



Department for International Trade Consultation Response

UK-US FTA

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 an FTA with the United States and lay out a framework for what civil society expects in future trade agreements.

What concerns, if any, does your organisation have about a free trade agreement (or related trade talks) with the United States, and why?

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. This particularly applies to an FTA with the United States because of the significant downward pressure that will be brought to bear on UK standards in areas such as food and chemicals. 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 when negotiating and ratifying an FTA with the US. 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.

However, the precedent of the Trade Bill, which gives ministers the power to negotiate continuity agreements with third countries, gives serious cause for concern. The Bill affords ministers Henry VIII powers such that they can amend primary legislation, potentially affecting

important human rights and regulatory standards.¹ This is despite the government's claim that the deals with third countries will remain the same as before.²

Furthermore, the current Trade Bill gives Parliament no role in setting a mandate for future negotiations, which would define the scope of trade deals. 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.³ 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 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.
- Have 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.

The need for Parliamentary scrutiny is particularly pressing in the context of an FTA with the US. The size of the US economy, and the vast differences between its regulations and the EU's, mean that it is paramount that Parliament is involved at every stage of the process. The controversy and public backlash around TTIP should serve as a warning that ordinary voters expect democratic oversight of a trade deal with the US, and after Brexit it is essential that these powers are given to Parliament, not just ministers and civil servants.

(B) Involvement of Civil Society

TJM appreciates the Department for International Trade's willingness to consult civil society organisations on the UK-US FTA 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.

¹ House of Commons Library (2018), 'The Trade Bill' – Lorna Booth et al, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8073>

² BBC News, 'Brexit: UK hopes to roll over 40 EU trade deals, says Liam Fox', 29 March 2018 <https://www.bbc.co.uk/news/uk-politics-43581729>

³ See Trade Justice Movement (2018), 'Securing democracy in UK trade policy' https://www.tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_web.pdf

It is essential that civil society remains engaged in all stages of negotiating the UK-US FTA. There should be a separate public consultation when the UK has begun negotiations with the US, including details of the UK's aims for the negotiation 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 society.

(C) Comprehensive Impact Assessments

In addition to consulting members of the public, the government should commission and publish independent impact assessments which critically examine the economic, social and environmental effects of the UK-US FTA. These should be designed to accurately inform MPs and the public about the impact of the deal, with particular attention to: environmental and health standards; workers' rights and deregulation; public services and privatisation; the impact on global sustainable development and developing countries; impact on gender, equality and discrimination; and any concerns around rule of law and national sovereignty.

The UK must ensure that the deal does not impinge upon the UK's commitments to helping developing countries. Many developing countries benefit from the Generalised System of Preferences (GSP), which is designed to offer preferential tariffs to the least developing countries. Trade agreements between wealthy countries, such as the UK and US, risk undercutting exporters in developing countries who would normally benefit from preferential tariff rates. In the case of a deal with the US, we would be particularly concerned about developing country producers of goods like cotton, sugar, nuts and wine - goods which the US produces cheaply but we currently import largely from developing countries under GSP. Given the UK's proud record in championing international development and partnering with less developed countries, many of which are historic allies, it would be wrong not to assess the impact of an FTA with the US on these countries' exporters. The Department for International Trade should also proactively seek the views of representatives from these countries and factor these in to any future deals to avoid any negative impacts.

The risk of a UK-US FTA in areas such as the environment, workers' rights, public services and local communities are explored further in other sections of our consultation response.

2. Regulatory cooperation and deregulation

DIT's original consultation document explains how modern FTAs aim to eliminate non-tariff barriers (NTBs) to trade, as well as to reduce tariffs. This includes aligning standards through various forms of bilateral regulatory cooperation. The document states that removing NTBs leads to "increases in product quality, variety and consumer choice."⁴ While regulatory cooperation in a UK-US FTA may increase the variety of goods available to British consumers, this should not be conflated with an increase in the quality of goods. Indeed, there is plenty of evidence that regulatory cooperation

⁴ Department for International Trade (2018), 'An information pack for the Consultation relating to a bilateral Free Trade Agreement between the United Kingdom and the United States', p14 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727810/PDF_Information_note_on_United_States.pdf

(notably alignment of standards through mutual recognition or harmonisation) 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 standards in order to reduce costs for producers and compete.

Furthermore, regulatory cooperation can make it difficult for a government to raise its own domestic standards, if 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.

The Government has emphasised that after Brexit, the UK's "regulatory standards will remain as high as the EU's" and that "We will not water down our standards on food safety, animal welfare and environmental protection as part of any future trade deals."⁵ There is clear public support for retaining current standards – IPPR research found 82% of the public are in favour of retaining current regulations, even at the expense of securing a trade agreement with the US.⁶ The government must keep to this commitment, and also ensure that the UK's regulatory regime does not recognise lower standards in other countries as 'equivalent' to those in the UK.

Example: Food standards and animal welfare

The government has not announced its negotiating priorities with the US and has repeatedly claimed that no UK-US FTA would involve a reduction in UK standards. However DIT has not ruled out Mutual Recognition Agreements (MRAs) with the US on health, environmental and other standards. Indeed, the UK was supportive of such provisions in TTIP and it seems likely that regulatory cooperation will form part of the negotiations and that this will apply to food standards. The Office of the US Trade Representative states on its website, "We seek to eliminate or reduce non-tariff barriers that decrease opportunities for U.S. exports, such as unwarranted sanitary and phytosanitary (SPS) restrictions that are not based on science, unjustified technical barriers to trade (TBT), and other "behind-the-border" barriers."⁷ More specifically, a report from the European Centre for International Political Economy (ECIPE) think tank states that "US trade [free trade] agreements typically require other countries to recognise their approach to agricultural products such as chickens and beef."⁸

US standards in many areas are lower than those in the EU. For example, in environmental and health policy, EU law follows the precautionary principle, which bans products and practices which have an unproven risk of harming the environment or public health. US regulations are not guided by this principle; instead the onus is on the consumer to prove that a product is harmful, which is a much riskier approach. Another example is food hygiene; while the EU enforces high levels of cleanliness and hygiene tests at multiple stages in the process of food production, the US requires only an 'end of pipeline' test - which leads to

⁵ Government Response to Environment, Food and Rural Affairs Committee Sixth Report of Session 2017–19, 'The future for food, farming and the environment' (HC 870) (October 2018).

⁶ The Independent, 'Ditch trade deal with Trump rather than accept chlorinated chicken, Britons say', 7 April 2018 <https://www.independent.co.uk/news/uk/politics/brexit-trade-deal-theresa-may-us-uk-eu-chlorine-chicken-food-safety-standards-poll-a8292496.html>.

⁷ The Office of the US Trade Representative, Non-Tariff Barriers and Regulatory Issues (accessed October 2018) <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-2>

⁸ Henig, David, 'Assessing UK Trade Policy Readiness', European Centre for International Political Economy (2018), <http://ecipe.org/publications/assessing-uk-trade-policy-readiness/>

controversial practices like washing chicken in chlorine at the end of the production process, something which is banned in the EU. Recent research highlights the health risk of chlorinated chicken in failing to kill bacteria,⁹ but this is just one example of how US food standards are lower than the EU's. Other areas include GM crops, pesticides and herbicides, animal-rearing, food additives, product labelling, hormone-injected meats and animal welfare standards.^{10 11 12 13} These concerns have been repeatedly raised by a number of civil society and expert groups including the National Farmers' Union and the Food and Drink Federation.¹⁴

There is evidence that US reports higher rates of foodborne illness than in the UK. Annually, 14.7% (48m) of the US population suffer from a foodborne illness, versus 1.5% (1m) in the UK - nearly ten times the proportions of each population. In addition, the US reports higher rates of deaths from foodborne illness than in the UK. The annual death rate in the US is 3000 per annum, versus 500 in the UK, which is also proportionally higher for the size of each population.¹⁵ Whilst it is difficult to assess the extent to which differences in food standards contribute to these figures, the evidence gives us reason to avoid convergence with the US on food standards.

DIT has not explicitly proposed mutual recognition of US health, environmental and other standards in a UK-US FTA; however it is difficult to see how a comprehensive FTA would reduce NTBs without aligning such standards. DIT's consultation document states that: "the greatest number of non-tariff measures in the US fall under the category of sanitary and phytosanitary measures. This is a category which covers any standards which a country applies to ensure food safety, animal health or plant health standards. According to this data the US also has a high number of technical barriers to trade, which include regulations, standards and procedures required to ensure that domestic legislative requirements are met."¹⁶ While the government has not announced its negotiating priorities with the US, and the content of the deal will depend first and foremost on the Future Economic Partnership

⁹ The Observer, 'Chicken safety fear as chlorine washing fails bacteria tests', 26 May 2018, <https://www.theguardian.com/world/2018/may/26/chicken-health-fear-chlorine-washing-fails-bacteria-tests-brexit-salmonella-listeria>

¹⁰ Food & Water Watch (foodandwaterwatch.org), quoted in Yes Magazine, 'Infographic: The U.S. Food That Europe Won't Touch', 17 January 2014 (accessed October 2018) <https://www.yesmagazine.org/issues/how-to-eat-like-our-lives-depend-on-it/thirteen-ways-food-is-safer-cleaner-and-kinder-in-europe>

¹¹ The New York Times, 'A Pesticide Banned, or Not, Underscores Trans-Atlantic Trade Sensitivities', 23 February 2013, <https://www.nytimes.com/2015/02/24/business/international/a-pesticide-banned-or-not-underscores-trans-atlantic-trade-sensitivities.html>

¹² Soil Association, 'UK Consumers Reject Hormone-treated Beef', 26 June 2018 <https://www.soilassociation.org/blogs/2018/june/uk-consumers-reject-hormone-treated-beef/?author=honor+eldridge>

¹³ IFL Science, 'Banned in Europe, Safe in the U.S.' (accessed October 2018) <https://www.iflscience.com/health-and-medicine/banned-europe-safe-us/>

¹⁴ House of Commons International Trade Committee Report (2018), 'UK-US Trade Relations', ch.5 'Trade in Goods Case Studies' <https://publications.parliament.uk/pa/cm201719/cmselect/cmtrade/481/48108.htm#footnote-175>

¹⁵ Sustain, quoted in Business Insider, 'Liam Fox under pressure to rule out adopting US food standards in Brexit trade deal with Trump', 10 October 2018 <http://uk.businessinsider.com/liam-fox-under-pressure-to-rule-out-adopting-us-food-standards-in-brexit-trade-deal-2018-10?r=US&IR=T>

¹⁶ Department for International Trade (2018), 'An information pack for the Consultation relating to a bilateral Free Trade Agreement between the United Kingdom and the United States', p25 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727810/PDF_Information_note_on_United_States.pdf

(FEP) with the EU, these sentences imply that negotiations will concern sanitary and phytosanitary (SPS) measures, which includes things like food and health standards.

There is little reason to believe that the US will adjust its regulations, in SPS or elsewhere, to align with the EU's higher standards - for example, by banning GM crops or hormone-injected beef - due to the size and power of these industries in the US. The Cato Institute, an influential American thinktank, has put forward proposals for comprehensive mutual recognition of regulations and standards in a future UK-US deal.¹⁷ Last year, Wilbur Ross, the US commerce secretary, insisted the UK would have to accept American food standards if it was to secure a trade deal.¹⁸ The UK government has been vague about whether or not chlorinated chicken would be accepted into the UK.

One of the main reasons for public backlash against TTIP is that it could have led to the EU reducing standards to align with the US, through mutual recognition in number of different sectors, including agriculture, health and financial services.¹⁹ It would be tempting, in a rush to secure a new trade deal with the US after Brexit, to model this deal on TTIP and agree to regulatory cooperation across multiple sectors. However there is reason to believe that this would put deregulatory pressure on existing standards in important industries including food, health and financial services. This could have far reaching negative consequences for policy and public welfare in the UK.

Example: Financial services

The position of the EU in TTIP negotiations threatened to introduce provisions that would have restricted countries' ability to manage financial flows. For example, provisions to liberalise capital flows would have eliminated important safeguards against the diffusion of financial crises. Elements of macroeconomic policy that allow countries to manage financial crisis might also have been curtailed. Increasing the mobility of cross-border capital flows can have knock-on effects in other areas. So for example increasing the mobility of cross border capital flows increases competition for investment between countries. They therefore need to find ways to increase the return on any given investment. This often happens through downward pressure on wages, labour standards and taxes. The latter can in turn see declining revenue for public services.

It is worth noting the far-reaching implications of regulatory cooperation on financial services between the UK and US. Evidence from private sector membership organisation 'TheCityUK' submitted to Parliament's International Trade Committee Inquiry stated that: "The potential for partnership between the UK and the US is likely to extend not only across the global economic framework, including the WTO, but also to all areas of financial regulation and standard setting, via the G20 and the Financial Stability Board and also through sectoral bodies for agreeing regulatory standards, including the Basel Committee on Banking Supervision (BCBS), the International Organization of Securities Commissions (IOSCO), and the International Association of Insurance Supervisors (IAIS)... Enhanced co-operation for the development of rules and principles on global issues of common concern would also contribute to the achievement of shared economic goals relating to third countries, in

¹⁷ Mentioned in The Times, 'Brexit is an opportunity for a genuinely liberal US-UK free trade deal', 27 September 2018 <https://www.thetimes.co.uk/article/brexit-is-an-opportunity-for-a-genuinely-liberal-us-uk-free-trade-deal-mz7j059h6>

¹⁸ Mentioned in the Guardian, 'Trump adviser Ross says UK-US trade deal will mean scrapping EU rules', 6 November 2018 <https://www.theguardian.com/business/2017/nov/06/trump-ross-says-uk-us-trade-deal-eu-brexit-chlorinated-chicken>

¹⁹ Global Justice Now (2015), 'Race to the bottom. Regulatory cooperation in TTIP: A blueprint for corporate domination?' https://www.globaljustice.org.uk/sites/default/files/files/resources/race_to_the_bottom_0.pdf

particular new and emerging markets that can be expected to play an even greater role in the future global economy.”²⁰

The UK must not seek to include in any future UK-US deal provisions that would weaken the ability of either country to avoid or manage financial crises.

3. Investor-State Dispute Settlement

Investor-State Dispute Settlement (ISDS) mechanisms allow private companies to sue governments if they believe that changes to domestic law or policy implementation have negatively impacted on the profitability of their investment. ISDS was a controversial proposal in the TTIP negotiations, and was replaced in the Comprehensive Economic Trade Agreement (CETA) by the similarly structured Investor Court System (ICS). The European Court of Justice is currently producing an opinion on ICS in CETA which could mean that it is not implemented.

The original stated aim of ISDS was to increase investment in countries where the legal infrastructure was considered to be weak, however the evidence suggests that such provisions have done little to help attract investment to these countries. 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.^{21 22} 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.²³ 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.

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; governments risk significant legal costs for defending a case and compensation in the millions, sometimes billions, of dollars if they lose. This has 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.

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

²⁰ House of Commons International Trade Committee, Written Evidence submitted by TheCityUK, March 2017 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/ukus-trade-relations/written/48127.html>

²¹ 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>

²² UNCTAD, Investor–state dispute settlement: review of developments in 2017. June 2018, https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf

²³ Gus Van Harten & Pavel Malysheuski, “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

obtain a permit for the plant.²⁴ Other cases include *Lone Pine vs. Canada (2013)*²⁵, 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.²⁶

For these reasons, Trade Justice Movement believes that ISDS (or the CETA alternative of ICS) should not be included in any future FTA between the UK and the US. Its inclusion would undermine key shared values including democracy, transparency and rule of law; there is also significant public opposition to its inclusion in such a deal. In a [separate briefing](#), Trade Justice Movement has outlined possible alternatives to ISDS, some of which are preferable, but many suffer from the same problems. Ultimately it is difficult to see how a system where the public insure private investor risk can avoid the problems of regulatory chill and democratic oversight. Increasingly, this dissatisfaction with ISDS means that it is being left out of FTAs. In October 2018, the US and Canada decided to drop ISDS altogether from the US-Mexico-Canada Agreement (USMCA), the replacement to the North American Free Trade Agreement (NAFTA). This lends support to the view that ISDS should not be considered a necessary component of modern trade agreements.

Instead of pursuing ISDS in a future deal with the US, the government should consider alternative ways of ensuring investors have adequate protection. This could be done by require UK businesses to undertake due diligence before investing in the US 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.

4. The environment

DIT's consultation document recognises that trade can pose a threat to the environment, especially where it encourages industries with harmful environmental externalities.²⁷ 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.

Trade and investment deals pose a potential barrier to fighting climate change and developing better environmental policy. A new UK-US FTA presents an opportunity for rigorous, binding environmental

²⁴ See report from the International Institute for Sustainable Development, 'The State of Play in Vattenfall v. Germany II' (2014): <https://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-ii-leaving-german-public-dark-en.pdf>

²⁵ 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>

²⁶ See Investment Treaty News, 'Awards and Decisions', 23 September 2010, <https://www.iisd.org/itn/2010/09/23/awards-and-decisions/>

²⁷ Department for International Trade (2018), 'An information pack for the Consultation relating to a bilateral Free Trade Agreement between the United Kingdom and the United States', p14 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727810/PDF_Information_note_on_United_States.pdf

regulations, to ensure that the UK's post-Brexit trade does not conflict with its international climate commitments.

Energy policy

It is difficult to overestimate the importance of the energy sector to both climate change and the global economy. The high costs and potential profits of energy exploration and production make energy the single largest destination for foreign direct investment (FDI).²⁸ Much of this investment is protected by ISDS (discussed earlier) in BITs, which makes it very difficult for governments to control or limit this investment. Yet controlling the energy industry is essential if the UK is to meet its international commitments on climate change, as defined in the COP21 Paris Agreement. It is essential that a UK-US FTA does not include ISDS, which can be taken advantage of by energy companies to challenge environmental policy, and that the deal does not include an Energy Chapter to encourage further investment in fossil fuels. The government will be aware of opposition from local communities across the country to fracking. There is evidence that fracking poses a severe threat to climate change through fugitive methane emissions, making it worse for climate change than coal on some measures.²⁹ It is important, for our natural environment and our climate change commitments, that a UK-US trade deal is not used as an opportunity for US fracking firms to begin exploration in the UK.

The Energy Charter Treaty (ECT) governs a significant proportion of trade and investment in the energy sector. The treaty offers protections to investors, including national treatment (i.e. ensuring that foreign firms are treated the same as domestic firms). An energy chapter in a UK-US trade deal might be modelled on the ECT, giving US and UK energy firms equal treatment rights, so that UK policy would be unable to favour domestic firms. This would mean a risk that US firms could challenge the UK government for developing its own domestic green industries, or for favouring domestic firms for environmental reasons. It is important that the UK retains the power to control its domestic energy policy, particularly in relation to developing a green energy sector and safeguarding environmental protections.

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, if the UK gets a deal with the EU. 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 a future UK-US partnership must not undermine this non-regression. As discussed earlier, modern FTAs tend to seek some form of regulatory cooperation to overcome NTBs. It is essential that any regulatory cooperation does not reduce the UK's environmental standards, or bind it (either legally or in practice) to not improving its existing standards.

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 in line with EU standards after Brexit. This could be achieved through formal harmonisation or some sort of similar commitment in EU law, and would not only be good for the environment but also reduce friction for cross-border trade. Indeed, maintaining the EU's 'common rulebook' on goods standards is a core part of the government's Chequers proposal for the FEP. It is clear that this kind of regulatory cooperation with the EU on environmental standards would limit the scope of a UK-US FTA, since the UK would be unable to align its standards with the EU and US simultaneously. TJM has concerns about the deregulatory and democratic effects of regulatory

²⁸ Financial Times (2015), 'The FDI Report 2015: Global Greenfield Investment Trends'

²⁹ Parliamentary Assembly to the Council of Europe Committee on Social Affairs, Health and Sustainable Development (2016), 'The exploration and exploitation of non-conventional hydrocarbons in Europe' <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23190&lang=en>

cooperation, discussed earlier, however our members are in agreement that a UK-US FTA must not be an opportunity to either reduce our existing standards or restrict the UK's ability to raise standards in the future. Given the EU's comparatively high environmental standards, a comprehensive FTA with the EU is more likely to deliver on our environmental targets than a TTIP-style deal with the US.

EU principles

In addition to environmental regulations on goods and services, EU environmental law is also 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. However environmental groups have rightly emphasised that the environmental principles, or similar equivalents, should continue to direct UK environmental legislation and retain binding force after Brexit, and the government has implied that some principles will be enshrined in a new 'Environmental Principles and Governance Bill'. It remains unclear whether this will include all the EU principles, and what powers the new environmental watchdog will have to enforce them - leading to criticism from many environmental groups.

The UK-US deal poses a further risk to the ambitions of the Environmental Principles and Governance Bill, since the US does not honour the same principles in its environmental law. In the EU, the Precautionary Principle is enshrined in EU law, whereas in the US it is not, which means that potentially harmful products and practices can be allowed until they are proven to be environmentally damaging, even when there is significant risk of environmental damage and scientific unknowns. Much of US environmental legislation is managed at the state-level, and not applied nationally. Although the polluter pays principle appears in certain statute laws in the US, this is a fundamentally different structure to the legally enforceable environmental principles which stand above EU law. Any UK-US FTA which encourages regulatory cooperation on environmental principles risks the UK having weaker protections post-Brexit, and converging towards US-style environmental legislation.

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."³⁰ 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. Both the US and the UK should commit to funding for the research and development of green technology and could develop a bilateral cooperation agreement on this issue. 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.

5. Public services

TJM is concerned about the potential effect of a UK-US FTA on the provision of public services in the UK. Proposals for TTIP would have seen significant liberalisation of services. The inclusion of a negative list for public services would have given the provisions significant scope, including services

³⁰ Department for International Trade (2018), 'An information pack for the Consultation relating to a bilateral Free Trade Agreement between the United Kingdom and the United States', p16 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727810/PDF_Information_note_on_United_States.pdf

that might be developed in future; the inclusion of a ratchet clause would have made it extremely difficult to reverse privatisation, even where private provision is demonstrably failing. 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. Many public services are already provided by a combination of state and private sector finance, something which is controversial among many voters, who are concerned that this decreases the quality of service provision and increases the cost to individuals. In terms of a trade deal, it also means that the vast majority of UK services would be covered. Liberalising trade in services could encourage this trend further, without democratic support, and with potential implications for social welfare.

Although there are no specific proposals for public services liberalisation in a UK-US trade deal, there are a couple of reasons to be concerned. First, a Chequers-style FEP with the EU would restrict the UK's ability to negotiate trade deals which are focused on goods, since goods regulation would be harmonised with the EU. This means that services would be one of the most significant areas within the scope of a UK-US FTA, which puts pressure on the UK to offer public services liberalisation in return for a US trade deal. Indeed, the Cato Institute, an influential American think tank, recently set out its proposal for a UK-US FTA which would "open all government procurement markets to goods and services providers from the other party... It should open all services markets without exception to competition from providers of the other party."³¹ Second, as mentioned earlier, the services provisions in a UK-US FTA could be based on TTIP or the Trade in Services Agreement (TiSA), a plurilateral treaty which aims to liberalise services, particularly in transport, healthcare and banking.³²

TiSA aimed to further liberalise trade and investment in services, and expand "regulatory disciplines" on all services sectors, including many public services.³³ The "disciplines," or treaty rules, would provide all foreign providers access to domestic markets at "no less favorable" conditions than those offered to domestic suppliers and would restrict governments' ability to regulate, purchase and provide services. This would essentially change the regulation of many public and privatized or commercial services from serving the public interest to serving the profit interests of private, foreign corporations."³⁴ A number of our members are trade unions who represent UK public services workers, have deep concerns about the deal.

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.³⁵ 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 a UK-US deal would lock-in and put pressure on the government to increase privatisation. Legal advice commissioned by Unite Union led to the conclusion from leading QC Michael Bowsher, a former chair of the Bar Council's EU law committee, that the NHS would not have been adequately protected from

³¹ The Guardian, 'Rightwing think tanks unveil radical plan for US-UK Brexit trade deal', 18 September 2018 <https://www.theguardian.com/politics/2018/sep/18/rightwing-thinktanks-unveil-radical-plan-for-us-uk-brexite-trade-deal-nhs>

³² European Commission, 'Trade in Services Agreement (TiSA)' (accessed October 2018) http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm

³³ European Parliament Directorate General for External Policies (2016), 'Financial services liberalisation and TiSA: implications for EU Free Trade Agreements' [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578019/EXPO_STU\(2016\)578019_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578019/EXPO_STU(2016)578019_EN.pdf)

³⁴ Public Services International (2013), 'Brief on the Trade in Services Agreement (TiSA)', http://www.world-psi.org/sites/default/files/documents/research/en_psi_tisa_policy_brief_july_2013_final.pdf

³⁵ ONS (2012), 'Public Sector Employment, Q3 2012' http://webarchive.nationalarchives.gov.uk/20160107051715/http://www.ons.gov.uk/ons/dcp171778_288679.pdf

liberalisation under the proposed TTIP deal.³⁶ TJM is confident that the government is aware of the immense public outcry which would be generated were the NHS to be included in a UK-US deal; it is the view of many of our members that post-Brexit trade deals, including a UK-US FTA, must exclude the NHS as well as other public services. However there are more subtle ways in which private investor interests can affect healthcare provision.

For example, the inclusion of ISDS could prevent future nationalisation of currently privately provided healthcare services or deter the government from introducing health legislation, as private investors could threaten to sue the government for lost profit. ISDS was also used against Slovakia when it sought to bring health insurance back into the public sector³⁷ and against Australia for legislating for plain cigarette packaging.³⁸ Another concern is that allowing US firms to bid for public health contracts might pave the way for greater liberalisation, and convergence towards a US insurance-based model of healthcare, where more of the costs are covered by individuals rather than the state.

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. This sort of behaviour might not be possible under a new UK-US FTA if the deal demands that procurement does not favour local industries, for example by including a ban on local content requirements. The ostensible aim of preventing protectionism must not be used to undermine ethical procurement powers for local authorities.

6. Human rights

A number of rights have already been discussed: a UK-US FTA poses a potential threat to democracy and scrutiny, environmental protections, rule of law, health regulations, product standards and public services. In addition to this it is worth highlighting a number of other rights that can be threatened via the mechanisms of ISDS and certain kinds of regulatory cooperation.

Workers' rights

³⁶ The Guardian, 'TTIP deal poses 'real and serious risk' to NHS, says leading QC', 22 February 2016 <https://www.theguardian.com/business/2016/feb/22/ttip-deal-real-serious-risk-nhs-leading-qc>

³⁷ 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/>

³⁸ 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>

Workers are currently protected by domestic and EU legislation, which enshrines their right to organise, guarantees minimum wages and ensures protection from discrimination. Workers also enjoy rights related to health and safety at work, maternity and paternity leave, holiday entitlement and working hours. Those rights which are guaranteed in EU law are being translated into UK law through the European Union (Withdrawal) Act. As with other rights, workers' rights are one area which can be affected by FTAs. Workers' rights tend to be more lax in the US, and some differ between states. In general the US has a lower minimum wage,³⁹ less legislation on equal opportunity and discrimination at work, more rights for employers to hire and fire,⁴⁰ and fewer entitlements like paternity and maternity leave.⁴¹ The US has not ratified a number of the most important International Labour Organization Conventions, including the rights to freedom of association and collective bargaining.⁴²

Fewer labour rights can mean lower costs for businesses. More trade with the US across similar industries could lead to a deregulatory pressure on UK labour rights, and encourage firms to cut standards, for example by offering more zero hours or temporary contracts. Any regulatory cooperation on labour rights could speed this deregulatory process up further. The fact is that the UK and US have fundamentally different approaches to the rights of workers and responsibilities of employers. It is hard to see how an FTA could harmonise trade in services without overcoming these fundamental differences. Doing so may be at the expense of hard won labour rights in the UK.

Gender

TJM is pleased that the 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 gender provisions are secured in future trade deals, including a UK-US FTA. In December 2017, 118 WTO members supported a Joint Declaration on Trade and Women's Economic Empowerment at the Ministerial Conference. A number of trade deals now include gender chapters and countries including the UK have a renewed focus on female entrepreneurship. International action to address the gendered impacts of trade policy is welcome. However, this will not be effective if it is limited to non-binding declarations, gender chapters in trade deals or initiatives to increase women's access to export markets. The government must ensure that a future UK-US FTA complies with the UK's commitments under international human rights law. Comprehensive gender impact assessments should be conducted, together with human rights and sustainable development assessments, and their findings should be taken into account. Where a conflict is identified, commitments on gender equality and other human rights, must be given precedence over other trade rules in the the FTA.

³⁹ The Telegraph, 'How generous is the British minimum wage compared with the rest of the world?', 22 July 2015, <https://www.telegraph.co.uk/finance/jobs/11753344/How-generous-is-the-British-minimum-wage-compared-with-the-rest-of-the-world.html>

⁴⁰ Osman, Chris (2001), 'An ocean apart: US and EU employment law compared', Thomson Reuters Practical Law [https://uk.practicallaw.thomsonreuters.com/7-101-3606?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhpc=1](https://uk.practicallaw.thomsonreuters.com/7-101-3606?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhpc=1)

⁴¹ The Guardian, 'The US is still the only developed country that doesn't guarantee paid maternity leave', 3 December 2014, <https://www.theguardian.com/us-news/2014/dec/03/-sp-america-only-developed-country-paid-maternity-leave>

⁴² UNISON (2014), 'The Transatlantic Trade and Investment Partnership' <https://www.unison.org.uk/content/uploads/2014/05/On-line-Catalogue224102.pdf>