases to 44. The UK is a founding member of the office which provides a single application that can cover multiple countries.
11. EPO application process - Through the EPO, there is one single application to cover multiple countries. When filing an application at the EPO, applicants select which countries they want their patent to take effect in (it can be costly to have patent protection in all available countries, applicants can pick and choose territories to be covered). Successful applicants are granted a bundle of national patents (therefore legal cases are dealt with in national courts). The process is like the UK system with search and examination undertaken separately. Within the filing examination stage there is an opportunity to appeal against the examiner's decision, heard by the boards of appeal. Once a patent has been granted (or notice of intention to grant patent is given) there is a 9-month window to oppose the patent. The full grant is only in power once any opposition has been resolved. There is a current backlog of resolution here.
12. Unitary patent process - A unitary patent can cover all those who are members of the Unitary Patent scheme (including multiple EU member states). This patent is upheld by the Unified Patent Court and therefore is taken out of the national legal system.
13. CE (US) sought clarify on dual applications: would a priority application at the UK IPO and the same application at the EU IPO proceed in parallel? NC (UK) confirmed both would proceed in parallel but there is an opportunity to warn the applicant of the duplication and if necessary the UK patent can be revoked. CE (US) asked whether this depends on what is covered. NC (UK) answered that we compare the EU and UK claims, if there is overlap the UK patent will lapse unless the holder decides otherwise. There is also an opportunity for the applicant to change their application. This process also applies in a similar situation involving the PCT.
14. The UK Patents Act 1977 is aligned with the EPC. It is desirable that we have close alignment on our systems, as it ensures consistency in the standard, which simplifies the process and lowers costs. We work closely with the EPO to share best practices and IP examination tools. The UK is an influential delegation at the EPO. The EPO is important to the UK and the US, with 90% of UK patents in force coming through the EPO route, 92% of US applicants for patents in the UK are through the EPO. This number is even higher for life science patents (98%).



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15. CE (US) was surprised the UK government ratified the UPC agreement before the UK's exit., and asked what the implications are for judgements of the CJEU, as the Court of First Instance which cover pharmaceuticals is based in London – what will happen post exit? NC (UK) confirmed we have ratified the agreement and we have a positive view of the court. We intend to stay part of the agreement throughout the implementation period (a transitional phase in which we will abide by EU rules). Beyond this is subject to negotiations. The FEP White Paper is due to be published; we can have a further discussion following its publication.
 16. CE (US) asked about the constitutional challenge in Germany which is holding up their ratification. If this process takes longer than expected and the UK leaves before then will the UK's ratification be null and void? MH (UK) responded that we are not sure but are preparing for all eventualities.
 17. CE (US) asked if within the EPC, is it possible to still get coverage for EU members and then get a bundle of patents which also covers the UK, Switzerland, Norway etc. Would these patents be subject to the Unitary Patent Court (UPC)? NC (UK) said this was the case, but we will need to come back on whether they would be subject to the UPC.
 18. CE (US) accepted that these are difficult questions but there is interest amongst US stakeholders given importance of UK markets and they are strongly in favour of the Unitary Patent due to reduction in cost and simplicity. MP (UK) stated that it is helpful to ask now as when we get clarity these can be bought up in future working groups or on VCs.
 19. *Deviation from the EPC* - CE (US) explained that the US understanding is that under the EPC obligations, national law must conform with the convention. Is it possible that the UK could diverge from the convention to, for example, adopt a grace period? NC (UK) clarified that the convention is clear that patents need substantial alignment. We are not sure the degree of deviation allowed, but how the current system works would suggest that alignment is important. CE (US) followed up asking whether it would be possible as a purely legal matter. (UK) indicated that there are already some legal aspects where we have taken a different view to the EU courts, so it is not impossible although these divergences are often to do with interpretations e.g. patentable subject matter.
 20. CE (US) has seen situations where some parties to the convention have a 12-month grace period compared to the 6-month restricted standard within the convention – could the UK offer more generous grace periods? (UK) stated that we take our standing in the EPO seriously, the grace period question is important for all applicants and choosing to deviate from the EPO is not something that would be politically helpful. Legally there is an element of interpretation which could be challenged in other states who currently have a grace period.
 21. MP (UK) suggested it would be useful to see any US research on this area if possible. CE (US) answered that the driver behind the research was a meeting with UK stakeholders who had positive views of grace periods. As a result, the US wanted a view of grace periods in the context of Europe but accept that it does create political problems. UK adoption of a grace period could signal to other countries that there is value more generally in getting one. NC (UK) stated that UK stakeholders are not against grace periods but they would want global harmonisation i.e. getting China and Europe on board and third party safeguarding.
 22. ZS (UK) explained that currently it is difficult to answer the question around what value a grace period would add for UK businesses and consumers. Changing the current system would cause practical problems, which would mean that organisations filing in the UK (as opposed to other EPO countries) would then only be able to get a UK patent (although there would be



some residual value in having a UK one available if they are not eligible for an EU patent following disclosure). There is the possibility of a UK grace period showing others that there is value in having a (longer) grace period and encouraging the adoption of a grace period.

23. CP (US) provided trade context: within US FTAs, they (USTR) like to include 12-month grace periods and this could come up in stakeholder consultations. The grace periods enable the biotechnology industry (and others industries) to publish findings in academic conferences without losing chance of patenting. NC (UK) highlighted that when the IPO talk to technology transfer offices about grace periods they strongly encourage stakeholders to file first then publish, which is the convention that they now follow. NC (UK) highlighted the historic and cultural differences which have led to stakeholder behaviour with respect to filing.
24. Patent eligibility - CP (US) mentioned that there have been conversations about patent eligibility standards in previous FTAs. FTAs provide an opportunity to ensure the same standards of new uses, and plant matters are patented in the other Party. NC (UK) suggested that it would be helpful if the US could provide an outline of what they are interested in in this space.
25. CE (US) has found that (half of their) stakeholders support, and the other half oppose, the new US policy: the Myriad case (*Association for Molecular Pathology v. Myriad Genetics*) ended 20 years of practice on granting patents for isolated gene sequencing (an issue previously seen as settled). The USPTO issued guidance that changed how they examine applications especially with respect to abstract ideas. Additionally, industry have put forward proposals to look at statutory language changes for subject matter eligibility. This is favourable for users of technology as there are fewer patents, innovators oppose this as they lose out on their investment into R&D.
26. The legislation is divisive, life sciences are disturbed about the direction taken due to the uncertainty it causes. The issue is setting up for Congressional action – however there have been higher priorities recently and this will carry on over the next few months, whilst waiting for the Supreme Court vacancy to be filled. The new USPTO director is interested in the patentable subject matter issue and they are hoping for a positive change that provides more certainty and a broader swathe of eligibility.
27. CP (US) highlighted there are constraints surrounding what is eligible to be patented/available for patenting in India (who have included an extra barrier to pass before something can be considered as inventive), Indonesia and Argentina with the US working to open this restriction. There is no guarantee of a patent being granted but it is better to get patent for new formulas. NC (UK) added that this is mirrored by UK stakeholders.

C) US non-paper presentation – Patent Term Adjustment, Patent Term Extension, and Data Exclusivity

28. Patent term adjustment - The US offer patent term adjustments for office delays (section 154) where applicants are entitled to an adjustment of their patent term for delays attributable to the USPTO. Statute sets USPTO deadlines and failure to meet these entitles applicants to a one-day extension on the patent term for every day of USPTO delay.
29. Patent term extension - The patent term extension (section 156) is offered for delays in the granting of marketing approval for regulated products i.e. drugs and medical devices which are defined by statute. This extension is on top of any other adjustment to the patent term. The two sources of delay are separately compensated. Extensions are 0.5 day per day spent during



clinical examination, and after that is 1 day for 1 day from filing for new drug to new grant by the FDA for marketing approval.

30. There are limitations and considerations for extension as well as a due diligence requirement, there is a statutory time limit of 60 days to apply for the extension. There is a mechanism between the USPTO and FDA for calculating what the extension term is.
31. DB (US) explained that there can be multiple patents that could claim different aspects of a particular pharmaceutical product. The extension available for the marketing delay with respect to the FDA review is available for only one patent for each product so the applicant must choose. NC (UK) confirmed this is the same in UK and asked what happens when more than one product is covered in single patent. DB (US) stated that the extension is for the term of the entire patent but the rights enforceable are only for what was reviewed by the FDA.
32. LMQ (US) highlighted that a patent covering multiple products would require the applicant to decide which product would be covered by the patent and so have the rights of extension. CE (US) explained that if a product is approved for a medicinal indication, but the applicant was then using the product for something else, e.g. 'paint thinner' this application is outside the scope of protection which is only granted for what has been authorised (in this case a medicinal indication).
33. LMQ (US) stated that the principle of the US system is similar to the UK/EU supplementary protection certificate (SPC); SPCs say upfront what the limits of extension are and the US is similar. CE (US) highlighted that in the US the Patent Term Extension is an extension of the patent term but in the UK the extension sits on top of the patent as a separate IP right. However, there are similarities e.g. one per product and maximum extension of 5 years.
34. Data exclusivity - This is separate from patent exclusivity. The US data exclusivity system works in same way as in Europe. When the innovator files a new drug application for a new drug product they must provide clinical data to show efficacy of this drug. The FDA then assess and approve, if appropriate.
35. Data exclusivity provides protection if another party seeks to get approval for the same drug product by filing a generic application using previous clinical trial data, without first party consent. The basic term of protection is 5 years during which another party cannot apply with reference to the innovators data. An additional 3-year protection is available for new clinical indications.
36. For orphan drugs there is 7-year data exclusivity protection, to incentivise development of a drug for rare diseases. In the US this is defined by less than 200,000 diagnosed (in Europe it is a prevalence of less than 5 in 10,000 people – there are different thresholds for this exclusivity between US and Europe).
37. There is an extension of exclusivity for paediatric studies (similar to Europe SPC extension). Additionally, there is further exclusivity protection for antibiotic or anti-fungal drugs of 5 years on top of any other existing extension.
38. Patent linkage - The US operates a linkage system through which a generic that makes an application for FDA approval of a generic drug using an innovators data, must make a certification as to the drugs patent status. The FDA then alerts the innovator that an application has been made for a product against that patent. The US has an "Orange Book" pharmaceutical patent database, which allows them to action the linkage and gives transparency to generics as to the patent status of the drugs.



39. The linkage system is different between biologics and small molecules, as the Hatch-Waxman Act did not settle these issues. The Biologics Price Competition and Innovation Act is subject to a long Congressional debate which is linked to the difference between small molecule drugs and biologics. US stakeholders are relatively happy with how things are working so far; however the 12-year extension was a point of contention (some US stakeholders have sought 15 years).
40. UK asked what the reason for was giving 12 years. US responded that a key reason is the difference between the manufacturing process for small molecules and biologics. Small molecule generics can be created as an exact copy of the patented pharmaceutical; this process is relatively straightforward. Biologics are complex molecular structures, and the configuration depends on how it is structured e.g. how it folds (Scientific term – Protein folding, which determines the physical structure of the molecule). Biologics are therefore defined by how they are made, rather than their chemical structure. This means it is difficult to define within the patent what has been created as a biologic, and therefore to exclude competitors, as a competitor could use a different method to create something biosimilar (biosimilar – term used for a generic biologic pharmaceutical) which thus avoids patent infringement.
41. When arriving at the 12-year mark, the US considered the importance of the biotechnology community and the two forms of exclusivity (patent extension and data exclusivity). For small molecules the average total term of market protection was 11.5-12 years, which was why they settled on 12 years for biologics. It is also expensive to get a biologic product to market (\$1-\$1.2 billion) from innovation/R&D to clinical trials and onto market. The balance in the US is to incentivise the creation of new products but to also enable affordable, similar products onto market, in order to meet the requirements of both consumers and innovators.
42. MP asked how has this played out in NAFTA 2.0, has data exclusivity featured given it was a challenging area for TPP. CP (US) replied that the NAFTA negotiations are on-going, but exclusivity is an important objective for US. It has not been welcomed by the (Canadian) generic pharmaceutical industry.
43. NC (UK) asked what the impact is on generics for the delay to market. (US) Research has been undertaken to examine how long it takes to get biologics onto the market which found that biosimilars were coming to market approximately 16-17 years after the original biologics were approved. This has been attributed to the long test process. NC (UK) pointed out that the processes around approving biologics is always changing and the speed at which regulators are operating mean the timing might look different in the future.

D) UK Data/Market Exclusivity System

44. DE (UK) presented the UK's approach to Data/Market Exclusivity. Within the UK there is no difference between biologics and small molecule pharmaceuticals (aside from orphans). Exclusivity lasts for 8 years and during that time other organisations cannot use or reference the innovator's data. Data extensions are enforced after the market protection term, which is 2 years, during which generics can manufacture but not market. Data extensions can result from a change in the product classification e.g. from Prescribed to Over the Counter and only apply to the data which pertains to that change in classification. There is a potential further 1-year protection for a new indication e.g. new target disease or different phase of disease, but the application for this must be submitted in first 8 years.



45. Market exclusivity is for orphan drugs/treatments only – the prevalence of these types of condition is low, c.5 of 10,000 of the EU population and must be severe e.g. chronically debilitating. There is an additional explanation that without the exclusivity recouping of R&D costs would not be possible. The total protection in the UK is for $8 + 2 + 1 = 11$ years. The starting point is when the innovative organisation is granted market authorisation, and this runs in parallel to the patent term.
46. CP (US) asked for clarification about the 1-year data exclusivity protection. DE (UK) explained that it is not market exclusivity but is used to compensate for additional studies that are required to show the efficacy of the treatment. This 1 year only applies to the data that is used to prove the efficacy of the change. Market protection means others can see the data, but they cannot sell the product. They can secure market authorisation as authorisation is based on safety and clinical examinations. Extensions are capped at 11 years compared to 12 years in the US.
47. (US) This process comes from an EU directive but does UK law mirror everything that is in this directive? DE (UK) said that we think so with respect to the national court procedure, but we will come back on this. Prior to 2005 when directive came into effect there was a patchwork European approach to extension times: Centralised, decentralised and national – 3 tiers. National aligns with decentralised but we will confirm if UK law requires alignment.
48. The authorisation process is a national process. An applicant only seeking to go to market in the UK would present to the MHRA for approval after which the 8 years exclusivity + 2 years data extension + 1-year extension for a new indication model would apply. Innovators would go to the decentralised tier to get European coverage. There are 2 forms of mutual recognition: where the application is recognised in one state but also wants coverage in others, and where applicants want some but not all states covered. In both scenarios the countries have opted in for 8+2+1 model.
49. CE (US) asked if there would there be any change to the structure following the EU exit. DE (UK) confirmed that we are seeking associate membership of the European Medicines Association (EMA) which would need high alignment with EU. But we cannot comment further at this stage.
50. CE (US) asked if the non-EMA centralised process would apply for the UK or is this subject to negotiations. DE (UK) confirmed the UK are seeking to be part of whole regulatory framework including in the decentralised process. CE (US) asked what would happen should there be objections to new guidelines that UK did not want to apply. DE (UK) answered that this would need to be thought through in our associate membership agreement. We would want flexibility to decide which guidelines the UK would follow. An associate membership would also likely help limit any border problems with shipments that are currently envisaged.
51. (US) To get the 5-year exclusivity period in the US it must be the first time they have approved the active ingredient present in the product, is this the case in UK? DE (UK) There is no data exclusivity for an existing active ingredient, but we are happy to come back to the US on this.
52. CE (US) asked about the case where the applicant was using a compound which combines a previously approved active ingredient with new active ingredient, using new data and not referencing old data. Is this able to obtain the new exclusivity? MP (UK) answered that this is one to take away and respond to later, although any case studies for this would be helpful for us to see. DE (UK) said, on a similar note, once an orphan drug is approved and given exclusivity it would block similar substances seeking protection for the same indication. However different approaches for developing an orphan drug treatment could be on the market. (**Action** – MP to follow-up with DE and MHRA colleagues to confirm several points outlined above and agree to further VC with the US on specific questions)



E) UK/EU Supplementary Protection Certificates.

53. NC (UK) presented on SPCs. Like the patent term extension, SPCs are a national right, however they are provided for by EU regulations i.e. if you want an SPC in the EU you must approach individual states separately, but the laws governing the conditions for the SPCs are set out in EU regulation. This does have consequences for EU exit.
54. The SPC enters into force when the patent expires and provides a further period of exclusivity to compensate delay whilst waiting for marketing approval for the drug. However, unlike the US, it is not an extension of the patent, it is a separate IP right. SPCs are applied to encourage innovative pharmaceutical research and create a consistent system across the EU. The UK cannot currently create a patent term extension as there is a 20-year patent term limit under the EPC and extending the patent term would exceed this 20-year mark.
55. SPCs protect pharmaceuticals and plant products including pesticides. An SPC adds patent protections to the combination of active ingredients for which the marketing authority has been obtained. It is possible to have multiple SPCs from one patent. SPCs are available in the EU for medical devices (this is subject to litigation following the application for an SPC for a medical device which was rejected by the UK IPO). There is also a wider EU review of the whole SPC system.
56. CE (US) asked what is the point of contention with respect to medical devices. (UK) The contention is a legal question over the current drafting of the SPC regulation; whether a medical device meets these conditions. The case currently underway relates to a combined product that also administers the drug, so it is at the borderline of what is a product and a device.
57. The US asked if multiple SPCs can run concurrently. NC (UK) answered that it depends on marketing authorisation for that compound. SPC protection only extends to protect for the compound that was approved.
58. NC (UK) explained that between 1993 – 2016 there were 749 SPCs: 639 for human/veterinary medicines and 45 of those for veterinary are UK only patents and those that relate to plant protection account for about 10% of the 749. CE (US) wanted to know how does this compare to other EU countries. NC (UK) clarified that the UK is one of the bigger granting authorities and that Germany has similar numbers.
59. NC (UK) highlighted that for plant protection, the product's data exclusivity period is more important than the SPC, as the innovator company invests in modifications or new uses of existing ingredients rather than inventing new active ingredients (seeds).
60. Calculating term length - The term length is the difference between the filing date of the patent in Europe and when authorisation is granted, minus 5 years. NC (UK) stated that stakeholders have not raised any issues about the UK system in this area. Whilst there are different formulas between the US and UK both generally come to the same conclusions. There is an additional incentive for paediatric medicines of an additional 6 months exclusivity.
61. CP (US) thought that we should look at case studies of patent term extension and SPCs that show similarities between the US and UK regimes. All agreed that this would be a useful next step.



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62. CE (US) highlighted that there is a dashboard within the USPTO which shows progress of getting through the current backlog.
63. CP (US) mentioned that the June statement refers to an agreement made on SPCs within the withdrawal agreement – what was this agreement. NC (UK) clarified that there was an agreement regarding SPC applications which are pending when the UK leaves the EU. The agreement is that EU regulations would still apply to those applications that have already been filed.
64. CP (US) asked if post EU exit, will EU regulations on SPCs apply. NC (UK) stated that the Withdrawal Act carries over EU legislation for the interim period to provide certainty for business, but that the future system is subject to the negotiations of the FEP.
65. NC (UK) highlighted that there were UK stakeholder concerns regarding the EU SPC Manufacturing waiver and there is ongoing consultation with stakeholders (innovators and generics). The proposal allows a generic manufacture to produce SPC protected medicines if done exclusively to export to non-EU markets where such a protection has expired or never existed. Innovators do not disagree in principle, however there is concern around stockpiling of non-exported products, for day 1 generic entry. From a legal standpoint we (UK) are concerned about the lack of clarity in the text. There also needs to be clarification around whether this change will be to new SPC applications or if it will apply retrospectively.
66. CE (US) described a scenario where the UK leaves and cannot agree with the EU on medicines, and implied that this would make the UK an export market. Will this lead to an issue with markets being flooded with competitor products. NC (UK) answered that this will be considered during the FEP negotiations.
67. CP (US) stated that stakeholders are concerned about stock piling, export exceptions and the proposal the European Commission (EC) has made. The US are concerned how it could expand/morph in parliament and are monitoring closely. NC (UK) highlighted that the UK still has seat at the table to influence the proposal and the EC want an agreement by May 2019.
68. The US asked if a patentee can get a SPC even if they were not the original party that submitted the data for the approved product. (UK) The SPC right follows the patent, so this could be possible.
69. Negative SPC - A rare but possible strategy when marketing authorisation was granted within the 5-year period. This would result in a negative term SPC; however, innovators do apply for negative SPCs to which there are additional extensions e.g. an applicant has their application approved in 4 years and 9 months. Under the formula 5 years would then be subtracted leaving them with an SPC of negative 3 months. However, by obtaining this SPC they can then add extensions to it which provide protections e.g. a 6-month paediatric extension (giving the applicant a 3 month right).
70. CE asked if SPCs can also apply to biologics. NC (UK) confirmed this was the case. CE (US) asked how an active biologic is defined. NC (UK) explained that this has not yet been tested in the courts and only a handful of biologics have got far enough to qualify for SPC protection. As SPCs fall under EU law there is a role for the CJEU which can interpret the legislation with referrals mainly to provide clarity. CJEU is not bound to follow its own precedent and some interpretations have created uncertainty. Our relationship with the CJEU depends on our FEP negotiations.



71. CP (US) asked about the Chequers statement which states that there would be due regard to CJEU statements. When will this apply, and would it be only for those rules that form part of the common rulebook? MP (UK) stated that discussions on the details of this should take place in the coming weeks, and it would depend on the FEP negotiations.
72. CE (US) asked with regards to the paediatric extension, does it apply to any paediatric studies or only ones that apply to whole paediatric population (0-18 years)? NC (UK) explained that applicants must develop a paediatric proposal plan and that then makes them applicable for the extension if it is approved.
73. CE (US) asked about any controversy regarding what constitutes an active ingredient. NC (UK) stated there have been challenges, for example where a later product has been authorised for the same active ingredient but the patent it relies on is a new active pharmaceutical ingredient, this opens the possibility of having an SPC even though there is already an authorised product. CE (US) explained that the reason for asking is that there is controversy whether two molecules are classified as the same or different, for different uses (the contention lies around the understanding of statute definitions). NC (UK) stated that the UK has had cases exploring what is a product and what is an active ingredient. We can provide cases which highlight the differences.
74. CP (US) stated that an element of US trade policy that relates to SPCs is that the system should extend the rights and benefits of the patent, there is a footnote in TPP that addresses this issue in relation to the Canadian system. The Chequers statement references the UK exploring the possibility of joining CPTPP, which has many suspended provisions which are of importance to US. However, USTR feel that even the suspended provisions do not reach the level of ambition that the US are looking for on IP for future trade agreements. Those suspended provisions are important to the US and they would like to take them further. MP (UK) asked for USTR thoughts on why the remaining states removed/kept the IP clauses that they did. CP (US) thought that part of IP suspensions could be to draw the US back in later with concessions in these areas.

F) UK Court System for Patent Disputes

75. NC (UK) provided an overview of the UK court system with a focus on how it functions for patent disputes. The UK is a common law jurisdiction, so the legislation sits alongside precedent. The IP courts are civil courts with no juries, and the judges are IP specialists, who often have an extensive background as IP barristers.
76. There are three tiers of court the Patent Court (High Court), the Court of Appeal, then the Supreme Court. There are low-cost options (IPEC and SCT) within the legal system which can be suitable for many IP disputes. The Court of Appeal sits as panel of 3 judges however it is not uncommon for pharmaceutical disputes given their size to go to the UK Supreme Court.
77. Injunctions - In most IP cases judges are hesitant to grant what they see as draconian injunctions but for the pharmaceutical sector where generic launches can cause unrecoverable losses to the innovator, judges are more willing to grant injunctions. Generics must show they have followed due diligence (using the clear the way doctrine) before launching a generic that could infringe on an active patent. The clear the way doctrine specifies that generics should seek revocation of patent or declaration non-infringement of patent before proceeding with their generic product.
78. CE (US) highlighted there is no linkage in the EU, is this the same in the UK? NC (UK) confirmed this is the case. In lieu of this, there is a case law onus on the generic to make their way through the litigation procedure before launching. The “clear the way” doctrine looks to balance out their



power of knowledge (of innovators products) by having them obtain the necessary clearances from all required parties before proceeding with their generic.

79. The UK system is quick to launch injunctions and they can be done in the same day, with case studies showing that they have even been granted by phone over the weekend. Stakeholders have expressed no concern about the time taken to grant injunctions. The UK has one of the shortest litigation processes in the EU (12 months). If the generic is found not to infringe the patent, the generic can claim damages to offset loss from speculative claims of infringement.
80. Publication of marketing approval - Marketing authorities are not involved in the process to determine what (if any) infringement is occurring when a generic applies for authorisation. The market authorisation process is purely scientific, concerning the clinical, safety and health implications of the product. Therefore, a generic can get market authorisation even if litigation has commenced. MHRA publishes all products that have received marketing approval monthly. Innovators can see any generics who have gained marketing approval and take legal action if required.
81. CP (US) asked how soon after the publication of marketing approval can the generic drug launch. DE (UK) stated this can vary and there is not an allowance for determining this within the marketing authorisation process as this could withhold marketing without a scientific rationale, which is against the EU regulations. The drug could go to market two days after receiving authorisation. The EMA sends out a preliminary notice: a draft of what products they plan to authorise, this is published online 60 days before the final authorisation on an EU level. The MHRA publish this monthly but there is no preliminary launch at the UK level.
82. CE (US) asked what information is made available at UK level. The US are trying to understand if the UK process is akin to linkage without statutory linkage provisions. The information published is key to understanding this, what information is published that would allow innovators to know the generic company that is about to infringe. DE (UK) explained that the EMA and MHRA publication lists provide a range of information, including the molecule/product, the name of the company who has made the application. We can provide links to the EMA and MHRA table that are published. (**Action** – MP to follow-up with DE to provide relevant links via email to USTR)
83. CE (US) followed up by asking if there is no forewarning to innovators beyond the MHRA list unless the generic has undergone due diligence. NC (UK) explained that whether the generic followed the due diligence is part of whether they would be hit by an injunction, this legally incentivises generics to follow the due diligence process.
84. CE (US) asked what percentage of cases do generics fail to follow the due diligence, and causes innovators to seek an injunction. NC (UK) said this is hard to measure but feedback from stakeholders is that the process is efficient and satisfies their need. There has been no demand for alternative approaches.
85. CP (US) stated that within US trade policy, patent linkage (also known as Expedious Resolution of Patent Disputes) is an opportunity for innovators to resolve any issues before having to more extensive legal proceedings. With the key emphasis on providing notice, and fast resolution. MP (UK) an action for the UK is to show the US some case studies of use of clear the way and use of injunctions.
86. MP (UK) concluded by thanking the US IP delegation for 3 days of productive talks at the SME Dialogue and TIWG 4.



Key Actions and Next Steps:

- **UK patent filing process:** UK to provide the current backlog of patent filings in the IPO.
- **Unified Patent Court:** Once the UK has further clarity on the FEP negotiations and the implications for the UK's membership of the UPC we can discuss either at future TIWGs or via video conferencing.
- **Patent eligibility:** The UK to ask the US for an outline of what they are interested in exploring further with regards to patent eligibility. USTR highlighted that there have been conversations about patent eligibility standards in previous FTAs and how does it match with the UK.
- **Data exclusivity:** In the US, to get the 5-year exclusivity period it must be the first time they have approved the active ingredient present in the product. DE (UK) did not think there is data exclusivity available for an existing active ingredient but UK to come back on this.
- UK to respond on the possibility of a **combined compound** using a previously approved active ingredient with new active ingredient – using new data and not referencing old data to obtain new exclusivity.
- **SPCs/patent linkage:** UK and US to review patent term extensions and SPCs to highlight the similarities between the two regimes.
- UK to provide links to the **market authorisation tables** published by the EMA and MHRA which lists those applications that have obtained marketing approval.
- UK to provide case studies showing the **due diligence procedure** (clear the way) and the use of injunctions to protect innovators in scenarios where due diligence is not followed.
- **Active ingredients:** UK to provide cases that explore the difference between a product and an active ingredient.

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Session Lead Analysis/Comments:

- There was mutual recognition that this was a conversation between two of the world's leading countries with regards to patent policy. The US were testing our system and eager to push their positions but all in a highly respectful manner. Nicki Curtis (UK IPO) and Charles Eloshway (USPTO) both demonstrated a depth of knowledge of one another's systems. I would recommend that a useful way to move the agenda forward is for further expert sessions (via VC) to tackle detailed points.
- We have reached a point (for Patents in Pharmaceuticals/Health) where beyond specific policy details in niche areas, we are awaiting the clearance to negotiate and exchange text to really take significant further steps. There is however significant scope to discuss patents in other areas at future sessions, in particular: Technology and Agriculture/Chemicals.
- The agenda for TIWG 5 should focus on broadening the patent discussion to ensure that all areas have been covered and to tease out further thinking from the US in the area of Patent Linkage/ERM/ERPD. (See IP Session 1 note for further IP topics to be discussed at TIWG 5)



Department for
International Trade

SERVICES: FINANCIAL SERVICES

Date: 11 July 2018

Time: 13:00-16:00

Participants:

Name	Department/Directorate
Rebecca Fisher-Lamb	DIT – Trade Policy
Johanna Michael	DIT – Trade Policy
Sukhmani Khatkar	DIT – Trade Policy
Michael Drewett	DIT – Trade Policy
George Radice	DIT- UK-US Trade Policy
Elizabeth Sutton	DIT – Legal Advisers
Jaya Choraria	HMT
Matt Mueller	HMT
James Flannery	HMT
Harriet Nowell Smith	HMT – Legal Advisers
Shirley Rhone	HMT – Legal Advisers
Umar Akram	HMT
Lauren Skarkou	HMT
Haytham Agabani	HMT
Matt Sullivan	US Treasury
Matt Swinehart	US Treasury
Laillee Moghtader	US Treasury
Tom Fine	USTR

Key Points to Note:

- UK talked through high-level principles for Financial Services on mutual benefit, ambition, resilience and comprehensiveness. US was generally positive and receptive. They agreed on shared ambition but noted need to understand EU angle and consider details.
- UST presented on their approach to the FS chapter. We had a detailed and useful discussion which has deepened our understanding of the US approach and sensitivities and clearly illustrated to US counterparts UK readiness to engage in the detail.
- We agreed to continue specific discussions on FS at next TIWG.

Report of Discussions and Outcomes:

1. Opening Remarks

HMT (JC) welcomed UST and USTR, noting that we are delighted to have first the substantive discussion on the approach to Financial Services (FS). The focus of the discussion is FS in FTAs to lay the groundwork for FS provisions in a future UK-US FTA. The discussion builds on the brief



discussion of FS part of the US “5-Chapter Model” at TIWG2. HMT recalled that the US presentation of its Non-Conforming Measures (NCM) approach to services and investment at TIWG3 excluded financial services. HMT noted that the agenda for this session was, firstly, for the UK to set out high level principles for the approach to FS in FTAs and, secondly, for the bulk of the discussion to focus on the US presentation of their approach to the FS chapter and discussion of this. UST (MS) agreed with the agenda.

2. UK Approach and High-Level Principles

HMT (JC) noted that HMG was in the process of developing the UK’s approach to trade and investment policy. At this stage, we can outline principles and objectives of our approach with the caveat that the discussion is exploratory and without prejudice to future policy positions for a UK-US FTA which we would be setting out in the Autumn. HMT invited DIT to briefly recap on broader services discussions.

DIT (RFL) recalled technical discussions on cross-border services and investment issues at the last working groups and noted it was great to be able to dive into the detail on specific sector approaches, whilst making sure we are linked up across the piece.

DIT noted that the Prime Minister had emphasised in her Chequers statement that a key test for any agreement with the EU will be the UK’s freedom to exercise an independent trade policy. The Prime Minister has made clear that the UK will maintain flexibility to secure ambitious trade agreements that are in our economic interest. The UK set out in the plenary session a future US/UK trade deal remains a top trade priority for the UK. The Chequers statements and the message from our Ministers has been clear that we will strike different arrangements with the EU for services, where we feel it is in our interests to have regulatory flexibility. Across services, HMG will need to take a case by case approach to each issue in each area, to consider what is in the UK economic interest going forward.

HMT (JC) noted that the PM’s statement recognised that current levels of market access would not remain the same and explained consequences for financial services. The PM has been clear that passporting will come to an end, but the UK retains its aim to protect stability and preserve the benefits of integrated markets. The Chancellor had previously been clear that equivalence was not sufficient. HMG still wanted an ambitious outcome with the EU. HMT asked if the US had any initial questions and noted plans to discuss EU Exit in more detail in a subsequent HMT-UST bilateral meeting.

The US (LM) acknowledged that UK policy is under development and appreciated that achieving positive negotiating outcomes with the EU is key to UK objectives; they too had one eye on Chequers outcomes.

HMT (JC) outlined the UK’s 4 principle for FS in FTAs:

1. **Mutual Benefit** – The UK and US are the two leading global financial centres, unparalleled in size, internationalisation and sophistication. Similar levels of FS exports in absolute value – almost £15bn in UK exports and over £12bn in US exports. FTA discussions are supporting and enhancing our already strong relationship in FS is in our shared interest. The possible FTA exists in the broader context of already substantial FS flows, business relationships that work well, and comprehensive and effective government and regulatory cooperation.
2. **Ambition** – A possible UK-US FTA, within financial services, can redefine what is possible in an FTA. FTAs are currently limited on FS – models such as TPP and CETA are an inadequate benchmark. We should not be constrained by what is already on the shelf. We have the opportunity to set a gold standard.



3. **Resilience** – Financial services are unique due to their interconnectedness and centrality to the economy. Both jurisdictions already adhere to the highest regulatory standards and continued cross-jurisdictional cooperation is key to ensuring financial stability, market integrity and consumer protection. Given the structural importance of FS to the economies of both parties (i.e. the size of our FS sectors of GDP is 6.5% in the UK and 7.3% in the US respectively), clarity of application of a possible future FTA is essential.
4. **Comprehensive** – The UK emphasised that a possible future deal should be comprehensive – various options for delivering a comprehensive FTA are under consideration. These include enhanced market access commitments, robust dispute settlement provisions, structures for cooperation between the parties’ authorities and ensuring an appropriate level of prudential safeguarding.

US (LM) responded that they share the goal of having strong agreements and noted that details will be developed over time. From the US side, further elaboration requires better understanding of how developments play out between the UK and the EU.

3. US Presentation

US Treasury (MS) opened by noting that the presentation provided an overview of the US’ historic approach to FS in FTAs, without prejudice to future negotiating positions. Historically, FS has been included in all US FTAs. US FS disciplines build on the principles laid down in the WTO.

UST (MSw) clarified that the FS components of their FTAs have always focussed on market access rather than cooperation on regulatory issues. UST noted that some confusion had arisen around regulatory cooperation provisions in TTIP – US policy is to develop comprehensive financial services provisions in FTAs, but exclusively in relation to market access.

UST (MSw) agree that financial services are subject to unique considerations which is why it is essential for financial services to be covered by a standalone FTA chapter – these considerations are primarily the primacy of prudential regulation and the role of FS as the “nervous system” of the whole economy.

- A. **Scope** – UST (MS) noted that FS Chapters apply to financial institutions, investors and their investments in financial institutions and cross-border suppliers of financial services.

In US agreements, a financial institution is defined by reference to the domestic law of the parties. In the US system, this definition relies on whether a firm is regulated as an FI (for instance, if it is subject to regulatory capital requirements).

UST (MSw) also noted language on “in like circumstances” to ensure direct comparisons between like financial institutions – e.g. applying the same principles to firms operating in the same FS sub-sector – to permit consistent interpretation of the agreement.

- B. **Coverage** – UST explained that US FS Chapters apply to all commercial presence, and to a specific set of cross-border financial activities. In the US view, the most up-to-date model for cross-border commitments is that found in TiSA.

HMT (JC) pressed on US thinking about whether cross-border commitments can be expanded, including proposals from US industry. UST noted that there have been recent innovations on cross-border commitment in the US model – Portfolio Management Services and Electronic Payment Services were added in TPP and have been carried over into NAFTA 2.0. However, UST has no current view on where cross-border commitments can be expanded.

USTR asked about UK industry thinking on additional cross-border commitments. HMT (JC) noted that we are at the early stages of getting input from industry.



Additionally, UST (MSw) noted that Financial Information & Auxiliary Services can be interpreted broadly, potentially covering FinTech. HMT (MM) noted that Fintech is an important area where we should explore how we can use definitions and provisions to keep FTAs up-to-date, allowing FS trade policy to “move with the market”.

- C. **Core Obligations** – The US focussed this section of the presentation on the obligations they see as core to the agreement – National Treatment (NT), MFN, Market Access, Transfer of Information, Transparency & Institutional Structure.

For NT & MFN, UST reiterated the point on coverage “in like circumstances” permitting direct comparison between firms in individual sub-sectors.

NT now applies across all commitments and is now much cleaner, but negotiated outcomes can result in deviations.

On MA, the US follows the approach taken in GATS.

HMT (JC) queried how the MA provision applies for FS in KORUS – excluding cross-border provisions. UST (MSw) clarified that there has been a change of US approach post-TiSA – mirroring the wider cross-border services approach. This new approach provides additional clarity about what the agreement covers and what is permitted. HMT (JC) pressed the US on the rationale for MA obligations not covering cross-border supply of financial services in earlier US agreements and asked whether the new US approach was more like CETA where the FS chapter pulled in MA for both mode 3 and cross-border supply of services.

UST provided background on how MA provisions have been drafted. In the early 90s, the novelty of GATS negotiations engendered different approaches, including a divergent model for FS as a result of separate FS negotiations. The US has looked to tighten up MA drafting in recent FTAs to ensure consistency across different parts of the agreement and that all differences are intentional. However, consistency of form is subject to negotiations – the form of TPP was a function of negotiations taking place with 11 other parties.

More generally, the US is also prepared to consider where things can be made consistent – for instance on transparency (as in TiSA) and the list of cross-border commitments. HMT (JC) asked about the rationale for having a specific commitments section which was a mix of different elements. What was the value of having commitments e.g. on EPS that were best endeavours and didn’t seem to include national treatment obligations. US (MSw) noted that whilst they take a different form from other market access commitments it is important to ensure cross-border obligations are treated in the same way as other commitments (i.e. subject to MFN/NT) especially where commitments are being added – i.e. on EPS/Portfolio Management in TPP.

UST (MSw) flagged that ensuring NT and guaranteeing consistent legal form for cross-border obligations for financial services is a US priority.

- D. **Data & Transfer of Information** – UST and USTR noted that the US has a broad objective to prohibit data localisation requirements for FS and that this is a key interest for the US. This is subject to assurance that regulators will have access to relevant information required to carry out supervisory functions, particularly in a crisis scenario.

UST (MSw) acknowledged that this is a new area of FS trade policy development, especially relevant to restrictions on flow of data in EMS (China, India etc.).

UST (MSw) referred to TiSA proposals as an example of a “best offer” on data. HMT (JC) noted language on “immediate, direct, complete and ongoing” access to firm-level data for regulators in the proposal on data localisation and asked how these terms were defined. UST explained that this language is derived from discussions with US regulators when reviewing rules on data access and targeted localisation measures. US regulators have experienced narrow – but significant – problems regarding access to data, particularly in relation to developing markets.



Supervisors receive data through a portal – moving away from on-site regulator inspections – but need to be able to access in real time. Immediate does not mean instantaneous but ‘on demand’. HMT (MM) probed on the difference between immediate and instantaneous. UST (MSw) suggested this was the difference of milliseconds and that the crucial point was that regulators have access when they need it without any delay.

UST explained that this is especially relevant in the context of resolution, where flow of data to supervisors needs to be close to instantaneous. Key is that regulators get what they want when they need it. US position is informed by targeted approach to individual firm supervision and general tightening-up post-crisis, during which several cross-border resolution scenarios were played out. In the US view, the bottom line is that regulators get access to firm-level data and have the ability to share information around resolution.

HMT (JC) asked whether the US had drafted the provision in line with existing domestic practice, or whether the US had needed to change its domestic measures. US explained that their approach to data and data localisation is consistent with domestic legislative practice. Where the US approach deviates, this is listed as a reservation. For instance, domestic rules previously changed to stipulate that insured deposits could be held only through a subsidiary rather than a branch. Existing branch deposits were “grandfathered” under the new regime – which also “grandfathered” some data localisation requirements relevant to branches.

HMT (JC) asked whether the US had any written explanation of the definitions. This would help us assess how the proposed US provision related to UK regulatory requirements. UST acknowledged that we wanted further explanation but USTR (TF) said that as the language itself had been so difficult to negotiate with the regulators there was not any further explanation (given that it would also need to be negotiated). UST noted that we could discuss further in subsequent discussions.

HMT (MM) asked whether there had been any particular issues, e.g. in resolution during financial crisis, that directly informed the new language developed.

US (MSw) explained that during the financial crisis cross-border resolution was a key issue, most notably in the case of Lehman Brothers. This showed that securing clear commitments to access to data for regulators is critical but also that this needs to be facilitated by more collaboration between regulators to facilitate information sharing.

HMT (MM) noted that there is a significant technological shift occurring in data management in the whole sector and that firms are increasingly moving to cloud-based computing. It is important to ensure FTA provisions stay relevant as the technology changes. HMT (MM) asked how the provisions apply to clouds given third party providers are not specifically referred to.

US (MSw) clarified that their approach applies to both in-house and third-party data. Acknowledged that – although clearly relevant to emergent technologies like cloud computing – current language does not explicitly cover these activities.

USTR (TF) clarified that the digital services chapter does not define this in any other way and it isn’t covered more broadly.

UST (MSw) provided clarification on the scope of FS data provisions. The ‘locating and use of computing facilities’ provision applies solely to financial institutions or financial services suppliers that the US requires to be regulated as a financial institution. Under the US definitions of ‘covered person’ and ‘computing facilities’ for FS, some firms – e.g. PayPal, Visa and Mastercard and certain types of swap dealers – are not subject to the FS localisation provision. However, there is no “black hole” as firms not covered by the FS localisation provision are captured by the locating of computing facilities provision in the e-commerce chapter.



- E. **Transparency** – US commitments on transparency are all in line with existing domestic legislation and there had been no need to amend legislation to accommodate trade commitments.

US (MS) pointed out the 120-day timeline for processing licensing applications, noting that this commitment is overlaid with “to the extent practicable” language. HMT (JC) asked whether “to the extent practicable” meant the provision was “best endeavours. UST (MSw) noted that it was stronger than best endeavours.

The US indicated that their preferred model is for transparency is TiSA – rather than TPP – given the higher level of specificity, particularly on licensing requirements. DIT (RFL) asked if there were areas where the US would have gone further. TF (USTR) noted that some TiSA members were not up to the “gold standard” on transparency, and there had been some US desire to push commitments further.

US emphasised the desirability of negotiating high standards across agreements where possible, whilst also noting that provisions are subject to negotiations – for instance, this may explain the absence of a notice and comment provision in KORUS.

- F. **Institutional Provisions** – the US emphasised their view that the Financial Services Committee focusses exclusively on implementation of the agreement and not cooperation. The committee has a role in dispute mediation insofar as it is a forum for raising issues with agreement implementation.

HMT (JC) asked for more detail about how the US approach in the NAFTA renegotiation was evolving given previous UST comments about this.

UST (MSw) noted that NAFTA institutional provisions are atypical and not current US practice – melding regulatory cooperation with implementation is not the current US policy model. HMT asked whether this meant that both the UST International Banking Office and International Trade teams attend the FSC versus in future just International Trade team attending. Would regulators be brought in as relevant? UST noted that nothing precludes regulators from participating in the NAFTA FS committee, but discussion is normally trade-focussed, so the discussion is not necessarily a good use of regulators’ time.

UST (MSw) also stressed that NAFTA is the only agreement in the US to specify that FSC meets annually. Generally, the US (compared to the EU) is not “committee happy” and takes the view that committee meetings should be useful and not held unnecessarily. Going forwards the Committee would meet as needed.

On practical applications of the FSC, UST (LM) noted that the NAFTA text looks like it should be limited to implementing the FTA – however, the need for things to talk about in annual meetings had led to elements of cooperation being incorporated into discussions. UST noted that the FSC has played an important and effective role in KORUS, particularly in ensuring implementation of transfer of data obligations by the Koreans. The US was conscious of time and wanted to avoid FSC meetings becoming a check box exercise.

HMT (JC) noted that it was interesting that the EU and US seemed to be moving in different directions on the role of FS Committees and asked the US for their view on the model for the committee established under CETA and the EU-Japan agreement. UST responded that, in their view, the CETA FSC mirrors committee arrangements in NAFTA.

USTR (TF) noted that in previous discussions about TTIP, industry mistakenly used to say that financial services weren’t included in TTIP due to regulatory cooperation not being included. HMT (JC) noted that it often had to correct such drafting too and acknowledged that it was a mistake to say that FTAs did not cover financial services.



DIT (RFL) queried coordination between committees under the US system. USTR noted that the Services and FS committees do not generally meet together.

- G. **Exceptions** – UST (MS) talked through the exceptions they see as being key to FS: Prudential Carve Out, Monetary Policy Exception, Affiliate Exception, General Exceptions (incl. Law Enforcement Exception).

HMT (MM) queried the need for a separate Affiliate Exception, noting that this could be covered by the PCO. UST noted that the exception provides an additional level of security for regulators that they will be able to intervene when necessary to impose restrictions on the ability of banks to distribute profits to affiliates. This is especially relevant in a crisis scenario.

UST explained that the law enforcement exception covered criminal activities operated or facilitated through the financial system, most notably money laundering.

- H. **Prudential Carve Out** – UST asserted the US view that the PCO should apply to all non-goods chapters – this is the consistent approach and intention and the substance of PCOs in all US agreements has remained constant.

On drafting of the PCO, UST noted that the US avoids an exhaustive list of what constitutes a prudential measure both in a FTA or outside; in their view, prudentialism is fact and circumstance-specific – there is a risk that if the PCO is described too specifically, it becomes too narrow. Additionally, UST noted an IMF and OECD attempt at producing an exhaustive list but clarified that they do not think that this should be used to interpret agreements and that UST opposed this work at the IOs.

When asked by HMT (MM) for thoughts on broadening a non-exhaustive list, UST noted that the preference is not to add to the list. US preference is for an approach based on “appropriate generality” – using a list model means it is hard to maintain the right balance between generality and specificity. It was difficult to come up with examples that maintained generality. Payments and clearing systems are an integral part of this. In the IMF context, they have attempted an exhaustive recitation of macro-prudential measures and the US has a disclaimer that this is not an exhaustive list and is not to be used for interpretation of any agreement.

HMT (MM) asked for views on the PCO drafting model in CETA in that the PCO in CETA refers to integrity of FS suppliers in general, as opposed to the US model which refers to the integrity of cross-border suppliers. UST suggested that the CETA drafting model is overly-complex – possibly a mistake from mixing EU and NAFTA approach – but fundamental approach is the same to US model.

HMT (MM) asked for views on the EU inclusion of a reasonableness test in the PCO. UST noted that the US drafting model includes an anti-abuse clause as standard in the 2nd clause of the PCO. Furthermore “reasonableness” is a further – in the US view, unnecessary – ratcheting up of the legal test

Primary US objective in drafting the PCO is to avoid potential questioning of a prudential objective (for instance, in the WTO *Argentina v. Panama (Measures Relating to Trade in Goods & Services)* case) and avoiding any kind of cost/benefit analysis of regulatory actions. However, UST also noted that the PCO has not been invoked in many disputes.

HMT (MM) asked about the coverage of the PCO in TPP compared to other US agreements and whether this applied to all services or just financial services. UST (MSw) suggested that the intention of the coverage was the same, but the drafting was flipped around. The substance was the same.



- I. **Non-Conforming Measures (NCMs)** – UST noted that the non-conforming measures are a separate “bucket” of things not covered by prudential or other exceptions – NCMs are a distinct set of issues.

HMT (JC) noted that industry often flags lack of scheduling of US state level barriers as an issue. UST noted that the US does bind state-level NCMs, including state-level measures on licensing, and addresses state-level issues around transparency – e.g. the illustrative list in TPP – to provide additional clarity for FTA partners. USTR (TF) commented that where there are legitimate concerns about transparency the US does make attempts to address these.

HMT (JC) asked whether TPP provision on consultations on regional NCMs in the FS chapter was now part of the US model. UST (MSw) said that this provision didn’t really have any effect in practice. HMT (JC) noted that this was no doubt an important provision for the US’s trading partners.

UST noted that the model in US FTAs is simply a function of the US federal system. HMT (JC) noted that issues around state measures had also been discussed in the broader services/investment session. USTR added that the US was clear with the EU Commission during TTIP negotiations that they were happy to “have the conversation” on specific local measures if such measures could be identified.

- J. **Disputes** – UST noted that the US is re-developing its policy on dispute settlement and that all discussions were without prejudice to future conversations and negotiating positions.

On FS ISDS provisions, UST outlined the US model for the prudential filter, including the 120-day limit for initial determinations by a panel. HMT (JF) queried the US approach to inclusion of Minimum Standard of Treatment as grounds for an FS ISDS claim, noting that this is not in the scope of FS ISDS for some US agreements – e.g. KORUS and NAFTA. The US were defensive, emphasising changing views on MST and stating their approach has “no particular trajectory” and that in TPP the US ended up with it as a negotiated outcome. UST (MSw) reemphasised that the US is currently developing policy and that specific questions on broader investment policy should be filtered through US investment colleagues. HMT (JC) noted separate discussions led by investment leads on ISDS and asked about FS industry views on novel US proposals.

On SSSDS, UST (MS) emphasised the importance of including provisions to avoid cross-sectoral retaliation. The intention of these provisions is to limit harm that is done in the FS sector and avoid bringing disputes in the real economy into the sector, triggering knock-on effects.

Additional Questions: TLA (HNS) asked an additional question on US NCMs in TPP, relating to the prohibition of deposit-taking by branches of foreign firms. UST noted that in general prudential measures were not scheduled but some things were on the line.

4. Closing Remarks

HMT (JC) noted that this initial discussion on financial services had been very useful and it would be useful to continue the discussion with a financial services specific session at the next Working Group in Washington in November. UST agreed it was a useful discussion and they are keen to continue discussions. HMT suggested that HMT and UST should take stock nearer the time to decide what areas to focus on. UST agreed and noted that we could continue discussion on data. DIT (RFL) noted that it would be necessary to review sequencing with USTR ahead of November, in particularly scheduling the investment and FS sessions separately.

HMT (JC) closed the session, noting that we looked forward to meeting again in Washington in November.



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Key Actions and Next Steps:

- HMT and UST to have a discussion in early Autumn regarding the agenda for the FS session at next Working Group. Possible options for the agenda include encouraging UST to provide a response to UK high-level principles, a further discussion on data (where we would like further information from the US on how to define and interpret their TiSA proposals) as well as more detailed discussions in other areas of possible ambition as HMG's policy development progresses.

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Session Lead Analysis/Comments:

This was a constructive initial discussion and it was positive that UST was willing to engage on financial services as part of the TIWG given their historic allergy to trade discussions. In response, the US nodded, acknowledging our view that there was an opportunity to be ambitious and set a gold standard for FS in a possible³ future UK-US FTA (and confirmed this informally after the close of the session). However, it is not clear what they mean by "ambitious". We emphasised that we should think beyond existing precedents. UST explained their general approach to FS in FTAs was based on their existing practice as well as their proposals in both TiSA and the NAFTA renegotiation. The US does not seem to have started thinking specifically about prospects for financial services in a UK-US FTA.

UST hyper-sensitivity about keeping FS regulatory issues out of FTAs showed in the Q&A about the role of Financial Services Committees in FTAs as well as their introductory comments. We will have to continue to tread carefully and be strategic about our engagement on this particularly sensitive, but important, issue.

As in the broader services and investment discussions, the US were also defensive about state-level measures and their approach to ISDS.

The separate UST-HMT bilateral also took place before the Brexit White Paper had been published. UST have not yet asked any specific questions about implications for UK-US relations on financial services.



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CLOSING PLENARY SESSION

Date: 11 July 2018

Time: 17:00-17:30

Participants:

Name	Department/Directorate
Oliver Griffiths	DIT- UK-US Trade Policy
Richard Salt	DIT- UK-US Trade Policy
Sophie Brice	DIT- UK-US Trade Policy
Victoria Donaldson	DIT- Legal
Neil Feinson	DIT- Trade Policy
Rebecca Fisher-Lamb	DIT- Trade Policy
Julian Farrell	DIT- Trade Policy
Lola Fadina	DIT- Trade Policy
Jaya Choraria	HMT
Rhys Bowen	DExEU
Ceri Morgan	DEFRA
Dan Mullaney	USTR
Tim Wedding	USTR
David Weiner	USTR
Sam Rizzo	USTR
All participants from UK and US delegations present.	

Key Points to Note:

- Agreement to have ongoing UK-US discussions between lead officials to answer questions following the publishing of *The future relationship between the United Kingdom and the European Union* white paper.
- Agreement that subject matter expert meetings should not be one-off occasions at the Working Groups, but commitment to maintain an ongoing dialogue between the UK and US policy leads across all areas – particular conversations to be scheduled on digital/telecoms and sustainability ('labor and environment').
- Agreement that UK would pull together full list of actions that have come out of this Trade and Investment Working Group and share with US counterparts.

Report of Discussions and Outcome:

US Overview: The US (Mullaney) thanked the UK for the hospitality of this working group, and noted that there had been great engagement from both delegations – leading to a strong, diverse set of meetings. The US noted three types of discussions now underway:

- Areas with a high level of ambition. These are areas with significant overlap in terms of UK/US interests and priorities including: SMEs, professional services, and intellectual property. There had similarly been strong work on continuity agreements – particularly the veterinary and organics agreements.



- Promising conversations. The US thought that the GRP, digital, telecoms, financial services, economic, and legal group sessions had all made a promising start. We should look for future conversations to be driving progress in all of these areas, building on the next steps identified in these discussions. The US noted that these future conversations should get into further detail on policy positions, especially on investment.
- Areas of uncertainty. The Chequers statement has left the US with a number of questions surrounding the future regulatory framework for goods and agriculture. The US noted that they will want to come back to this topic in future conversations. The US noted that further questions/issues remained on:
 - Future UK plans on technical regulations, especially on industrial products.
 - The US will want the UK to preserve sufficient policy space and flexibility for in different sectors, especially on horizontal TBT issues. This is also true for SPS and agri-food issues. The US also noted their stakeholder pressures, especially on agriculture – noting that any future FTA deal would need to be approved by Congress, who is especially sensitive to these sets of issues in any trade deal.
 - The US concluded by asking the UK to keep enough policy space to achieve regulatory compatibility – not necessarily through (or just through) MRAs. Instead they stressed the need for regulators to have comfort/confidence in the other regulators.

UK Overview. The UK (Griffiths) thanked the US for discussions and for their summary, stating that Chequers had provided a 'real context' for discussions. He invited DExEU to give a further update:

DExEU Overview. The UK (Bowen) welcomed this valued conversation with the US, and the opportunity to discuss more detail on the UK's future relationship with the EU and our future relationship with our wider trade partners (including the US). The UK reiterated the approach set out in the Chequers statement, our intention for an independent trade policy, that allows the UK maximum freedom to develop our own policies, while maintaining no hard border between the Republic of Ireland and Northern Ireland. The UK knows that goods and agriculture are two areas in which the US has expressed concerns; however, *The future relationship between the United Kingdom and the European Union* white paper will answer some of these questions and will be an important step in giving the US more details on what was set out at Chequers statement. The UK noted that they expect the US to still have questions once the White Paper is published and agreed that we will follow up in order to help answer these.

STOs and Continuity Agreements Summary. The UK (Griffiths) summarised work accomplished on Short-Term Outcomes. Officials committed to having a joint economic IP study in place for the next working group, as well as agreeing a date for the next SME dialogue. On Continuity Agreements, the UK noted good progress and that discussions were useful, especially on Spirits, Organics, Wine, and the Veterinary Equivalence Agreement. To summarise progress and actions:

- The Spirits text had been agreed in principle (both sides welcomed this).
- Organics: UK notified the US that the UK will write for an inspection [To be held September 2018].
- Wine and VEA: Agreed a follow-up VTC by end of July 2018.
- MRA: short-form text to be shared with US shortly.
- New (possible) agreements were tabled: pasta, cereal, oilseeds, and wheat. The US to give the UK further information on these to assess.



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- The UK also noted the legal group that has been set up to help answer questions around the continuity agreements and implementation period. The UK will help support the flow of information and offered to answer any questions that Cleve Williams (US) might have.

Future FTA. The UK (Griffiths) noted the growth and expansion of the Trade and Investment Working Group, both in terms of officials attending and depth of discussion. This Working Group was beneficial to better understand each other's systems and approach, in light of a future FTA. The UK noted how this Working Group held successful initial discussions on digital and financial services and saw dialogue blossoming in other trade areas. The UK was glad to hear that during this Working Group there was some scoping discussions of chapters that might be included in a future FTA, and this spoke to the good progress the discussions had made.

Conclusions and next steps. The UK (Griffiths) offered to follow-up with US counterparts to answer questions following the publishing of the future relationship between the United Kingdom and the European Union White Paper. The UK also encouraged policy leads to set up follow-up / interim conversations between now and the next TIWG in order to progress discussions. Finally, in conclusion, the UK agreed to pull together the full list of actions and share with US counterparts.

Key Actions and Next Steps:

- Actions summarised from STOs and Continuity Agreements to be carried forward by group leads, as noted.
- UK lead officials to offer, and set up (if necessary), discussions with US counterparts to answer questions following the publishing of the future relationship between the United Kingdom and the European Union White Paper.
- UK/US Policy leads to set up follow-up / interim conversations between now and the next TIWG in order to progress discussions.
- UK to pull together the full list of actions and share with US counterparts.

End of report

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

Richard Salt
Deputy Director, UK-US Trade Policy Group
Department for International Trade