



## Department for International Trade Consultation Response

### UK accession to the CPTPP

Trade Justice Movement  
October 2018

#### About the Trade Justice Movement

The Trade Justice Movement is a UK-wide network of seventy civil society organisations, with millions of individual members, calling for trade rules that work for people and planet. Our members include trade unions, NGOs, consumer groups and faith organisations. Together we are calling for trade justice, where the global system of trade ensures sustainable outcomes for ordinary people and the environment.

A list of current members is [available here](#).

The Trade Justice Movement has deep concerns about the Government's post-Brexit trade policy. At this critical time, it is essential that we lay down norms for international trade which promote sustainable development and protects the environment. We believe that civil society has a crucial role to play in the development of trade policy, and has too long been left out of the conversation. In this consultation we outline our specific concerns about the UK joining the CPTPP and lay out a framework for what civil society expects in future trade agreements.

#### What does your organisation think would be the greatest benefits for individuals/sectors that you represent, or the UK as a whole, were the UK to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and why?

The majority of available impact studies consider the TPP: the twelve-country agreement that includes the US, rather than the CPTPP which excludes the US. A relatively small number of clauses were suspended from the TPP to form the CPTPP when the US withdrew; these clauses could be reinstated if the US decided to rejoin. This response therefore refers to studies of the CPTPP where possible but otherwise uses data from TPP analyses.

#### *Impact studies suggest minimal gains and likely job losses*

Impact studies suggest that the CPTPP will at best bring minimal benefits in some areas to participating countries and is likely to entail significant losses in others. For example, one of the most optimistic studies forecasts gains for New Zealand, after 12 years of the agreement being implemented, of between 0.3% and 1% of gross national income against their predicted 2030 baseline. Since it takes twelves years to realise the gains, they are vulnerable to global economic shocks which are not taken into account in the studies. A study undertaken using the United Nations Global Policy Model (UNGPM) finds that TPP could in fact generate losses.<sup>1</sup>

There are a number of issues with the impact studies undertaken for the TPP and the CPTPP. Studies which project gains assume full employment and constant income distribution (so that no one group sees higher gains or losses than another) in all countries as well as an automatic investment of increased

<sup>1</sup> Capaldo, J., Izurieta, A. and Sundaram, J.K. (2016) Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement  
<http://www.ase.tufts.edu/gdae/Pubs/wp/16-01Capaldo-IzurietaTPP.pdf>

profits in productive activities; this excludes some of the major risks of trade liberalisation.<sup>2</sup> For example, the most-cited report projects no employment gains or losses for any participating economy but this is because “the model assumes that all economies operate constantly in full employment and that therefore workers in a sector that contracts as a result of a trade deal can be automatically absorbed into a different sector.”<sup>3</sup> The report finds that the TPP creates no net increase in exports and predicts GDP growth of between 0.5% and 2.2% for nine of the 11 countries, with Malaysia projected to experience a 6.1% growth and Vietnam 13.6%. Other studies using the same methodology find zero impact on GDP for all countries except Vietnam.<sup>4</sup> The study using UNGPM modelling finds net job losses across participating countries of 770,000 by 2025 under a TPP scenario.

Impact assessments currently do not include the UK, making extremely difficult to predict the impact of UK membership of the CPTPP. However it is of note that the gains for New Zealand are predicted in a context where CPTPP countries are the destination for 30% of its goods exports, include four of the country’s top 10 trading partners and are a source of approximately 65% of FDI.<sup>5</sup> The UK does not have the same regional interests as New Zealand and has lower levels of trade with the group as a whole: only 7% of UK trade is with countries in the CPTPP.<sup>6</sup> It is therefore highly likely that the UK would see much lower gains than New Zealand.

Predictions in relation to impact are further complicated by the fact that the CPTPP contains suspended clauses from the original TPP agreement, which would come into force if the US rejoined the deal. Given the size and importance of the US economy, the impact of joining the CPTPP could be quite different to joining a revived TPP.

#### *The UK cannot shape the deal to reflect its own priorities*

It is however clear that the UK would not be able to mitigate any negative impacts or shape the deal to ensure positive impacts. This is because the UK would be joining a deal that has already been completed; it would be required to make concessions but it is unlikely to be able to extract significant reciprocal concessions from the other participating countries. Not only does this reduce any potential benefits of joining, it is also likely to influence the expectations of future trading partners, further curtailing UK trade policy.

Any possible gains to the UK are further undermined by the fact that, assuming the UK successfully transfers EU deals into its own law, it already has deals with 7 of the 11 CPTPP countries and proposes to embark on negotiations with a further two: Australia and New Zealand. It is unclear to what extent joining the CPTPP would add to these existing deals. Further, the UK had the ability to influence the EU deals and will be able to shape its own future deals, which means that there is a greater chance of them reflecting UK priorities, including environmental and human rights standards.

*Membership of CPTPP would appear to be at odds with the Chequers statement*  
Whether it is in fact feasible for the UK to join the CPTPP would appear to depend significantly on the outcome of the EU-UK negotiations on the future relationship. For example, it seems unlikely that the UK will be able to join if it is not able to offer tariff reductions in areas of importance for existing CPTPP members, which would be the case if the UK aligned its tariffs with those of the EU. In addition, the

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<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> Burfisher, M. E. et al. (2014). ‘Agriculture in the Trans-Pacific Partnership’. ERR-176, October, U.S. Department of Agriculture, Economic Research Service, Washington, DC. <https://ageconsearch.umn.edu/bitstream/188429/2/err176.pdf>

<sup>5</sup> New Zealand Department for Foreign Affairs and Trade (2018) *CPTPP: National Interes Analysis* <https://www.mfat.govt.nz/assets/Uploads/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-National-Interest-Analysis.pdf> p. 4

<sup>6</sup> UK Department for Internaitonal Trade (2018) *An information pack for the Consultation relating to the UK potentially seeking accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/745951/FTA\\_brochure\\_CPTPP\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/745951/FTA_brochure_CPTPP_FINAL.pdf)

CPTPP is more closely aligned with the US approach to regulation than it is to that of the EU<sup>7</sup> and therefore places the onus on end users to prove harmful effects of a product rather than using the precautionary principle (amongst others). In light of this, it appears unfeasible to suggest that both membership of the CPTPP and a degree of regulatory alignment with the EU are possible simultaneously.

If the UK wishes to seriously consider membership of the CPTPP it must:

- Commission an independent impact assessment covering: the UK, including disaggregated information by region and sector, CPTPP member countries and third countries, particularly developing countries (see below for more detail).
- Ensure that the process of undertaking the impact assessment engages with communities who are likely to be affected to explain the likely impacts and take their concerns into account.
- Ensure a full debate and affirmative vote in Parliament both before the UK begins negotiations to join the deal and before ratification can take place.
- Put in place mechanisms for review of UK membership at regular intervals with the option to withdraw if the agreement is found to undermine UK commitments in areas such as human rights and the environment.

**Which of these areas of the CPTPP agreement best describe the benefits that you have outlined above?**

[select none]

**What concerns, if any, does your organisation have about the UK potentially joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and why?**

Please supply your answer and any supporting evidence below

Key concerns:

### **1. Democracy and Scrutiny**

The Trade Justice Movement (TJM) is concerned about the level of democratic oversight, scrutiny and public involvement in the negotiation and agreement of new Free Trade Agreements. Our concerns in respect of democracy and scrutiny can be summarised as (A) the lack of Parliamentary scrutiny of FTA negotiations and its ability to amend or reject proposed FTAs; (B) the lack of a clear role for civil society in contributing to the creation of FTAs and (C) that weak impact assessments of FTAs do not give sufficient weight to social factors - including the effect of FTAs on the environment, human rights and developing countries.

#### **(A) Parliamentary Scrutiny**

We do not yet know what Parliamentary mechanisms the government intends to employ if it negotiates entry into and ratifies the CPTPP. The current Trade Bill does not cover the UK's new post-Brexit trade deals and there currently appear to be no plans to bring forward a second Bill which deals specifically with this issue.

Current provisions under the Constitutional Reform and Governance Act are insufficient given the broad scope of modern trade deals. The precedent of the current Trade Bill, which gives ministers the power to negotiate continuity agreements with third countries, also gives serious cause for concern. The Bill affords ministers Henry VIII powers such that they can amend primary

<sup>7</sup> See for example TPP Chapter 8: Technical Barriers to Trade, parties are committed to “review of relevant scientific or technical information” for regulations in areas such as pharmaceuticals, cosmetics and medical devices. No reference is made to the precautionary principle. Under Chapter 7: Sanitary and Phytosanitary Standards, parties are obliged to ensure their measures are “based on documented and objective scientific evidence that is rationally related to the measures”.

legislation, potentially affecting important human rights and regulatory standards.<sup>8</sup> This is despite the government's claim that the deals with third countries will remain the same as before.<sup>9</sup>

Furthermore, the current Trade Bill gives Parliament no role in setting the parameters for the UK joining deals like the CPTPP. Parliament is given no power to scrutinise the texts of trade negotiations, and it therefore has limited power to monitor, amend or prevent changes to legislation resulting from new trade deals.<sup>10</sup> The government must urgently bring forward legislation to ensure that Parliament has a clear role in the development of trade deals.

Specifically, Parliament should be given:

- A role in setting the mandate for negotiations or in setting the parameters for joining existing deals and the ability to approve or reject the commencement of trade negotiations.
- Access to key negotiating texts in a timely manner and be able to feed in to negotiations, including via full debates in parliament.
- The ability to approve or reject trade deals via a binding vote at the end of the negotiations.
- A formal role in the review of implemented trade deals.

In order to provide an appropriate level of scrutiny, the government should establish a Trade Scrutiny Committee in Parliament, composed of cross-party MPs. The committee should have advance warning of proposed trade deals, oversight of negotiation texts and the ability to refer deals - or provisions within deals - to ratification in Parliament. Parliament's decision on a deal, or amendment of a negotiating position, must be final and bind the government.

These steps are necessary to ensure the level of democracy and transparency that will empower Parliament to decide whether or not a negotiated trade deal is in the public interest. It will also have the effect of holding the incumbent government accountable for its negotiations, and ensure that the public interest is not forgotten when trade deals are negotiated.

#### (B) Involvement of Civil Society

TJM appreciates the Department for International Trade's willingness to consult civil society organisations on the CPTPP and the presence of such organisations on some of DIT's working groups. However there continues to be a lack of clarity on what the different mechanisms are for gathering civil society input and how views will be incorporated into future negotiations.

It is essential that civil society remains engaged in all stages of possible entry into the CPTPP. There should be a separate public consultation when the UK has begun formal negotiations, including details of the UK's aims for the negotiations so that individuals and civil society organisations can assess specific provisions of the proposed FTA.

With all trade deals, there is a risk that those groups with the most financial interest in a trade deal - such as multinational businesses - have the most influence over countries' negotiating positions. However, it is important that negotiating positions are in the public interest, and accountable to the electorate, not just corporations. DIT should build in mechanisms for listening to civil society groups - through online consultations, events in local communities and meetings with representatives of key groups, such as trade unions, NGOs and faith organisations. This will help to ensure that any resulting trade deal is reflective of the concerns and interests of wider

<sup>8</sup> Lorna Booth et al (2018), 'The Trade Bill' House of Commons Library <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8073>

<sup>9</sup> BBC News (29 March 2018) 'Brexit: UK hopes to roll over 40 EU trade deals, says Liam Fox', <https://www.bbc.co.uk/news/uk-politics-43581729>

<sup>10</sup> See Trade Justice Movement (2018), 'Securing democracy in UK trade policy' [https://www.tjm.org.uk/documents/reports/TJM\\_SecuringDemocracyInUKTradePolicy\\_2017\\_web.pdf](https://www.tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_web.pdf)

society.

### (C) Comprehensive Impact Assessments

In addition to consulting members of the public, the government should commission and publish an independent assessment which critically examines the likely impact of the UK joining the CPTPP, both on the UK, CPTPP member countries and third countries. The assessment must be based on real-world data, including as regards employment, and consider the impacts on human rights (especially gender equality and labour rights), the environment, public services, the UK's commitments under the Sustainable Development Goals, rule of law and sovereignty, and be disaggregated by region and sector, alongside consideration of the impact on GDP. It should be designed to accurately inform MPs and the public about the impact of the deal. Finally, the assessment must cover both the CPTPP and the TPP.

The UK must ensure that the deal does not impinge upon the UK's commitments to helping developing countries, both in the CPTPP group and outside it. Many developing countries benefit from the Generalised System of Preferences (GSP), which is designed to offer preferential tariffs to the least developing countries. The CPTPP risks reducing the policy space of the developing country members of the deal and undercutting exporters in other developing countries who would normally benefit from preferential tariff rates. An analysis of the specific product categories will be required as part of the impact assessment to understand the various possible scenarios. Given the UK's record in championing international development and partnering with less developed countries, the Department for International Trade should proactively seek the views of representatives from these countries and factor these in to any future deals to avoid any negative impacts.

### CPTPP contains ISDS provisions

The CPTPP contains an Investor-to-State Dispute Settlement (ISDS) mechanism. ISDS effectively provides international investors with a form of risk insurance, the costs of which are shouldered by taxpayers: the average costs of defending a case is US\$8 million and the average award is US\$504 million.<sup>11</sup> <sup>12</sup> Over 95% of all compensation awarded in ISDS cases has gone to companies with over US \$1 billion in annual revenues and super-rich individuals with over US\$100 million in wealth.<sup>13</sup> The mechanism offers sweeping rights to investors with no equivalent for domestic companies or communities facing adverse effects of business malpractice. It offers a degree of enforceability that is unparalleled elsewhere in international law.<sup>14</sup>

Arbitration courts do not meet recognised standards for rule of law: they lack an appeals system, judges do not have the same level of training, trials are not always transparent and there are very high costs to bring a case. ISDS also has worrying implications for public policy; the high costs of defending a case and of potential awards have led to 'regulatory chill', whereby states are reluctant to introduce legislation which might harm the profits of these investors – even if the legislation is in the interests of the environment, social welfare, or is democratically supported by the electorate.

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<sup>11</sup> Gaukrodger, D. and K. Gordon, "Investor-state dispute settlement: a scoping paper for the investment policy community", *OECD Working Papers on International Investment*, 2012/03, OECD, 2012, p19 <http://dx.doi.org/10.1787/5k46b1r85j6f-en>

<sup>12</sup> UNCTAD, *Investor-state dispute settlement: review of developments in 2017*. June 2018, [https://unctad.org/en/PublicationsLibrary/diaeprinf2018d2\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaeprinf2018d2_en.pdf)

<sup>13</sup> Van Harten, G. & Malysheuski, P. (2016) "Who has benefited financially from investment treaty arbitration? an evaluation of the size and wealth of claimants" *Osgoode Legal Studies Research Paper* No. 14/2016, [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2713876](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2713876)

<sup>14</sup> Gordon, K., Pohl, J. & Bouchard, M. (2014) 'Investors Rights and Human Rights - Interactions under investment treaty law' <http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/investors-rights-and-human-rights-interactions-under-investment-treaty-law-by-kathryn-gordon-joachim-pohl-and-marie-bouchard/>

Companies have challenged a range of government policies, from environmental policy to minimum wage legislation. For example, in *Vattenfall vs. Germany* (2009), Swedish energy firm Vattenfall launched an investor-state claim against Germany because it had tightened legislation on water quality which affected Vattenfall's plans to build a coal-fired power plant. Vattenfall argued that this amounted to an expropriation and a violation of Germany's obligation to afford foreign investors "fair and equitable treatment." To avoid the case being taken to an international tribunal, the German government agreed a settlement, including the weakening of the environmental standards required to obtain a permit for the plant.<sup>15</sup> Other cases include *Lone Pine vs. Canada* (2013)<sup>16</sup>, where the company is challenging a ban on fracking under the St. Lawrence river and *Anglian Water Group vs. Argentina* (2010) where investors successfully sued Argentina for measures taken during its currency crisis.<sup>17</sup>

The TPP investment chapters are of particular concern because:

- i. They offer very broad protections. The kinds of investments that are protected include: enterprises, shares, futures, production contracts, intellectual property rights, licences and any other tangible and intangible movable or immovable property.
- ii. The provisions apply to policy and implementation decisions taken at both a national and regional level. This opens up devolved, regional and local governments to challenge under an agreement over which they have had at best minimal say.
- iii. New Zealand's experience demonstrates that the UK is very unlikely to be able to negotiate an 'opt-out' from this section of the deal: New Zealand wanted to do so but instead was obliged to negotiate side letters with CPTPP member countries which state that ISDS will not apply between New Zealand and the other country. Only half of the countries agreed to this, the others, including Japan and Canada, refused to sign such letters.<sup>18</sup>

Instead of pursuing ISDS in a future deal with the US, the UK government should consider alternative ways of ensuring investors have adequate protection. This could be done by requiring UK businesses to undertake due diligence before investing in third countries and encouraging businesses to seek to resolve issues in-country as soon as they arise, including by recourse to mediation. Companies can also make use of political risk insurance, such as the World Bank's Multilateral Investment Guarantee Agency (MIGA) or those available through private providers. The UK should also bring its trade and investment policy in line with its commitments on business and human rights and support moves to hold companies to account for infringements of these rights in third countries. This should include an accessible mechanism for communities to seek redress and enforceable penalties for companies.

#### **Services chapters could lock in privatisation and undermine public services**

The chapters in the CPTPP covering services remain unchanged from those in the TPP. The CPTPP is of particular concern because it:

- i. Includes a negative list for services which means that all services are included unless a country explicitly excludes them: this constitutes a significant liberalisation. This is a risky approach to the liberalisation of services because it assumes all future services, many of which have not yet been developed, will automatically be included. The net effect of this is to reduce the state's ability to ensure that public services are operated in the public interest, rather than in the interest of private profit and to limit the extent of liberalisation or choose which services to liberalise at what time. The TPP text specifies that only "services that are [provided] neither on a commercial basis nor in competition with one or more service suppliers"<sup>19</sup> can be excluded from

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<sup>15</sup> See report from the International Institute for Sustainable Development (2014), 'The State of Play in Vattenfall v. Germany II' <https://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-ii-leaving-german-public-dark-en.pdf>

<sup>16</sup> See case details at Global Affairs Canada, NAFTA - Chapter 11 - Investment (accessed October 2018) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/lone.aspx?lang=eng>

<sup>17</sup> See Investment Treaty News, 'Awards and Decisions', 23 September 2010, <https://www.iisd.org/itn/2010/09/23/awards-and-decisions/>

<sup>18</sup> Government of New Zealand (n.d) 'Understanding CPTPP: Investor to State Dispute Settlement' <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/understanding-cptpp/investor-state-dispute-settlement/>

<sup>19</sup> TPP Chapter 10: Cross-Border Trade In Services, Article 10:1

liberalisation. This means that the vast majority of UK services, including most parts of the NHS, would be covered.

- ii. Includes a ratchet clause, which means that the deal assumes ever-increasing liberalisation and erects prohibitively high barriers to governments wishing to renationalise services. The consultation briefing document suggests that the government has a commitment to protecting public services and that the CPTPP poses no risk. However the CPTPP only excludes public services if they are not provided on a commercial basis or in competition with other suppliers; this wording means that the vast majority of UK services will be included. The NHS for example has an internal market and competes with private healthcare providers, bringing it under the terms of the deal.
- iii. The services chapter also applies to all levels of government, this restricts the powers of devolved administrations over their service provision.

Assuming the UK agrees a Chequers-style arrangement with the EU, the UK would most likely come under significant pressure to compensate for the fact that it cannot negotiate on most aspects of goods by making deeper offers in services.

*Example 1: Healthcare provision*

One particular area of concern is healthcare, which is largely provided by the publicly-owned NHS in the UK, and is also the country's single largest employer.<sup>20</sup> Because the NHS already operates in competition with a number of private sector employers, it will be covered by services provisions in trade deals unless the government seeks a specific exemption. Including the NHS in CPTPP would lock-in and put pressure on the government to increase privatisation. Similar proposals caused significant public outcry during the TTIP negotiations.

The inclusion of ISDS could also impact on health care, for example by preventing the future nationalisation of healthcare services or deterring the government from introducing health legislation, as private investors could threaten to sue the government for lost profit. For example, ISDS was used against Slovakia when it sought to bring health insurance back into the public sector<sup>21</sup> and against Australia for legislating for plain cigarette packaging.<sup>22</sup>

The UK should not join deals that cover public services. If the UK does join the CPTPP, it must at minimum insist on including a 'non-covered measures' provision that limits liberalisation to WTO commitments, except in the extra sectors covered. This would have the effect of translating a negative list into a positive list; Australia, Canada, New Zealand and Vietnam already have such provisions in the CPTPP.

**The CPTPP has sweeping intellectual property provisions.**

The CPTPP contains provisions that will have a negative impact on farmers, particularly those in developing countries, and could push up the prices of medicines.

- i. CPTPP requires all countries involved to sign up to UPOV91, which gives companies the ability to patent plant varieties. Provisions under this convention limit farmers' ability to save, exchange and re-use seeds. It also puts pressure on countries to allow traditional knowledge to be incorporated within patent and copyright law. This can lead to corporate appropriation and profit from traditional knowledge, without benefit to the communities and peoples who have developed and held that expertise.<sup>23</sup>

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<sup>20</sup> ONS (2012), 'Public Sector Employment, Q3 2012' [http://webarchive.nationalarchives.gov.uk/20160107051715/http://www.ons.gov.uk/ons/dcp171778\\_288679.pdf](http://webarchive.nationalarchives.gov.uk/20160107051715/http://www.ons.gov.uk/ons/dcp171778_288679.pdf)

<sup>21</sup> Investment Treaty News, 'Achmea: The Beginning of the End for ISDS in and with Europe?', 24 April 2018 <https://www.iisd.org/itn/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/>

<sup>22</sup> The Guardian, 'Revealed: \$39m cost of defending Australia's tobacco plain packaging laws', 1 July 2018 <https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws>

<sup>23</sup> Rose, J. (March 8, 2016) 'Biopiracy: When indigenous knowledge is patented for profit' (<https://theconversation.com/biopiracy-when-indigenous-knowledge-is-patented-for-profit-55589>

- ii. The deal gives pharmaceutical companies and manufacturers of agricultural products such as herbicides and pesticides data exclusivity protections for between five and twenty years. In the case of pharmaceuticals, this can remove the possibility of other companies developing competing or generic versions of the medicines because the cost of clinical trials can be prohibitive and there are serious ethical issues regarding duplicate trials. In the case of agricultural products, this can make it increasingly difficult for small farmers to compete with larger operations.

The UK must ensure that international cooperation on intellectual property rights does not increase costs for farmers, particularly those in developing countries, lead to the expropriation of traditional knowledge in farming or pharmaceuticals or lead to higher prices for medicines. Data exclusivity rules must also not have the effect of creating an unreasonable monopoly.

### **Regulatory cooperation provisions could undermine sovereignty**

Regulatory cooperation, particularly in the form of mutual recognition of standards, can have a deregulatory effect as standards converge to the lowest common denominator. This is because mutual recognition intrinsically involves drawing an equivalence between different standards regimes, such that both countries' goods are available in each market. This incentivises regulators in the country with higher standards to cut them, in order to reduce costs for producers and so that they are able to compete with imports from the other party.

Mutual recognition also makes it difficult for a government to raise its own domestic standards, since it has committed as part of the FTA to recognise the other country's lower standards, over which it has no control. Standard raising subsequently requires coordination between FTA members, which can be politically difficult and slow. This reduces the democratic power of ordinary citizens, who expect that their government has control over the standards of goods sold in their country.

CPTPP provisions relating directly to regulatory coherence are non-binding and take the form of voluntary cooperation. Participating countries are therefore 'encouraged' to 'take into account' the views of interested persons when introducing laws, regulations and policies covered by the CPTPP. They commit to:

- Establishing mechanisms to coordinate between government agencies;
- A coordination body to review and report on covered regulatory measures;
- Timely disclosure of proposed regulations and to review existing regulations to see whether they should be repealed.

Whilst these provisions do not legally limit the ability of governments to introduce regulations there is nevertheless a potentially significant political pressure to make changes including removing or not introducing various regulations. How these provisions work in practice will depend on the various interests in the different countries, but nothing in the deal signals a commitment to increasing standards and the mechanism leaves open the possibility of groups with greater lobbying power being able to disproportionately influence regulations in member countries.

#### *Example: Food standards and animal welfare*

The CPTPP includes countries that have a significant interest in increased trade in food and agricultural products. For example, meat, dairy and horticultural produce are priorities for New Zealand, specific products such as beef and wine are priorities for Australia and they might challenge the UK's current approach (as a member of the EU) to geographical indications, which protects products such as Anglesey sea salt, Melton Mowbray pork pies and Stilton cheese, with negative implications for UK producers of these products. Canada is seeking to increase its exports of agricultural products, including wheat, beef and pulses, which could mean increased competition for UK farmers.

The UK, via EU law, currently has relatively high standards for things like food and animal welfare; it also follows the precautionary principle, which bans products and practices which have an unproven risk of harming the environment or public health. The government has repeatedly claimed that FTAs will not involve a reduction in UK standards. However it has also been supportive of the kind of mutual recognition provisions in deals like CETA and TTIP that could lead to exactly this outcome. Since the CPTPP more closely reflects the US approach to standards, whereby the onus is on the end consumer to demonstrate that a product is unsafe, the more precautionary approach could be significantly undermined.

In response to criticism and campaigning pressure, the UK government has also argued that the 'right to regulate' will not be undermined by trade deals. CPTPP includes a mention of this in its preamble;

however, whereas the core chapters of the deal have strong, legally binding provisions, including ISDS, the right to regulate has no enforcement mechanism.

### Contains damaging provisions on financial services

CPTPP threatens to undermine the ability of governments to regulate banks, hedge funds and other financial services. A few decades ago, financial services would have been largely excluded from trade deals so that countries could have full prudential oversight of a sector which has recently proven its critical position in the economy.

The provisions in the CPTPP are particularly worrying because they:

- Restrict countries' ability to manage financial institutions by taking the relatively unusual step of imposing 'Fair and Equitable Treatment' rules to financial services.<sup>24</sup>
- Could prevent countries from imposing limits on financial corporations, whether a cap on the high-frequency trading in speculative markets that causes extreme volatility and crashes, or a basic restriction on banks becoming too big to fail.<sup>25</sup>
- Restrict countries' ability to manage capital flows via provisions in its investment chapter.<sup>26</sup> Provisions to liberalise capital flows severely limit important safeguards against the diffusion of financial crises. The judgement as to what constitutes appropriate measures to manage such flows, including the use of reserves or the maintenance of a trade surplus, is left to a tribunal.<sup>27</sup>
- Could have knock-on impacts in other areas. For example, increasing the mobility of cross border capital flows intensifies competition for investment between countries. They therefore need to find ways to increase the return on any given investment. This can happen through downward pressure on wages, labour standards and taxes. The latter can in turn see declining revenue for public services.<sup>28</sup>

Whilst article 11.11 appears to offer some flexibility in terms of prudential oversight, it includes a number of limitations that could create significant barriers to countries seeking to make use of them: for example, the provisions of the chapter can be suspended only for "non-discriminatory measures of general

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<sup>24</sup> TPP Chapter 11

<sup>25</sup> Art. 11.2 incorporates Articles 9.6 FET and 9.8 - Expropriation such that a measure that restricts the size of banks, or requires banks to be capitalised to a certain level may breach these provisions if a government (or a previous government) had previously indicated that no such measure would be taken. [CME Czech Republic BV (The Netherlands) v Czech Republic, Partial Award, UNCITRAL, 13 September 2001, IIC 61 (2001), at 551, 554–555, and 591. and Saluka Investments BV v Czech Republic, Partial Award, UNCITRAL, 17 March 2006, ICGJ 368 (PCA 2006) at 302]. In order not to breach the treaty, a tribunal would have to judge that measures had been applied in a transparent and non-discriminatory manner and that no contrary indications had been given to an investor. [LG&E Energy Corporation and ors v Argentine Republic, Decision on Liability, ICSID Case No. ARB/02/1, IIC 152 (2006), at 130].

<sup>26</sup> See TPP Chapter 9, Article 9.9

<sup>27</sup> Exceptions to the financial services provisions are limited in their applicability and must not be 'used to avoid necessary macroeconomic adjustment'. However there are a number of issues with this. For example, there is no agreement (even at the IMF) about what the equilibrium exchange rate should be and whether a country's exchange rate is over/undervalued etc. Therefore it is extremely sensitive to give the ability to decide this to a TPP tribunal. For example, some may think that a certain amount of foreign exchange reserves or trade surplus indicates an undervalued exchange rate, but others may see such reserves as prudent to avoid another Asian financial crisis (or to avoid having to get assistance from the IMF if there is such a crisis). This prevents countries from using capital controls to achieve or maintain a pegged exchange rate that is deemed to be over/undervalued by a TPP tribunal, even in the crisis situations above. TPP Parties will have to use other methods to achieve this instead (eg quantitative easing ('printing money') to cause depreciation).

<sup>28</sup> Blanton, R. & Blanton, S.L. (2012) 'Labor Rights and Foreign Direct Investment: Is there a race to the bottom?' *International Interactions: Empirical and Theoretical Research in International Relations* Vol. 38, Issue 3 [https://www.researchgate.net/profile/Robert\\_Blanton2/publication/254242241\\_Labor\\_Rights\\_and\\_Foreign\\_Direct\\_Investment\\_Is\\_There\\_a\\_Race\\_to\\_the\\_Bottom/links/5630d10c08aef3349c29f838/Labor-Rights-and-Foreign-Direct-Investment-Is-There-a-Race-to-the-Bottom.pdf](https://www.researchgate.net/profile/Robert_Blanton2/publication/254242241_Labor_Rights_and_Foreign_Direct_Investment_Is_There_a_Race_to_the_Bottom/links/5630d10c08aef3349c29f838/Labor-Rights-and-Foreign-Direct-Investment-Is-There-a-Race-to-the-Bottom.pdf)

application"; countries have found it difficult to demonstrate that measures they adopt meet these kinds of criterion.<sup>29</sup>

The UK must not seek membership of a deal that would weaken the ability of either the UK or other member countries to avoid or manage financial crises.

### **Places unnecessary restrictions on government procurement**

The CPTPP is one of only a small number of agreements to set out rules for government procurement. Whilst the impact of the chapter is limited by the use of a 'positive list' (countries will only apply the chapter to sectors that they specifically identify), governments will not be allowed to impose or enforce the use of "domestic content, a domestic supplier, the licensing of technology, technology transfer, investment, counter-trade or similar action to encourage local development or to improve a Party's balance of payments accounts" in these sectors.<sup>30</sup> This means that local, regional and national governments will not be permitted to use their procurement policy to encourage the development of local industries, local jobs or to support the development of environmentally or development-friendly industries. Such measures do not fall within the exceptions in Article 15.3 and are therefore fully covered by the chapter.<sup>31</sup> CPTPP also contains a commitment to negotiate even deeper liberalisation of government procurement.

#### *Example 2: local government services*

Local authorities provide many vital public services, such as in housing, education and environmental protection, and are also responsible for giving planning permission. For example, local authorities are responsible for establishing local clean air zones to tackle air pollution, and could block fracking companies from operating on land where it is deemed a health or environmental hazard. Provisions on things like investment protection and regulatory cooperation could prevent local authorities from taking decisions in the interest of their local area.

Local 'ethical procurement' policies could also be affected. EU rules allow for environmental and social considerations in awarding contracts; for example, local authorities can decide to procure only Fairtrade or organic produce. Local authorities are also allowed to ensure that procurement benefits small and medium-sized businesses in the area – for instance a number of cities, including Manchester and Glasgow, have become Sustainable Food Cities, and are trying to use more locally sourced, sustainable food in the public sector. The Scottish parliament has also passed a new public procurement act that allows Scottish public bodies to promote the environmental and social wellbeing of the area when buying goods or services. Many of these policies would not be permitted under the CPTPP.

The ostensible aim of preventing protectionism must not be used to undermine ethical procurement powers for local authorities. It seems unlikely that the UK will be in a position to amend this section of the agreement and therefore the UK should not join.

### **Contains worrying provisions on e-commerce**

CPTPP is one of only a small number of deals to include a full chapter on e-commerce. It requires that countries make it possible to transfer and store data in other countries, including sensitive personal data such as health records or financial history.<sup>32</sup> CPTPP does have exceptions for government data and incorporates some exceptions for privacy or 'legitimate public policy objectives' but the bar is set so high

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<sup>29</sup> Lester, Simon (2009) *The Tuna/Dolphin Appellate Body 21.5 Ruling: A decisions that could threaten the integrity and efficiency of WTO dispute settlement* [https://worldtradelaw.typepad.com/ielpblog/nondiscrimination\\_standards/](https://worldtradelaw.typepad.com/ielpblog/nondiscrimination_standards/)

<sup>30</sup> TPP Chapter 15: *Definitions*; Article 15.4, paragraphs 2,3 & 6

<sup>31</sup> Kapterian, G. (2010) 'A Critique of the WTO Jurisprudence on "Necessity"' *International and Comparative Law Quarterly* Vol.59, No.1. Jan. 2010 [https://www.jstor.org/stable/25622271?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/25622271?seq=1#page_scan_tab_contents)

<sup>32</sup> Financial corporations' data must be allowed to be transferred for processing, although it can still be required to be stored locally.

to meet these conditions that in practice they offer very little protection.<sup>33</sup> TPP will prevent regulators from requiring corporations to disclose source code except where it is being used for ‘critical infrastructure’ or as a clause in commercially negotiated contracts. In the latter case, the deal places the onus on procurement managers to ensure that contracts contained a provision for the disclosure of source code used in, for example, medical equipment. This leaves significant room for errors and omissions. Private health care providers could find it difficult to require such clauses in contracts because of their relatively limited bargaining power. The consequences of being unable to inspect source code can be significant – for instance a bug in medical equipment that could cost lives, or the impact on the planet of VW’s gaming of diesel emissions mechanisms.

The UK must give serious thought as to how to shape any agreement on e-commerce in a way that is beneficial to ordinary people. In particular, and before it enters into such negotiations, it should first ensure that online companies are properly regulated, that they are paying their fair share of tax and that they are subject to competition law. The UK should also support open source provision of internet services, whereby, for example, basic search functions are viewed as a public good and are therefore not run by for-profit companies.

### **Has only weak provisions on labour rights and the environment**

The chapters on labour and the environment are welcome to the extent that they encourage countries to implement ILO conventions and implement minimum wage, health and safety and hours of work legislation. However the chapters are non-binding and measured against their impact on trade rather than their impact on labour rights or environmental protections. For example if a country wants to sue another country for failure to properly enforce ILO conventions, it can only do so if it can demonstrate that this has impacted on its ability to trade with the other country;<sup>34</sup> <sup>35</sup> in contrast with the investment chapter, only states can sue states for such a failure, there is no provision for workers to bring a claim, leaving them in a weaker position than investors. It is also of concern that the clause on forced and child labour only commits governments to ‘recognise the goal’ of eliminating forced and child labour. Overall, these provisions are much weaker than any of the other provisions in the deal.

#### *Environment*

DIT’s consultation document recognises that trade can pose a threat to the environment, especially where it leads to a growth in environmentally damaging industries. Despite the close relationship between trade and the environment, international environmental agreements such as the Paris climate change commitments tend to be made in isolation from trade deal negotiations. Current trade rules place trade promotion and liberalisation ahead of climate goals: for example, ISDS might be used by private investors to challenge domestic environmental legislation, and WTO rules have regularly been used by states to challenge each other’s subsidies for renewable energy industries (not one case has been brought against a state for fossil fuel subsidies). No trade deal currently in force contains any binding commitments to ensure that international trade supports climate targets and CPTPP differs little from other deals in this respect.

#### *Environmental principles*

EU environmental law is directed by key ‘principles’, such as the ‘polluter pays’ principle and the principles of precaution, prevention and rectifying pollution at source. Unlike EU environmental regulations, these principles are not translated into UK law through the European Union (Withdrawal) Act. TJM believes that these environmental principles should continue to direct UK environmental legislation and retain binding force after Brexit, and the government has implied that some principles will be

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<sup>33</sup> If the term ‘legitimate’ is used in the text and an international tribunal interpreting ‘legitimate’ chooses to follow an interpretation found in World Trade Organization jurisprudence, it would mean ‘a widely recognized state practice’. Since there are varying degrees of privacy laws amongst the TPP countries, with Australia having strong protection such as a requirement for doctors’ records to be kept in Australia, compared to the weaker privacy protections in the USA, countries with stronger privacy protections may not be covered by such an exception. See for example Canada-Pharmaceutical Patents case, DS 114, Panel Report dated 17 March, 2000, p. 162 [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds114\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds114_e.htm).

<sup>34</sup> CPTPP Article 19.4

<sup>35</sup> ICTSD (6 July 2017) *Trade Dispute Panel Issues Ruling in US-Guatemala Labour Law Case* <https://www.ictsd.org/bridges-news/bridges/news/trade-dispute-panel-issues-ruling-in-us-guatemala-labour-law-case>

enshrined in a new ‘Environmental Principles and Governance Bill’. It remains unclear whether this will replicate all the EU principles, and what powers the new environmental watchdog will have to enforce them. This puts UK environmental legislation at risk in the context of joining the CPTPP: a lack of clarity regarding the UK approach could lead to unintended consequences and a divergence from these important principles.

#### *Non-regression on environmental standards*

Ministers, and notably the Secretary of State for Environment, Food and Rural Affairs (DEFRA), have repeatedly promised that there will be no regression on the UK’s existing environmental legislation. This is essential to combating climate change and meeting the UK’s environmental targets. Taking these standards seriously also means that there must be guaranteed non-regression in the case of a ‘no deal’ scenario with the EU, and future UK trade deals must not undermine this non-regression. Many of TJM’s members, including environmental groups and trade unions, seek a further commitment that there will not only be non-regression in environmental standards, but that standards will actually continue to rise. Indeed, maintaining the EU’s ‘common rulebook’ on goods standards is a core part of the government’s Chequers proposal for the FEP. The government must demonstrate that CPTPP does not threaten these commitments.

#### *Technology*

The government’s consultation document states that “Free Trade Agreements (FTAs) can also positively impact the environment as increased trade leads to the transfer of new, potentially more environmentally friendly, technologies and production methods.” Developing new technology is undoubtedly central to tackling environmental challenges including climate change, however it would be insufficient to rely on an assumption that trade will lead to better environmental technology, especially without government support. Environmentally damaging firms, such as fossil fuel companies, are likely to use the new investment opportunities and markets generated by an FTA to expand their existing, harmful operations, rather than invest in greener alternatives. Ideally FTAs would be structured to incentivise innovation of environmentally friendly technology, rather than simply make it easier for all firms - including those with harmful environmental practices - to invest and expand.

#### **Restricts countries’ ability to address climate change**

TPP will restrict member countries’ ability to meet their commitments on climate change. For instance, building local capacity is an important part of transitioning away from fossil fuels. One way to do this is to ensure that investors in the energy sector commit to using local suppliers, who might for example make parts for wind turbines, or to share research and technology with local industries. The CPTPP prohibits these measures, it also explicitly envisages an increase in flights to support the expansion of trade.

Despite promises that the agreement would include enforceable commitments by governments to at least seven international environment agreements, the CPTPP text mentions only four, and only one - on trade in endangered species - has clearly enforceable commitments. The text does not refer to climate change, but only to voluntary measures for lower emissions with no benchmarks or timeframes.

#### **Would reinforce inequality**

The approach of CPTPP is likely to reinforce inequality within as well as between participating countries. This is likely to have particularly acute implications for groups who already suffer the effects of inequality. For example, the CPTPP does not take account of the fact that countries in the CPTPP have different levels of development and will need to make use of different policy tools. This is particularly striking in terms of the limitations that the deal places on countries’ industrial policy. For example, it bans or severely restricts the ability of countries to use measures that seek to ensure international investment benefits the local economy. This includes strong limits on technology transfer requirements, local content requirements and a ban on limiting the royalties that are to be paid for access to patented products or inventions. This is particularly problematic in relation to climate agreements, where the G77 of developing countries (of which Malaysia, Chile, Peru and Vietnam are members) are proposing that they should have royalty-free access to climate technology. The cooperation and capacity building and development chapters are not binding, there is therefore no obligation on the richer countries in the group to support the poorer countries, for example by providing training to suppliers to understand technical standards and requirements.

CPTPP is also likely to undermine gender equality goals. TJM is pleased that the UK government has made gender equality a priority in its trade policy. This is evidenced in the Department for International Trade’s “gender-responsive approach to trade” and the Commonwealth ‘SheTrades’ campaign. However there is more to be done to ensure that UK trade deals genuinely support gender equality goals. CPTPP

could undermine these goals in a number of ways; for example, women tend to access public services more often but also face relatively higher barriers to accessing them because, amongst other things, they tend to earn less than men and therefore find it harder to pay fees for privatised services. As discussed above, CPTPP locks in and assumes ever-increasing privatisation of public services; this will create more opportunities for corporations to make a profit but puts services even further out of reach for women.

### **Conclusion**

In light of the above, the Trade Justice Movement believes that the UK should not seek to join the CPTPP. Instead, it should seek to develop a trade policy that is explicitly shaped to support the achievement of its goals in areas including international development, human rights and the environment.