

A View toward the Post-Brexit Future: the UK in the NAFTA? Part II

Kluwer Arbitration Blog

February 13, 2018

[Patrick Pearsall, Thomas Wingfield \(Jenner & Block LLP\)](#)

Please refer to this post as: Patrick Pearsall, Thomas Wingfield, 'A View toward the Post-Brexit Future: the UK in the NAFTA? Part II', Kluwer Arbitration Blog, February 13 2018, <http://arbitrationblog.kluwerarbitration.com/2018/02/13/view-toward-post-brexit-future-uk-nafta-part-ii/>

In the first part of this article, we discussed the need to broaden the debate about the UK's future trading relationships, touched upon some potential advantages of the UK joining the NAFTA and traced the idea's limited history.

Is there political will?

These days, the idea remains on the periphery, even out of sight.

Each of the three NAFTA members is open to agreement with the UK, at least unilaterally.[fn] The UK Commons International Trade Committee has heard that "Both the Mexicans and the Canadians have publicly stated that they would welcome the UK to accede to NAFTA" (Oral evidence: UK-US Trade Relations, HC 481-I, 25 October 2017, Questions 70-71).[fn] President Trump has stated that "no country that could possibly be closer than our countries [...] We have been working on a trade deal which will be a very, very big deal, a very powerful deal, great for both countries and I think we will have that done very, very quickly." [fn] G20 Press Conference, 8 July 2017.[fn] Mexico has separately publicised its openness to negotiation with the UK. Likewise, Canada. Outside government, John Weekes, former chief NAFTA negotiator for Canada, has stated that "[i]n many ways it would make a lot of sense for the UK to join the NAFTA [...] You wouldn't have to sit down and work out de novo what a trade agreement with the US would look like, you would start with something that is already there." Likewise, "it would make a lot of sense from a UK perspective to have one agreement with the three North American countries rather than three agreements with the North American countries - especially when the North American countries have one agreement with each other." [fn] Prosperity Conference, 26 April 2017, Trade Panel: Prospects of a North Atlantic and other Free Trade Agreements. Australia's High Commissioner to the United Kingdom, Alexander Downer, said much the same with respect to the TPP: "Setting up new structures would be a laborious way to start." [fn]

In the UK itself, the NAFTA has been mentioned surprisingly few times in parliamentary debate, and generally only in passing. Last year, in the House of Lords following the EU referendum, Daniel Brennan observed "[a United States trade agreement with the UK] might bring us into or next to the NAFTA with Canada and Mexico. I am not recommending it but pointing out that there is an actual alternative." [fn] Outcome of the European Union Referendum, 5 July 2016, Lord Brennan, 15:48 (Hansard).[fn] Again in the House of Lords, following the last Queen's Speech, former Foreign Secretary David Owen asked "What would happen if we were able to get a NAFTA mark 2 with Canada and the United States? That is not at all impossible." [fn] Queen's Speech, 5th Day, 28 June 2017, Lord Owen, 19:09 (Hansard). [fn]

The new House of Commons International Trade Committee has re-commenced the first session of an inquiry into UK-US trade relations, which was originally interrupted by the June 2017 general election. Its terms of reference include “what involvement, if any, the UK should seek to have in the North American Free Trade Area or any future regional free trade agreement involving the USA.”^[fn] ‘UK-US trade relations inquiry launched’, ITC, 16 October 2017.^[/fn] Its Chair commented that “Ministers are only at the point of informal discussions with the US” and “[c]learly the Government has a lot of work to do before negotiators sit down for formal talks with their US counterparts”.

For now, the Government itself seems to be keeping its cards close. Effectively, the official position remains unchanged since before the election: “it is too early for the Government to outline the details of our position relating to a future trade agreement with the US.”^[fn] Liam Fox letter to Angus MacNeil, 26 February 2017.^[/fn]

However, it has more recently been reported that the NAFTA is one of several options considered as part of “Project After”, the Department of International Trade’s plan B brainstorming in the event of no deal with the EU. Here the NAFTA sits alongside other theoretical possibilities including the Trans-Pacific Partnership (“TPP”), free ports and unilateral free trade i.e. removing all tariffs altogether. The Department for International Trade stated: “We are confident that we will find a deal that works for Britain and Europe too. But it is our responsibility as a government to prepare for every eventuality, and that is what we are doing.”^[fn] *Newsnight*, 9 October 2017; ‘Brexit: Liam Fox, transition and “Project After”’, *BBC*, 9 October 2017.^[/fn]

What can the UK do now?

Prime Minister May has said she is “optimistic” about a deal with the US, but that there is a “limit” as to what can be done before Brexit.^[fn] G20 Press Conference, 8 July 2017.^[/fn] The EU is, amongst other things, a customs union. Pursuant to the EU’s common commercial policy, the EU has exclusive competence to negotiate trade agreements on behalf of the member states as a collective. Hence, the UK is restricted in what it can do whilst still a member of the EU. The UK Government has repeated that the UK will honour its obligations as an EU member state prior to Brexit.

It is clear, then, that the UK will not conclude any new free trade agreements until after Brexit. It is less clear, however, what the UK can do before Brexit. According to Secretary of State Liam Fox, “[r]emaining true to those obligations does not [...] preclude us from having discussions on our future trading relationships.”^[fn] Liam Fox letter to Angus MacNeil, 26 February 2017.^[/fn] The Commons International Trade Committee reported that “[w]hile there seems to be broad consensus that the UK can, legally, undertake informal discussions with non-EU countries about future trade relationships, it is not clear how far the Government can go towards negotiating new agreements on the spectrum from having informal discussions to having a deal ready to sign the day after the UK leaves the EU.”^[fn] *UK trade options beyond 2019*, House of Commons International Trade Committee, First Report of Session 2016-17, published 7 March 2017, ¶165.^[/fn] The Committee concluded that, “[g]iven that striking new FTAs is a major strand of the UK’s Brexit strategy”, this lack of clarity was “untenable”. Whilst “accept[ing] that there is no precedent for this situation—and that the EU’s view could differ from that of the UK”, the Committee requested that the Government set out clearly its position on how far it can go.^[fn] *UK trade options beyond 2019*, ¶201.^[/fn] Although the answer was waylaid for seven months by the intervening election,^[fn] Liam Fox letter to Angus MacNeil, 20 April 2017.^[/fn] the Government did respond, albeit with questionable clarity. The Government drew a distinction between negotiations of trade agreements and “discussions on our future trading relationships”, but declined to elucidate further: “it would not be appropriate to publish anything that may undermine our negotiating position”.^[fn] ‘UK trade options beyond 2019: Government Response to the Committee’s First Report of Session 2016-17’, published 17 November 2017, responses 21 & 22.^[/fn]

There may be some irony that the EU's legal competence currently prevents the UK from concluding new trade agreements to trade outside of the EU. Ultimately, however, the more important issue may be what the UK is able to achieve in a post-Brexit transition period. Very recently, the EU declared that "[d]uring the transition period, the United Kingdom may not become bound by international agreements entered into in its own capacity in the fields of competence of Union law, unless authorised to do so by the Union." [fn] XT 21004/18 ADD 1 REV 2, 29 January 2018, ¶16. [/fn]

Is it either-or?

The UK Parliament's International Trade Committee also asked "whether the UK should use informal discussions with the US to influence its formal trade negotiations with the EU." [fn] First session, UK-US trade agreement examined, ITC, 25 October 2017. [/fn] Further questions spring to mind - would doing so poison the EU negotiations? or show that the UK means business when it says 'no deal is better than a bad deal'? will non-EU nations be willing to reach agreements in principle when there is such uncertainty about the UK's agreement with the EU? Arguably however, these kind of questions do not go deep enough into viewing the UK's global negotiations in the round.

Even if joining the NAFTA would actually be to the UK's benefit, there may be no NAFTA to join. [fn] It also appears increasingly probable that the TPP (without the US) will come into existence. Recently, the remaining 11 TPP members announced their intention to sign a Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") in March 2018. Much of the discussion in this article would also apply to a future CPTPP. Britain has held informal talks with CPTPP members. Greg Hands, UK Minister of State for Trade Policy, is reported as saying "Nothing is excluded [...] With these kind of plurilateral relationships, there doesn't have to be any geographical restriction" (Financial Times, 2 January 2018). Liam Fox, International Trade Secretary, is reported as saying that press reports were "rather overblown" and the UK wanted to see how the TPP evolved after the US exit before making such a move (BBC, 3 January 2018). [/fn] In the first part of this article, we described the NAFTA as bringing a degree of certainty, but the NAFTA has perhaps never been so uncertain. Prime Minister Trudeau has said renegotiations could end in a "win, win, win", but President Trump has never renounced his statement that the NAFTA is "the worst trade deal ever".

Yet, the renegotiations continue. In itself, that is telling. Talks have been extended. The reality may not be as dramatic as some reports suggest.

And, at times of flux for both sides, the NAFTA may also be at its most flexible and welcoming. After all, President Trump is on record both for threatening to terminate the NAFTA and for being willing to cut a quick deal with the UK. Perhaps these should not be considered separately: perhaps the UK might inject some new lifeblood into the NAFTA.

Joining the NAFTA may or may not be a solution to the UK's trade in the post-Brexit future. Even if the possibility is far-fetched, it is a useful exercise to consider the question. What might initially seem no more than a stimulating idea may look increasingly worthy of consideration. These are the kind of questions that should be asked now, before it becomes too late.