

ISSUE BRIEF **05.18.22**

UK, Texas Should Proceed Carefully with, but Not Abandon, Bilateral Trade Deal

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INTRODUCTION: ECONOMIC AND POLITICAL MOTIVATIONS

According to recent reports, the United Kingdom, frustrated by the reluctance of the Biden administration to conclude the free trade agreement negotiations begun by the Trump administration, or even to seek the essential congressional authorization to do so,¹ has announced through its trade policy/international development minister Penny Mordaunt that it will pursue commercial arrangements with up to 20 individual U.S. states, beginning with Texas.² If the approach is successful, an arrangement could be concluded with Texas by October 2022, and with another seven states soon thereafter. These eight states combined account for 20% of the U.S. economy, and based on recent events, the Texas state government evidently sees few downsides to moving forward.

It is no surprise that UK officials have begun the negotiating process with Texas and other states that seem willing to talk, including California and Utah. If Texas were a sovereign nation, it would be the ninth largest economy in the world,³ just ahead of Brazil—and California's GDP is even larger.⁴

The UK is still suffering from an economic downturn largely caused by its withdrawal from the European Union at the end of 2020,⁵ making new commercial relationships, however circumscribed, attractive. According to UK data, Texas

(in 2001) exported \$9.4 billion worth of goods to the UK (including oil and gas, aerospace products, petroleum and coal products, basic chemicals, and computer equipment) and \$5.5 billion worth of services (including business management and consulting, travel and tourism, passenger fares, equipment installation, maintenance and repair, and industrial royalties).⁶ This made the UK one of Texas' largest export markets. Moreover, UK subsidiaries in Texas accounted for nearly 120,000 jobs, and exports to the UK supported more than 63,000 jobs.⁷

The Texas Economic Development Corporation states that the UK ranks No. 1 for Texas' private industry employment from foreign-owned firms. They cite excellent air transportation to the UK, the absence of corporate and personal income taxes, and high economic security.⁸ They might also have mentioned the expanding Port of Houston and Texas' excellent rail and road infrastructure, including an interstate highway system that allows goods from Texas to reach most of the United States within a few days. On Texas' part, given that the UK, despite its withdrawal from the European Union, is the fifth largest economy in the world (ranking just ahead of France but well behind Germany), closer relations may make sense. If one thinks of increased trade opportunities between the world's fifth largest economy (the UK) and the ninth largest (Texas), it is economically



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difficult to reject the idea out-of-hand, particularly when the Biden administration has effectively taken itself out of the business of negotiating trade agreements. Although the concept of the “Indo-Pacific Economic Partnership,” proposed by the Biden administration months ago,⁹ is still seemingly under discussion within the administration, it apparently would not include any market-opening measures on the part of the United States, which, in the opinion of many observers, would doom it to failure.

Thus, even if no political considerations were motivating either the UK or Texas, the prospect of enhancing an already robust commercial relationship is attractive. Additionally, for the UK, the chances of doing something significant may be greater with Texas than, for example, India, which has resisted trade liberalization and any meaningful regional trade agreements for decades.

LEGAL AND CONSTITUTIONAL CONSTRAINTS

In an interesting historical footnote, in 1838 England and the then-independent Republic of Texas concluded three treaties, one of which was a “treaty of commerce and navigation” that entered into force in 1842.¹⁰ Unfortunately for the UK and Texas, today’s legal and constitutional issues are much more complicated than 180 years ago. Serious constitutional constraints apply to agreements concluded by U.S. states with foreign nations. Most significantly, the Commerce Clause of the Constitution gives Congress the exclusive power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”¹¹ Scholars note that the meaning of “commerce” is not defined in the Constitution, and most of the court cases applying the Commerce Clause focus on relations between the states rather than with foreign nations.

However, with regard to agreements with foreign nations, the Constitution is more restrictive:

No state shall enter into any treaty, alliance, or confederation ...

*No state shall, without the consent of Congress ... enter into any agreement or compact with another state, or with a foreign power.*¹²

This language and the Commerce Clause would prevent Texas (or any other state) and the UK from entering into any formal international agreement that would, *inter alia*, affect tariffs or any similar charges or anything that clearly falls under the definitions of “commerce,” “treaty,” or “agreement.”

However, there have been multiple instances where U.S. states have entered into less formal arrangements, often termed “memoranda of understanding” (MOUs), with foreign states or governments that appear to have been generally accepted if they are considered non-binding. For example, after the Trump administration withdrew from the Paris climate accord, California, among other U.S. states, concluded widely publicized MOUs with other nations. California did so with China in November 2018 (renewed in April 2022), effectively promising to follow the requirements of the Paris accord. However, both the 2018 and the 2022 MOUs specifically note that they are voluntary, not legally binding (as indeed was the Paris accord), and must comply with “all applicable laws.”¹³

Some eyebrows were raised in mid-April 2022 when Texas Governor Greg Abbott concluded MOUs with each of the four Mexican states bordering Texas,¹⁴ with the stated intention of reducing illegal immigration, drug trafficking on their highways, and potential terrorism. However, the arrangements have no dispute resolution mechanism, though Governor Abbott reserves the right to terminate the agreements for non-performance by the Mexican states. Still, the governor’s office, if pressed, can reasonably argue that they are only MOUs and not international agreements (suggesting form is more important than substance) and that, in the end, they are not legally binding. Most of the criticism of these actions—including from the White House¹⁵

and many Republicans as well as Democrats in Texas—focused on the enormous disruption of cross-border trade that cost businesses hundreds of millions of dollars and further encouraged inflation. Critics also pointed to the fact that immigration law and policy is the exclusive province of the U.S. federal government but chose not to mention the alleged constitutional violations of such agreements.¹⁶ (At the same time, Abbott began sending busloads of undocumented immigrants to Washington, D.C.).¹⁷ In the absence of a federal challenge to the Texas MOUs, which for obvious reasons has not been forthcoming, the governor is unlikely to experience any downsides as a result of his actions, and the MOUs, for whatever they are worth, are likely to stand.

In the past, less controversial arrangements have been concluded as MOUs between cities on the U.S.–Mexico border and the adjacent border states. For example, the twin cities of Nogales, Arizona, and Nogales, Sonora, and the states of Arizona and Sonora (which have cooperated on a variety of issues of mutual interest since the Arizona–Mexico Commission was founded in the 1950s) have concluded a series of non-binding MOUs. In one of these agreements, the Arizona Department of Commerce and the Secretariat of the Economy of the State of Sonora formed a partnership to “drive innovation, entrepreneurship and technological advances in the region.” That agreement is also termed a “memorandum of understanding” and specifically states that “it is non-binding and does not create any legal or binding obligations between the states.” The MOU also states that “Nothing in this Memorandum of Understanding should be read to conflict with the laws and regulations of the United States of America or the United Mexico States (or any state or local jurisdiction), or with any relevant international agreements.”¹⁸

Abbott’s MOUs incorporate neither disclaimer, but by their nature they are based on good faith and are not legally enforceable.

WHAT COULD A UK–TEXAS MOU LAWFULLY ADDRESS?

It seems likely that the UK and the Texas governments are well aware of the legal constraints noted above and will seek to conclude an MOU with which they can make a credible case that they are not violating any federal constitutional or legal regulations. While they must avoid trying to lower tariffs and dealing with standards that are currently addressed at the federal level in the U.S. (including any issues related to immigration), they could address areas such as the mutual recognition of professional qualifications and the elimination of existing barriers to doing business in each other’s territories.

One approach that could be considered would be to review the failed negotiations between the United States and the European Union aimed at a mammoth free trade agreement in 2014–2016, the “Transatlantic Trade and Investment Partnership” (TTIP),¹⁹ and to draw on certain provisions of the USMCA,²⁰ limiting the discussion in each case to areas that are not reserved for the U.S. federal government. While the majority of the chapters of both accords are related to matters within the exclusive control of the U.S. federal government—such as customs, trade facilitation, and competition policy—it should be possible to draft language that deals with efforts to facilitate the movement of raw materials, energy, and other commodities (the latter of vital concern to Texas) and encourage close cooperation. The substance of the Arizona–Mexico MOU on support for entrepreneurs and technology generators, discussed above, might also be made applicable, *mutatis mutandis*, to the UK and Texas. Nor would there seem to be any barrier to a UK–Texas MOU that promised to improve conditions for small- and medium-sized businesses (SMEs) in both countries—especially since such provisions in recent trade agreements (including the USMCA) do little more than encourage the development of better websites to host critical information on exporting and importing, and set up committees to discuss SME issues in the future. Additionally, there are often opportunities to increase transparency,

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whether at the state, federal, or international level, usually on the basis of aspirations and best efforts rather than binding obligations.

Since formal trade agreements and MOUs are both fond of aspirational language, there would be nothing in a UK–Texas MOU to prevent references to economic cooperation and development assistance to businesses both large and small; improved port, road, rail, and communications infrastructure; and steps to encourage increased bilateral investment. And there is always the option of creating more committees to jointly study important issues and make recommendations. For example, while the “North American Competitiveness Committee” is a creature of the USMCA (Chapter 26), Texas and the UK could create a similar committee that could be called upon by stakeholders to address commercial issues confined to the state of Texas. Nor is there anything obvious that would prevent the parties from drawing on USMCA Chapter 28 (good regulatory practices) and Chapter 29 (publication and administration) again, as long as the undertakings are aspirational and non-binding.

Other potential areas of agreement depend only on the creativity of the negotiators. For example, while student visas are matters for federal immigration law in the United States, federal law would not prevent Texas from offering preferential admission to Texas public universities (with in-state or otherwise reduced tuition) for UK residents, with the UK supplying reciprocal benefits. (The state may already do this for certain Mexican residents, as does Arizona.) Similarly, steps could be taken to encourage both parties to increase their budgets for promoting tourism and trade fairs in the other’s country/state.

One obvious question is whether a UK–Texas MOU along these lines would have any economic significance as opposed to political benefits for both parties. The answer is probably “not a great deal.” Still, some provisions might be useful to certain stakeholders in some circumstances, and, other than administrative and travel costs, the expense of concluding such MOUs would be minor. In an era when the U.S. federal government is unwilling or unable

to conclude trade agreements, state-to-foreign-government arrangements, if undertaken consistently without violating the U.S. Constitution and U.S. law, may be worth considering. After all, for many government officials and other stakeholders, some freer trade is better than none.

ENDNOTES

1. “Trade Promotion Authority (TPA),” which allows the president of the United States to submit a trade agreement to Congress under conditions whereby Congress cannot change the agreement or unreasonably delay it, but only vote it up or down, expired July 1, 2001. The Biden administration has made no effort to seek TPA renewal, legislation that would be required before any new trade agreement could be submitted to Congress. See “Trade Promotion Authority Expires July 1,” National Small Business Association, June 29, 2021, <https://nsba.biz/tpa-expires-july-1/>.

2. Farouq Suleiman, William James, and Chris Gallagher, “Britain Targets First State-by-State U.S. Trade Deals Next Month,” Reuters, April 21, 2022, <https://www.reuters.com/world/uk/britain-targets-first-state-by-state-us-trade-deals-next-month-2022-04-21/>.

3. “Texas’ Economic Dominance Continues, Ranks No. 1 in U.S. in GDP Growth,” Yahoo!Finance, March 31, 2022, <https://finance.yahoo.com/news/texas-economic-dominance-continues-ranks-210700098.html> (citing 2019 data).

4. “GDP by State 2022,” World Population Review, 2022, <https://worldpopulationreview.com/state-rankings/gdp-by-state>.

5. See, e.g., Joe Mayes, “Just a Year of Brexit has Thumped U.K.’s Economy and Businesses,” Bloomberg, December 21, 2021, <https://www.bloomberg.com/news/articles/2021-12-22/how-a-year-of-brexit-thumped-britain-s-economy-and-businesses>.

6. “UK–Texas Trade and Investment Highlights,” Gov.UK, June 25, 2021, <https://www.gov.uk/government/publications/uk-texas-trade-and-investment-highlights/uk-texas-trade-and-investment-highlights>.

7. Ibid.

8. See “United Kingdom FDI and Trade with Texas,” Texas Economic Development Corporation, accessed April 28, 2022, <https://businessintexas.com/foreign-investment/united-kingdom/>.

9. Brock R. Williams, Mark E. Manyin, and Rachael F. Feifer, “Biden Administration Plans for an Indo-Pacific Economic Framework,” Congressional Research Service, February 25, 2022, <https://crsreports.congress.gov/product/pdf/IN/IN11814>.

10. “Treaty of Commerce and Navigation Between Her Majesty and the Republick of Texas, 1842,” Tarlton Law Library, April 15, 2019, <https://tarlton.law.utexas.edu/treaty>.

11. U.S. Const., art. I, § 8, cl. 3.

12. U.S. Const., art. I, § 10.

13. Memorandum of Understanding between the Ministry of Ecology and Environment of the People’s Republic of China and the State of California of the United States of America, April 18–19, 2022, <https://www.gov.ca.gov/wp-content/uploads/2022/04/4.18.22-China-CA-MOU.pdf>; see sections V and VII.

14. See, e.g., “Memorandum of Understanding between the State of Texas and the Free and Sovereign State of Nuevo Leon,” April 13, 2022, https://gov.texas.gov/uploads/files/press/EL_GOBIERNO_DEL.pdf.

15. Ted Hesson and Lizbeth Diaz, “Texas Governor Snarls Border Traffic, Buses Migrant in Effort to Pressure White House,” Reuters, April 14, 2022, <https://www.reuters.com/world/us/texas-trucker-border-inspections-disrupting-supply-chain-raising-prices-white-2022-04-13/>.

16. See Sandra Sanchez, “South Texas Border Leaders say Bridge Closures are ‘Self-inflicted Wounds’ caused by Governor,” *Border Report*, April 12, 2022, <https://www.borderreport.com/regions/texas/south-texas-border-leaders-say-bridge-closures-are-self-inflicted-wounds-caused-by-governor/> (citing criticisms, inter alia, by business stakeholders and U.S. Customs officials); “Editorial: AS Abbott Plays Politics at the Border Texans Pay the Price,” *Austin American Statesman*, April 16, 2022, <https://www.statesman.com/story/opinion/2022/04/16/gov-abbots-reckless-border-stunts-doing-more-harm-than-good/731487001/>.

17. Hesson and Diaz, “Texas Governor Snarls Border Traffic.”

18. “Memorandum of Understanding between the Arizona Commerce Authority of the State of Arizona of the United States of America and the Secretariat of the Economy of the State of Sonora of the United Mexican States (the “Participants”) to Cooperation on Initiatives Aimed at Fostering a Vibrant Innovation Network to Support Entrepreneurs and Technology Generators in the Arizona-Sonora Region,” June 15, 2018, <https://www.azmc.org/media/1432/economic-development-mou.pdf>.

19. See, e.g., Kimberly Amadeo, “Transatlantic Trade and Investment Partnership (TTIP): What Happened to the Big EU-US Trade Deal?,” *The Balance*, November 29, 2021, <https://www.thebalance.com/transatlantic-trade-and-investment-partnership-ttip-3305582> (discussing major issues addressed and reasons the negotiations failed).

20. United States–Mexico–Canada Agreement, Office of the United States Trade Representative, November 30, 2018 (entered into force July 1, 2020), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

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Cite as:

Gantz, David. 2022. *UK, Texas Should Proceed Carefully with, but Not Abandon, Bilateral Trade Deal*. Issue brief no. 05.18.22. Rice University’s Baker Institute for Public Policy, Houston, Texas.

<https://doi.org/10.25613/WNON-4758>

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