Briefing note: CPTPP Bill report stage

The Nuffield Trust is an impartial think tank which tries to improve health through policy analysis and research. Our Health and International Relations Monitor project, funded by the Health Foundation, examines how the UK's shifting international position affects health and social care in this country. The authors of this briefing, Cyril Lobont and Mark Dayan, would like to thank Professors Holly Jarman, Deborah Gleeson, and Albert Sanchez-Graells for their assistance in understanding key provisions of the treaty.

The CPTPP Bill represents an important opportunity for Members of Parliament to scrutinise the implications of changes in law associated with a major trade agreement. This short briefing presents our analysis of the implications for health, care and the NHS, and suggests key questions where commitments or provisions are unclear. It looks across the issues of investment protections, medicines, food safety and standards, procurement, and staffing.

Summary

- The CPTPP Bill provides an opportunity for MPs to scrutinise a major trade deal in depth. It is important to note that the agreement has already been reached, and some of the protections and suspensions it contains are quite unique. This debate offers only limited parliamentary scrutiny, which remains weak under the UK system.
- Investment protections under CPTPP create some risk that the government could be sued by private companies in international tribunals, on the grounds that new measures to clamp down on unhealthy products such as tobacco, or to renationalise private health services, have reduced the value of their investments. There are stronger defences against this than in some previous agreements, protecting the ability to regulate, but they remain largely untested.
- These stronger protections create an opportunity to give the UK less risk of having measures challenged than some earlier investment treaties. However, it is unclear whether companies could still continue to use these earlier agreements, which would be a missed opportunity.

- "Side letter" agreements which the UK Government has signed with each CPTPP member protect it from the risk that CPTPP rules on patents could force it to leave the European Patent Convention. This is separate from the EU and saves trouble for the NHS, the UK government and business in having multiple systems. However, these letters also mean that in theory the UK government has committed to campaign internationally to add an extra grace period for companies to be allowed to charge full prices for medicines.
- Other provisions on medicine currently carry little risk of increasing prices. However, if suspended provisions on how prices can be set and controlled were brought back, this would affect the ability of the NHS to bargain for affordable medicine.
- CPTPP has articles which commit the UK government to recognising food safety regulations from other countries which may not control potentially dangerous products in the same way. It does not provide for the UK to follow the "precautionary principle" of banning products where evidence of harm is unclear. However, the key provisions cannot actually be enforced under the agreement, and the UK has already agreed similar commitments before.
- Health services are exempt from provisions on procurement, and social care also appears not to be included. Purchasing of medicines and services like cleaning may be affected, but it is not clear that CPTPP meaningfully adds to agreements the UK has already signed anyway.
- There does not appear to be any meaningful implication for NHS staffing.

Investment protection, public health, and the NHS

Concerns for health and social care relate mainly to protections against "expropriation", where investors have assets confiscated, which are contained in Article 9.8 and Annex 9-B. The Nuffield Trust[1] and many other charities and experts[2] have warned that these may enable companies to challenge some health regulations and NHS policies, given the investor-state dispute settlement provisions included in some trade and business agreements, including CPTPP and discussed below. The UK's Annex II to the CPTPP[3] explicitly exempts health and social services (among other things) from specific articles of the investment chapter, but not expropriation.

One scenario in which challenges may arise would be if there were moves to renationalise services which the NHS currently contracts out to private providers (for example, a large proportion of mental health services). Article 9.8 allows for expropriation that does not discriminate between parties and is carried out for a "public purpose" but stipulates that compensation must be paid to the affected party or parties. "Public purpose" is likely to cover

[1] https://www.nuffieldtrust.org.uk/news-item/will-the-nhs-be-on-the-table-for-a-pacific-trade-deal
[2] https://www.tjm.org.uk/resources/briefings/shaping-future-uk-trade-policy-investment-protection-provisions
[3] Annex II Schedule of the United Kingom (publishing.service.gov.uk)

any actions relating to the NHS[4]. However, a government would still be bound to paying full compensation, with scope to legally challenge the amount.

Another key risk is that expropriation provisions may make it more difficult for the government to regulate in the interest of public health. For example, it has been suggested that investors may be able to challenge controls on the import of food and drinks that contain certain potentially harmful substances, on the grounds that they reduce the value of their assets.[5] This concept of "indirect expropriation" could carry a similar requirement to pay compensation.[6] Other scenarios posited include limitations on the ability to regulate against actions which have a negative environmental impact (with knock-on impacts on public health)[7], or to use tobacco control measures such as plain packaging. A notable case of the latter is Phillip Morris Asia's eventually unsuccessful, but expensive, dispute with the Australian government under an investment agreement between Australia and Hong Kong.[8]

Investor-State Dispute Settlement

The inclusion of investor-state dispute settlement (ISDS) is the main reason why these parts of the investment chapter of the CPTPP may pose a risk. ISDS is a process which allows foreign investors to directly challenge states if government actions negatively affect the value of their investments. This would include across the issues discussed above.

This makes it much easier to raise disputes than in trade agreements where only governments themselves can raise cases, and relocates those disputes to arbitration tribunals outside the law of any one country. Fears or threats of being challenged under ISDS can lead to 'regulatory chill' where states pre-emptively avoid regulation. Questions have been raised about why a key element of the UK's strategic approach to its 2022 trade agreement with Canada[9] was the exclusion of an ISDS mechanism, but this has been accepted in CPTPP

[4] https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0F5DF8774E1551D454F37EAE5D85B80B/S0020589322000343a.pdf/indirect-expropriation-and-the-protection-of-public-interests.pdf
[5] https://www.tjm.org.uk/resources/briefings/letter-to-kemi-badenoch-to-halt-the-accession-to-pacific-trade-deal
[6] https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0F5DF8774E1551D454F37EAE5D85B80B/S0020589322000343a.pdf/indirect-expropriation-and-the-protection-of-public-interests.pdf
[7] Ibid
[8] https://www.nortonrosefulbright.com/en/knowledge/publications/ded9c356/philip-morris-asia-v-australia#:~:text=On%20December%2017%2C%202015%2C%20the,the%20Agreement%20between%20the%20Government
[9] https://www.gov.uk/government/publications/uk-approach-to-negotiating-a-free-trade-agreement-with-canada

(which includes Canada). The UK has side letters with Australia and New Zealand opting out of ISDS, so this concern does not apply with regards to investors from those countries.

Lines of defence

The investment chapter contains some lines of defence against this being realised – more than in some existing UK agreements. Article 9.16 is a relatively weak protection. It states that the chapter should not prevent a Party from maintaining or enforcing measures related to environmental, health or other regulatory objectives "otherwise consistent with this Chapter". Critics argue that this wording makes the article self-negating[10], and it is difficult to predict how it would be interpreted in an actual ISDS case.

A stronger line of defence is annex 9-B of the investment chapter, which outlines what actions cannot be defined as indirect expropriation. It states "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances." An action is non-discriminatory if it is equally applied to all relevant parties. The "rare circumstances" exception provides a possible weakness. Previous arbitration on this language deemed that these only exist where the putative investor had been explicitly told a government would not regulate a certain way,[11] but again, this does not guarantee future arbitration will have the same outcome.

These factors mean that most public health regulations are unlikely to be deemed indirect expropriations and therefore will not leave the state liable to pay compensation, but caution should remain around the opaque and untested[12] terms used.

Could CPTPP be an improvement in protection?

The UK is already party to a number of Bilateral Investment Treaties with CPTPP members (Singapore, Malaysia, Peru, Chile, Vietnam and Mexico) which contain an ISDS provision. The ISDS provision in these is different from that in the CPTPP, and may offer more power to

[10] The Trans-Pacific Partnership and Canada: A Citizen's Guide, pp 54
[11] Methanex v USA (n63) Pt IV, Ch D, para 7
[12] Gleeson et al (2019), GLAH Trade agreements and pharmaceuticals

investors to open disputes in certain scenarios. It would be a missed opportunity to not limit investors from the mentioned countries to using the CPTPP's ISDS mechanism.

Questions for further scrutiny by Members of Parliament

- Will investors be able to choose whether they pursue ISDS under existing bilateral investment treaties or the CPTPP, given that the former may afford them more power over the state?
- It is implicit in the UK's policy to exclude ISDS from an FTA with Canada that risks were identified in allowing Canadian investors access to such a mechanism. Do Ministers still believe this will be a risk with the UK's accession to the CPTPP?
- Can the government guarantee that regulation in the interest of public health will never be at risk of being interpreted as "indirect expropriation" under the CPTPP?
- Is the government concerned that accession to the CPTPP might make it more difficult to renationalise certain healthcare services in the future?
- Why does the UK's Annex II not exempt health and social care from the CPTPP's article on expropriation?

Medicines

The UK government has consistently stated that "the price the NHS pays for drugs will not be on the table" during trade negotiations. However, concerns were raised that four separate parts of CPTPP might force the health service to pay more by obstructing its ability to buy cheaper "generic" drugs.

We believe that the final form of UK accession to CPTPP removes most causes for concern – though not necessarily all.

A major concern throughout the process, raised by the Nuffield Trust[13], industry, and legal sources[14], was that Article 18.38 seemed to be incompatible with the UK's membership of the European Patent Convention. The UK relies on this European-level agreement, which is entirely separate to the EU and covers a greater range of countries, for the granting of most medicines patents. It offers several advantages, notably allowing companies to enter the UK market without duplication and reducing the costs to the taxpayer of having a separate UK system. Article 18.38 requires signatories to offer a 12-month grace period, extending the time for which data used by the original patent owner cannot be used to support other

[13] https://www.nuffieldtrust.org.uk/news-item/will-the-nhs-be-on-the-table-for-a-pacific-trade-deal
[14] The UK and Trans-Pacific partnership (taylorwessing.com)

suppliers bringing in what would usually be cheaper medicines: the EPC does not provide for this.

The UK has dealt with this by signing a side letter[15] with each member of CPTPP where it promises to promote this kind of grace period in international fora and to press for its inclusion in the EPC. In return, Article 18.38 will not apply to it until it is successful. This removes the most obvious risk to NHS medicines pricing and access – but also commits the UK, at least on paper, to lobby internationally and in Europe for a system which would cost more.

Article 18.53 CPTPP also contains provisions for what is known as "patent linkage" – where medicines regulators support patent holders to see and challenge cheaper competitors. However, DBT have stated that "The UK has not had to make changes to our rules around marketing of generic drugs. Specifically, we have not had to introduce a "patent linkage" style system."[16] This is plausible, as the relatively mild provisions of Article 18.53 largely only require regulators to give patent holders notice and opportunity in case they want to object. New Zealand has concluded that simply publishing information on its medicine regulator's website meets the criteria[17], and the UK regulator already does this too.

Annex 26-A of the original TPP contained, like other trade deals with the USA, provisions that actually directly seek to limit how countries can control and bid down the price of drugs. However, it is relatively non-restrictive compared to those in other agreements and in any case, after the USA left, the remaining parties suspended this annex entirely as they signed CPTPP.[18]

This is among several areas related to health where CPTPP differs from what have been more typical trade agreements strongly influenced by the USA, because of its unique history. Again, it should not necessarily be seen as a valid test case for a class of agreements, and this limits the opportunity to scrutinise UK positions more generally. The fact that Parliament is not

[15] https://www.gov.uk/government/publications/cptpp-associated-documents
[16] committees.parliament.uk/writtenevidence/124880/pdf/
[17] https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/intellectual-property/
[18] https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf

guaranteed a vote on trade agreements, either in themselves or through a Bill such as this, means weak parliamentary accountability.

"Secondary patenting" is where drug companies can get extended exclusive rights to sell a medicine – and therefore charge full price – when they find a new use for an existing medicine. Article 18.37 requires signatories of CPTPP to accept this.[19] The wording used is unlikely to have any direct impact on the UK. It does not obviously go beyond what the UK already does, and other developed countries signing up to CPTPP have not had to go any further in allowing patents for new uses.[20] However, it could possibly limit a future government trying to dial back on these protections to make medicines cheaper.

Questions for further scrutiny by Members of Parliament

- What measures will the UK be taking in line with its commitment to seek changes to the European Patent Convention? What would be the cost implications of this for the NHS?
- Do Ministers see the currently inactive provisions of Annex 26-A's limiting the way medicine prices can be controlled as a possible risk in any future negotiation over CPTPP? What measures would they take to avoid or resits this?

NHS procurement

Chapter 15 of CPTPP contains extensive commitments on procurement, the purchasing of goods and services by the public sector. Clause 3 of the Bill, and its Schedules, make small changes in UK law to apply these. There are concerns that the CPTPP's rules on procurement will restrict the freedom the health and care sectors in the UK currently possess when they procure goods and services, for example by making it more difficult to buy locally. However, we conclude that the impact may be limited given exceptions for health services, and given other agreements that the UK has already signed.

Is procurement for health and care in the UK covered by the CPTPP?

The UK's annex 15 to the CPTPP uses a 'positive list' approach, meaning that an entity must be explicitly mentioned in the annex to fall under the CPTPP's rules on procurement. NHS bodies (NHS Business Services Authority, NHS England, NHS Trusts and NHS Foundation

[19] 18-intellectual-property.pdf (dfat.gov.au)
[20] The Trans Pacific Partnership Agreement, intellectual property and medicines: Differential outcomes for developed and developing countries - Deborah Gleeson, Joel Lexchin, Ruth Lopert, Burcu Kilic, 2018 (sagepub.com)

Trusts) are included in the positive list. However, the annex explicitly states that human health services (hospital services, medical and dental services, and 'other' human health services), administrative healthcare services, and supply services of nursing and medical personnel are not covered by the procurement chapter.

This implies that other things that the NHS procures, such as cleaning services or pharmaceuticals (which are mentioned in sections D and E of the annex on covered goods and services) are subject to these rules.

Social care services do not appear in section E of annex 15, meaning that the procurement of social care services would not be bound by CPTPP rules on procurement. This is despite local authorities, the main procuring entity of social care services, being included in the positive list.

What difference will this make?

A crucial question is whether CPTPP actually imposes anything meaningfully different to other agreements the UK has signed up to. The key existing agreements are the WTO GPA (Agreement on Government Procurement) and the UK's FTAs (such as those with Australia and New Zealand).

Academic studies suggest that the CPTPP does not appear to add much to these agreements with regards to procurement. [21] Despite some differences in phrasing, provisions such as those concerning non-discrimination generally afford similar rights to parties, and the stated intention of the CPTPP is that it should not interfere with existing international agreements.[22] Even minor divergence in wording, however, may lead to uncertainty regarding which agreement's rules take precedence, especially where procurement falls under the remit of more than two agreements.[23] The Bill would mean that CPTPP members are included as "treaty states", alongside a large number of other countries.

Questions for further scrutiny by Members of Parliament:

[21] The Growing Thicket of Multi-Layered Procurement Liberalisation between WTO GPA Parties, as Evidenced in Post-Brexit UK by Albert Sanchez-Graells :: SSRN
[22] Art 1.2(1) CPTPP
[23] ibid

- Why does annex 15 exclude some parts of NHS procurement from the CPTPP's rules, but not all?
- Can the government confirm that procurement of social care services will be exempt from the CPTPP's rules?
- How will the government ensure clarity on rules where multiple agreements apply to a given procurement scenario?
- What differences does the government see between the provisions on procurement in its existing international agreements, and those contained in the CPTPP?

Food supply and safety

Chapter 7 of CPTPP deals with "Sanitary and Phytosanitary Measures" – regulations on animal and plant products, crucial for food safety. Article 7.9 states that these must either be based on international standards or "on documented and objective scientific evidence that is rationally related to the measures".[24]

There is a risk that this is difficult to reconcile with UK regulations inherited from the EU on areas such as disease control and genetic modification in food. These often reflect the "precautionary principle" of banning innovations when the evidence is unclear or non-existent. This means regulators can require proof of safety before something is allowed, not just forbidding it when there is proof that it is harmful. The earlier Article 7.8 requires signatory countries to regard each others' regulations as equivalent if they achieve the same level of protection or same effect. This would mean the UK allowing products to enter if they met standards from the country they were grown in and exported from.

The specific requirements on permitted regulations and recognising other countries' regulations cannot actually be enforced by dispute resolution measures under CPTPP. However, several of the related procedural stages could be. Several articles reference the World Trade Organisation SPS Agreement, which has been interpreted in WTO dispute settlement as requiring scientific evidence for any bans in contrast with the precautionary principle.[25] This gave rise to the EU previously losing a case on hormone-treated beef, although it did not change its regulations.

The Chair of the Trade and Agriculture Commission (TAC), the government body overseeing trade deals and agriculture, told the Business & Trade committee that they had "not

[24] Consolidated TPP Text – Chapter 7 – Sanitary and Phytosanitary Measures (international.gc.ca)
[25] committees.parliament.uk/writtenevidence/111054/pdf/

investigated whether UK import bans based on the precautionary principle could be challenged successfully under the provisions of CPTPP". He said that the TAC had concluded this was no more of a risk than under WTO rules[26] [27]. However, the enforcement mechanisms and different political context relating to CPTPP would obviously be a new avenue for any such challenge.

Staffing

Concerns have been raised that "the NHS, and other sectors, could lose workforce as professionals will have easier access to labour markets in countries like Australia, New Zealand and Canada, particularly given current industrial unrest in the UK". [28] However, CPTPP contains very little on areas such as migration or the recognition of qualifications which might give rise to such concerns. It does have a section requiring parties to allow the temporary entry of businesspeople, but this excludes people "seeking access to the employment market of another Party" - in other words, actually looking for a job elsewhere.[29]

[26] https://committees.parliament.uk/publications/43305/documents/215619/default/
[27] https://committees.parliament.uk/oralevidence/14128/pdf/
[28] Making trade agreements work for health - Our blog - Public Health Scotland
[29] Consolidated TPP Text – Chapter 12 – Temporary Entry for Business Persons (international.gc.ca)

Nuffield Trust is an independent health charity. We aim to improve the quality of health care in the UK by providing evidence-based research and policy analysis and informing and generating debate.

For more information about Nuffield Trust, including details of our latest research and analysis, please visit www.nuffieldtrust.org.uk

Subscribe to our newsletter: www.nuffieldtrust.org.uk/newsletter-signup

Follow us on Twitter: Twitter.com/NuffieldTrust

59 New Cavendish Street
London W1G 7LP
Telephone: 020 7631 8450
www.nuffieldtrust.org.uk
Email: info@nuffieldtrust.org.uk

Published by the Nuffield Trust.

nuffieldtrust