



**USCIB Comments on Negotiating Objectives
Regarding a U.S.-UK Trade Agreement
Docket Number: USTR-2018-0036
January 15, 2019**

On October 16, 2018, the Trump Administration notified Congress of its intention to initiate negotiations on a U.S.-United Kingdom (UK) Trade Agreement. The United States Council for International Business (USCIB) supports negotiation of a comprehensive trade agreement with the UK as part of a broader strategy to open international markets for U.S. companies and remove barriers and unfair trade practices in support of U.S. jobs. We strongly believe that continued U.S.-UK free trade is overwhelmingly in the interests of both countries and their global trading partners, provided that the agreement is a high standard and comprehensive bilateral trade and investment agreement. USCIB's comments are based on the assumption that the UK will be successful in exiting the European Union (EU) by March 29, 2019, allowing for the ability to negotiate trade agreements with trade partners outside of the EU.

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and regulatory coherence. Its members include U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world, generating \$5 trillion in annual revenues and employing over 11 million people worldwide. As the U.S. affiliate of the International Chamber of Commerce, the International Organization of Employers and Business at OECD, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.¹

The UK is an important trade partner for the United States, currently being the 7th largest goods trading partner of the United States. U.S. goods and services trade with the UK totaled an estimated \$231.9 billion in 2017, with exports totaling \$123 billion. In 2017, the United States also had a goods trade surplus with the UK totaling \$3.3 billion, as well as a services trade surplus totaling \$10.9 billion. A successful trade agreement with the UK should cover not just market access for goods, but also address important services issues.

USCIB members see the value of common approaches toward establishing a more integrated and barrier-free U.S.-UK marketplace through cooperation in international standards and regulatory bodies and support closer coordination among regulators in the oversight of entities regulated in both markets to enhance oversight but avoid overlap and duplication. Regulatory discrimination and differentiation between the U.S. and the UK can be a frustrating obstacle to trade, investment and the ability to conduct business.

¹ More information is available at www.uscib.org.



USCIB supported the negotiations of a comprehensive, high-standard Transatlantic Trade and Investment agreement, eliminating of tariff and no-tariff barriers on goods and services trade, including between the United States and the UK. The range of issues that were on the table at the time, ranging from strong investment protections, to increased trade facilitation, and regulatory coherence, continue to be of great importance to our members. Below are several USCIB priority issues for negotiations of a U.S.-UK Trade Agreement.

Non-Tariff Barriers / Digital Trade

Forced Localization policies, or government requirements that foreign companies localize investments, production, services, or other activities, complicate the flow of goods and services between the United States and the UK. USCIB supports the elimination or restriction of such policies in favor of easing the flow of goods. In recent years, countries have also restricted cross border data flow to benefit domestic businesses. A U.S.-UK trade agreement should include commitments that data can flow unimpeded across borders except for limited and well-defined public policy exceptions.

Cross Border Data Flows

With advances in technology and the rapid growth in the use of the Internet, more and more businesses rely on the cross-border flow of data as part of their day-to-day operations. However, at the same time, our members have seen more and more countries seeking to restrict the flow of data across their borders for a wide range of reasons. In many instances, these restrictions represent protectionist policies intended to favor domestic businesses. Where the restrictions are based on legitimate public policy concerns, they could often be designed in ways that have a less negative impact on trade in services. A U.S.-UK agreement should include commitments that data can flow unimpeded across borders except for limited and well-defined public policy exceptions. The agreement should seek to circumscribe exceptions, such as security and privacy, to ensure they are not used as disguised barriers to trade.

For financial services, U.S.-Mexico-Canada Agreement (USMCA) Article 17.17 Transfer of Information is a good example of a strong free flow of data provision that a U.S.-UK agreement can draw upon.

Forced Localization

In recent years there has been an increase globally in the number of government requirements that foreign companies localize investments, production, services, procurements or other activities as a condition of doing business in that country. While some of these are similar to long-standing local content requirements, others present newer and more complex requirements that leave companies little option but to perform activities in a specific country. To the extent that the United States and the UK have such localization requirements, they should negotiate commitments that eliminate or restrict these types of forced localization laws and regulations.



For financial services, USMCA Article 17.18 Location of Computing Facilities prohibits data localization as long as financial institutions provide the access to data to regulators for their regulatory and supervisory purposes. Inclusion of such a provision in a U.S.-UK agreement is critical to the affirmation of this U.S. Government policy for the provision of financial services in a global economy.

Coordination and collaboration on Cybersecurity

In the USMCA Digital Chapter, Article 19.15, the Parties agreed to endeavor to build capacities of the national entities responsible for cyber incident response and to strengthen collaboration and cooperation to identify cybersecurity incidents and engage in information sharing. Such provisions may be expanded recognizing the long-standing relationship between the United States and the UK.

Other key digital priorities for a U.S.-UK agreement include:

- Prohibitions on data storage and data processing taxes, as well as prohibitions on applying taxation measures in a way that discriminates against digital services or is not technologically neutral;
- Prohibitions on requirements to disclose source code or algorithms or grant access to encryption technologies, as provided in USMCA Digital Chapter, Article 19.16;
- Prohibitions on customs duties for digital products and transmissions;
- enhanced coordination on security standards to prevent regulatory divergence and align national regulations with industry-supported international standards and best practices;
- Provisions encouraging parties to secure bilateral agreement under the U.S. CLOUD Act for law enforcement requests to data; and
- Disciplines to help ensure governments do not impose facilities-based or other unjustified and arbitrary requirements on providers of online services and applications.

In addition, U.S. and UK negotiators should ensure that any new digital regulations do not unfairly target firms in either market and do not increase barriers to trade.

Unilateral Measures on Taxation of the Digitalizing Economy

The UK has proposed an interim unilateral taxation measure to address the digitalization of the economy that is inconsistent with current tax principles in fundamental ways. The UK has not yet adopted this measure. USCIB members are concerned that: this measure targets U.S. companies; would undercut a broader international agreement; and may violate income tax treaty obligations and trade obligations of the UK. USCIB supports a solution that complies with treaty obligations (both tax and trade); is based on income tax principles, including taxing profits, not revenues, is based on local value creation by the company, appropriately recognizes the value of technology intangibles in the income allocation factors; minimizes double taxation; and includes strong dispute resolution mechanisms. The OECD is pursuing agreement along these lines and the issues should be decided at the OECD. These digital tax issues are of vital importance to U.S. business and must be resolved as soon as possible to maximize the benefits of a U.S.-UK FTA.



Intellectual Property

USCIB members recognize that both the UK and the United States have high levels of intellectual property (IP) protection that already exist in law and enforcement, albeit under different systems. At a minimum the existing protections and enforcement mechanisms should be enshrined in a U.S.-UK FTA. Some U.S. industries would like to see certain IP issues of concern in the UK addressed. For example, a U.S.-UK agreement provides an opportunity to seek provisions for effective patent enforcement systems that promote early resolution of patent disputes before an infringing product is allowed on the market. In addition, the United States should seek the highest standards for IP, including regulatory data protection for small molecules and biologics are consistent with the negotiating objectives under Trade Promotion Authority. Further, a U.S.-UK agreement should provide patent term restoration to compensate for delays during the marketing approval process for biopharmaceutical products, as well as measures that provide adjustments of patent term to compensate patent owners for delays that occur during the examination and grant of patents. Such delays reduce the effective patent life for some biopharmaceutical products. A U.S.-UK agreement also presents an opportunity for the United States and the UK to demonstrate global leadership and cooperation on IP, and to combat the erosion of IP rights in other areas of the world, including ongoing issues with China.

Media and Entertainment Services

The UK has a vibrant and globally competitive media and entertainment services sector. Bilateral negotiations with the UK therefore provide an opportunity to set an example of high standard commitments for open investment and market access in the media and entertainment services sector. There should be no anachronistic “cultural” discrimination provision nor last century “new services” limitation, which could fundamentally undercut many commitments over time.

Financial Services

Maximize cross-border market access in trade and investment

Ensure broad and deep market access commitments enhancing volumes of cross-border financial services transactions and foreign direct investment. A U.S.-UK agreement should utilize a negative-list approach when scheduling commitments supported by a “ratchet mechanism” that will capture future liberalization in the sector of the trading partner. Traditional free trade agreements have covered very few commitments in the area of cross-border trade in financial services. At a minimum cross-border supply of financial services must include traditional insurance commitments, investment advice, portfolio management and electronic payment systems. The two parties should engage with the financial sector to explore other services that could also benefit from commitments for the cross-border supply of those services.



Subsidies

A U.S.-UK agreement should set a high standard to discipline subsidies to financial services related entities. Provisions in the financial services chapter should discipline the granting of subsidies to state-owned financial institutions with limited exception for certain programs.

Priority Sector Lending

Today governments seek to require foreign financial institutions to participate in programs that require lending in particular sectors or to domestic firms. Often these sectors are not the sectors of typical business expertise for the foreign financial institution and require it to take on risk it otherwise would not. These programs undermine stability and opportunities to engage in other types of business when capital must be reserved for such programs. The United States and the UK should set a high standard to prohibit these types of requirements in trade policy.

Electronic Payment Services

A U.S.-UK trade agreement should follow the financial services commitments in the USMCA, providing for both market access and national treatment, to ensure a level playing field for domestic and foreign-based suppliers of electronic payment services (EPS) in both markets. Regulation should account for, and be respectful of, different business models, encouraging a diverse set of players in the payments space. This competition among players will not only result in greater consumer choice, but will also spur innovation, contributing to a more robust payments ecosystem that will allow all market participants to develop and supply a wide range of payment services with differing product features and value propositions.

The agreement should also apply digital trade provisions to electronic payment services suppliers. Specifically, digital trade provisions of the agreement should: a) ensure EPS suppliers are able to transfer information across borders; and b) prohibit requirements to use or locate computing facilities in a Party's territory as a condition for supplying EPS in that territory.

Customs and Trade Facilitation

Given the dramatic rise in e-commerce globally, the United States should encourage the UK to implement high standard trade facilitation measures for physical goods movement across borders. Acknowledging that the UK has no recent independent experience of its own negotiating trade agreements, USCIB supports the U.S. providing leadership to ensure both countries reduce and constrain protectionism through tariff reductions, facilitate customs clearance procedures, and commit to opening services markets to foreign participants. As two of the largest economies in the world, a trade agreement with best-in-class trade facilitation commitments would set the standard for the rest of the world to follow.



Therefore, the United States should prioritize securing commitments in the following areas: increased customs *de minimis* levels; improving on common data elements for import and export; harmonizing and simplifying customs clearance processes in order to obtain immediate release of goods upon arrival; binding rules on express delivery shipment channels; enhancing requirements to provide electronic portals for traders (that is, facilitating the submission and processing of electronic documentation via Single Window); alignment of respective trusted trader programs (i.e. AEO) requirements and meaningful Mutual Recognition Agreement (MRA); including no restrictions on drawback or duty deferral programs in the agreement; authorizing a robust and centralized system for the issuance and publication of binding rulings on tariff classification, customs valuation and origin; self-certification for origin; elimination of direct export requirement; and harmonizing informal clearance levels to facilitate low value (i.e., under *de minimis* and informal entry levels) shipments (given the dramatic rise in the level of shipments moving cross border because of e-commerce).

The customs *de minimis* level should be raised to be at or similar to the level of the United States, inclusive of duties and taxes. Raising the customs *de minimis* levels contributes to faster and more efficient customs procedures for express shipments, particularly for international express shipments derived from e-commerce, thereby alleviating the workload for the government customs officials charged with targeting and risk analysis. Meaning, this frees up UK Customs to target high-risk imports, such as illegal or illicit material, because those Customs agents can refocus their resources on risk-based targeting and analysis, as opposed to the considerable administrative burdens of clearing small or low-value shipments.

Also, the new, higher customs *de minimis* amount should apply to imports from all origins, and not exclusively goods of U.S.-origin, and that the agreement include no restrictions on drawback or duty referral programs.

In the area of customs valuation, an important topic for our members, the UK should be encouraged to re-instate “First Sale”, a practice which remains in place in the U.S. and benefits UK importers. In addition, we urge the U.S. to reinstate previous U.S. FTA text related to customs valuation of digital content (any type of digital content) embedded on carrier medium (any type of carrier media without exclusion) on the basis of the cost of value of the carrier medium alone. We believe that this an important provision, a precedence that our members can point to, and proves for expanded scope and application of Decision 4.1. Lastly, we urge parties to secure a commitment to prohibit the use of reference price databases and minimum pricing, practices which undermined the WTO Customs Valuation Agreement.

In recent months, there has been increased discussion about the treatment of electronic data transmissions. We believe that the parties should commit to work together to make the WTO Moratorium permanent. Not only should the parties agree to not apply customs duties to electronic data transmissions, parties should prioritize and agree to the non-application of customs processes and procedures to such transmissions.



Moreover, the United States should seek close cooperation with the UK in taking action to address the phenomenon of illicit trade. Illicit trade in goods forms a barrier to increasing market share for legitimately traded products and prevents producers from either side of the Atlantic from reaping the benefits of liberalized trade. Illicit trade is a major concern across industries with negative impacts on fiscal, health, and security matters. To tackle this problem, a U.S.-UK strategy should be devised and implemented that combines robust customs control and law enforcement, strong legislative responses in terms of dissuasive penalties on perpetrators, and enhanced cooperation mechanisms. A trade agreement with state of the art customs control and anti-illicit trade related provisions would set the standard for the rest of the world to follow.

Express Delivery Sector

Supply Chains

We encourage the U.S. and the UK to work together to improve supply chain efficiency through regulatory harmonization. Specifically, the U.S. should seek UK's agreement on the process of harmonizing regulations across the entire supply chain, from product conception to delivery to the consumer, which includes design, manufacturing, distribution and consumption. The agreement should include language on a broad scope of inter-related issues involved in improving supply chain efficiency, which should be addressed holistically to maximize supply chain performance and economic competitiveness. The agreement should include the creation of a supply chain forum that would address issues such as:

- Coordinating among government agencies/regulators with supply chain authorities;
- Engaging with the private sector and ensuring trade community input on key issues;
- Serving as a forum for trouble shooting and rapid response; and
- Establishing a review mechanism to ensure that supply chain commitments are implemented, and real-world supply chain performance levels are improved.

USCIB strongly supports negotiations that work towards reducing barriers and increasing trade in services. Similar to trade facilitation measures, services trade is also complementary to tariff reductions. Services are a part of and enable manufacturing, agriculture, and nearly all other sectors of the U.S. and UK economies. Services are also a key part of supply chains. Nowhere is this more evident than in transportation and logistics services, which are crucial services to the movement of goods. A potential U.S.-UK agreement aimed at increasing trade in services should contain binding market access and national treatment commitments in transportation and logistics services.

Postal Services

Additionally, the postal/courier sector is unique in that every country in the world has a de facto market dominant/monopoly player—their national postal operator. The United States and the UK should ensure that some of the unique challenges associated with market dominant players (*i.e.* national postal operators) in the sector are addressed with appropriate safeguards against abuse of



that position. In order to ensure their businesses have access to world-class delivery service options, the United States and the UK should commit to fair, non-discriminatory treatment of non-postal service providers through the inclusion of a delivery services sectoral annex.

Finally, regulatory coherence on standards is a laudable goal that, if achieved, could serve to eliminate many non-tariff barriers, which is consistent with both countries' stated intentions for negotiations.

Improved Regulatory Cohesion

Improved regulatory cohesion across the United States, the UK, and the European market, would likely be among the greatest gains from a future trade agreement between the United States and the UK. The objective of such improved regulatory cohesion is to facilitate trade in a way that ensures the existing market remains intact. It should thus be a key component in furtherance of the liberalizing trade objective that is driving the U.S.-UK trade relationship. Regulatory cohesion should not lead to the adoption of unnecessary and unscientific obstacles to trade under the guise of harmonization and cohesion, but rather to a regulatory environment that is based on a full assessment of relevant and sound scientific evidence and is as less trade restrictive as possible while acknowledging different policy objectives and regulatory preferences that may exist.

Harmonizing certification procedures would eliminate many of the challenges associated with trade of manufactured goods. In addition to differences between certification and standards testing, variations between regulations complicate trading. The UK and the United States should also try to address any potential material problems of regulatory or standards divergence in the high-tech area which cause competitive imbalances between the UK and U.S. businesses. Mutual Recognition of Good Manufacturing Practices (GMP) for pharmaceuticals should also be included, in order to avoid duplicative site inspections. A bilateral U.S.-UK MRA would be a logical step, replicating for the UK what is in the U.S.-EU GMP MRA.

In the chemicals sector, we assume that the UK will continue to participate in the chemical management regime for the EU (REACH - Registration, Evaluation, Authorisation and Restriction of Chemicals) after it ceases to be an EU member. The UK's continued participation in REACH should not preclude the United States and the UK from engaging in efforts to enhance regulatory cooperation in the assessment and management of chemical substances.

The United States and EU made progress on regulatory cooperation for the chemicals sector during the TTIP negotiations. We hope that the UK will want to build on that progress in regulatory cooperation discussions with the United States. The United States has since made further progress in the Sectoral Annex for Chemical Substances in the USMCA, and the ongoing U.S.-Canadian Regulatory Cooperation Council (RCC) has made some significant progress in coordination and cooperation on chemical assessments.



Based on this progress, we recommend that the U.S.-UK negotiations create a distinct track for regulatory cooperation for the chemicals sector and build on the outcomes of the USMCA and the RCC. Such an approach will allow the U.S. and UK governments and industry the opportunity to identify what we can accomplish in the short-term and how we can lay the ground work for longer term progress and success. It would also be useful in helping to advance progress in U.S.-EU regulatory cooperation discussions. In particular, we hope that there would be an opportunity to facilitate regulator-to-regulator dialogue on critical issues such as prioritization of chemicals for review, and classification.

USCIB also urges the United States and the UK to explore how to deepen regulatory cooperation and coherence in fintech developments, complimenting multilateral and other bilateral efforts aimed at promoting cross-border financial technology development and growth.

Investment

USCIB supports strong investor and investment protections. Those protections, which include robust investor-state dispute settlement (ISDS) rule-of-law provisions must be included in any final trade agreement. The provisions concluded in USMCA on ISDS, favoring specific sectors and not providing comprehensive protections to all investors alike should not be viewed as precedent.

USCIB also does not support any proposal of a multilateral investment court, such as the one proposed by the EU. Such a court has the potential to create many serious problems for U.S. investors (thereby adversely affecting American workers, shareholders and communities), removing the current advantages of the well-established arbitration system, which includes highly qualified international investment experts and an independent de-politicized process.

U.S.-UK restrictions on FDI should be reduced to a minimum. An ISDS mechanism through which businesses can seek redress directly from a government for expropriation, discriminatory treatment, and other treaty violations, is a crucial component of the agreement. Certain types of legislation cannot be adjudicated by domestic laws and all governments have the capacity to be discriminatory. ISDS depoliticizes important investment rules by putting them in the realm of neutral and legal arbitration. Although ISDS has been the subject of some recent criticism, it remains necessary to adequately ensure the fair treatment of foreign investors. It does not undermine any individual nation's sovereignty. Simply, it ensures that states follow World Trade Organization (WTO) and other basic obligations in making regulation non-discriminatory.

What constitutes an investment must be defined broadly, to include investment agreements, without carving out any industries or sectors from the protections of this chapter. The pillars of the investment chapter also must remain intact, including national treatment, most-favored-nation (MFN) treatment, minimum standard of treatment, guarantees for compensation in case of



expropriation, free transfers, prohibition of performance requirements, and ISDS. A U.S.-UK agreement should include protection from performance requirements to purchase or use a particular technology for all sectors, including financial institutions. It should also include protection from any requirement to transfer technology for all sectors, including financial services. It is also critical that an agreement reached with the UK include rules prohibiting Parties from requiring companies to transfer their technology, production process, or other proprietary information to persons in their respective territories as a condition of market access.

Government Procurement

A U.S.-UK agreement should ensure that financial institutions will not be discriminated against in the procurement of services by the government and its related entities. Too often in trade agreements government procurement is excluded through government procurement chapters or in financial services chapters themselves. A new and fresh approach is warranted to ensure this type of business continues to be open to financial institutions.

Chemicals Sector

Trade in chemicals is a strong feature of the U.S.-UK trading relationship, totaling \$15.1 billion in 2017. U.S. exports of chemicals to the UK were \$6.6 billion in 2017 and U.S. imports of chemicals from the UK were \$8.5 billion. The UK is an important market for U.S. chemicals exports, advantaged by significant investments in chemical manufacturing in the United States and highly integrated value chains.

The United States and the UK should immediately eliminate their respective chemicals tariffs under Harmonized System Chapters 28-40 without any transition periods or staging of tariff reductions. As the amount of trade is substantial in both directions, our respective chemical industries would benefit greatly from the savings enabled by eliminating tariffs on chemicals. Tariff elimination would increase the competitiveness of U.S. exports of chemicals, resulting in increased exports of U.S.-made chemicals to UK customers and partners.

Chemical manufacturers will benefit from duty-free trade only if the rules of origin for chemical substances are flexible, simple, and transparent. We recommend that the United States build on the rules of origin outcomes of the USMCA, in particular by ensuring that the chemical reaction rule is available to traders for conferring origin and avoiding regional value content requirements. In this regard, we propose a menu-based approach that has the fewest number of exceptions as possible.