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The UK's Accession to the Comprehensive Progressive Trans-Pacific Partnership (CPTPP): Legal Obligations and Political Economy

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I Introduction

A pillar of its ambitious 'Global Britain' trade strategy instigated as a consequence of its departure from the European Union (EU), the United Kingdom (UK) has applied to join the mega-regional Comprehensive Progressive Trans-Pacific Partnership (CPTPP) – the first country to do so after the 11 original signatories. The CPTPP trade agreement specifically provides for accession by new members, but the process it sets out is informal and lacks detail. To join, the UK will have to meet two benchmarks: demonstrate how it will meet the commitments under the CPTPP agreement and undertake to deliver the highest standard of market access offers on goods, services, investment, financial services, government procurement, state-owned enterprises and temporary entry for business-persons. It is possible that additional commitments or waivers may be negotiated.

The UK has strategic priorities that seem to be well aligned with CPTPP accession, but domestic interest groups, in particular in agriculture, may resist greater liberalisation. Concerns about data protection, intellectual property rights and investment have also been raised and may influence the UK's negotiating position in accession talks. Accession to the CPTPP complements the UK's recent successes in signing FTAs with Australia and New Zealand, both of which are CPTPP parties. Negotiations to modernize the UK's FTA with Canada, another CPTPP partner, are also under way. Accession appears to be imminent, but it remains unclear on what terms this will take place.

The CPTPP came into force in December 2018 for seven Parties: Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam. The remaining four countries (Brunei, Chile, Malaysia, and Peru) are not actively participating members because they have not yet ratified the treaty through their domestic legal systems (and are therefore properly termed

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Signatories), although for the purposes of this commentary the umbrella term Party will be used for all CPTPP countries, unless the distinction is material.

The UK could be the first of several new members of the CPTPP, expanding what is already a significant economic bloc of large and fast-growing economies – one of the world’s mega-regional economic integration pacts. While there are some provisions in the agreement that could be considered to be mercantilist or managerial, the removal of tariffs and other barriers can be considered to be positive for moving towards freer trade. This can be contrasted with the ‘managed trade’ preference which is emerging in the US, for example, which prioritizes non-economic goals at the expense of efficiency.¹ The UK’s accession to the CPTPP will make the agreement less regional and more of a platform agreement upon which global trade rules could be established, possibly along the lines of the World Trade Organization (WTO). The CPTPP is one of the biggest free trade areas in the world, by any measure. Its members account for 13% of global GDP and include some of the world’s largest and fastest growing economies, as well as smaller economies that are leaders in free trade.

This article sets out, in Section II, the legal framework of the agreement and its accession process, and in Section III, some political economy aspects of UK accession, considering some of the UK’s offensive and defensive interests and provisions that could attract political resistance.

II Main legal obligations and accession process

i) Main legal obligations

The CPTPP consists of 30 chapters covering tariff reductions and rules on market access for goods as well as services and investment. It also includes disciplines on intellectual property, government procurement, digital trade, trade remedies, state-owned enterprises and SMEs. Accordingly, the CPTPP is an excellent example of a modern, comprehensive Free Trade Agreement (FTA) in that it encompasses a breadth of topics, achieving economic integration across several countries of varying levels of development to a degree that would not be feasible multilaterally. It is widely recognized as the ‘gold standard’ FTA.

¹ See e.g. E Alden, ‘Free Trade is Dead. Risky “Managed Trade” is Here’ Foreign Policy (20 July 2021) <https://foreignpolicy.com/2021/07/20/free-trade-dead-managed-carbon-border-tax-climate-tariffs-trade-war-protectionism-esg-biden-trump-eu-china/> (October 2022)

In addition to tariff bindings and non-discrimination (National Treatment and Most Favoured Nation) obligations, the agreement's 'rules of origin' confer originating status and thus preferential tariff rates, on products comprised of parts and components made in any CPTPP country--a concept known as 'regional cumulation' although there is no diagonal accumulation.² The agreement's Trade Facilitation chapter also contains modern rules on customs clearance designed to reduce paperwork for international goods shipments.

The CPTPP has a chapter on Sanitary and Phytosanitary (SPS) measures covering laws relating to the protection of human, animal or plant life or health as applied to food products. It broadly replicates the WTO SPS Agreement in that it requires that Parties must not impose regulations which are discriminatory or excessive in respect of measures necessary for public health or safety given the level of scientifically ascertainable risk. Such measures must also conform to international standards or be supported by scientific evidence. As with many of the CPTPP chapters there is much emphasis on transparency between the Parties to reduce any regulatory burdens in this area. There is a Technical Barriers to Trade chapter, also quite similar to that of the WTO, which prohibits unreasonable safety-oriented regulations for manufactured products.

The Trade Remedies chapter contains material on safeguards, subsidies and countervailing duties which essentially re-iterate WTO obligations but with enhanced transparency and notification requirements. The UK's new agency, the Trade Remedies Authority is currently charged with investigating trade remedies matters, satisfying both WTO and ultimately CPTPP formal requirements in this regard.

On services, the CPTPP adopts a negative list approach to the scheduling of market access and national treatment commitments, with all exceptions, restrictions or non-conforming measures listed in Annexes. This format is preferable to the positive list style of the WTO's General Agreement on Trade in Services (GATS) because under a negative list (where only explicitly identified sectors are protected) the default is that the sector is open to international supply, helping identify areas where restrictions remain to be addressed through future negotiations with a view to expanding overall market liberalisation. The negative list

² Diagonal Accumulation would allow the inclusion of material from a non-CPTPP with which two or more CPTPP parties had existing preferential FTAs, e.g. Canada and Japan both have FTAs with the UK, so UK products would constitute originating for the purposes of the CPTPP even though the UK is not a Party.

approach also opens up future sectors that have not yet been fully realised, such as those dealing with digital trade, and therefore cannot be outlined in a services schedule.

Also going beyond the GATS, CPTPP Parties commit to recognising the education or experience obtained as well as licences or certifications granted in a particular country for purposes of the fulfilment of criteria for the authorization or certification of services suppliers. This obligation is also subject to exceptions set out in Annexes. For example, Australia has a number of exemptions enabling them to grant preferential treatment to indigenous services suppliers. The agreement further contains commitments on temporary entry to enable the travel of skilled people between Parties for the purpose of doing business, although all movement of temporary personnel remain subject to final approval from national immigration authorities and there are exemptions contained in country Annexes.

The Investment chapter offers most of the protections for foreign investors found in conventional Bilateral Investment Treaties such as non-discrimination, Fair and Equitable Treatment, Full Protection and Security and guarantees against expropriation (including indirect expropriation) without full compensation. Such commitments are subject to various exceptions in the Annexes. For example, Canada maintains the right to screen foreign investors in certain sectors subject to the rules set out in its domestic legislation.

The CPTPP additionally provides strong protection to intellectual property primarily by repeating commitments made through the WTO Trade Related Aspects of Intellectual Property (TRIPS Agreement), although exceeding it in some areas, notably in relation to the protection of certain Geographical Indications. These stronger protections are questionable from a productivity standpoint since GIs can be used to prevent entry into a market based purely on location, in contrast to other kinds of intellectual property which arise due to work done, such as patents and trademarks.

On the dynamic new and growing field of digital trade, the Electronic Commerce chapter of the CPTPP, considered to be cutting-edge at the time it was concluded, commits Parties not to impose customs duties on digital products. The electronic commerce chapter of the CPTPP does not go as far as some of the digital trade chapters in the UK's new FTAs, such as that with Australia. The CPTPP does not protect algorithms, nor does it contain material on digital identities, for example. The CPTPP's electronic commerce chapter does ensure electronic authentication and recognition of electronic signatures. There is also material on online consumer protection as well as access to the internet for the benefit of competition

among network providers. This chapter also prohibits data localisation rules by which governments require businesses to store data on their territory, although there are exceptions from this prohibition where the restriction can be justified by public policy objectives, such as privacy protection. The CPTPP further recognizes the importance of protecting personal information, requiring each Party to have an effective enforcement of privacy rules. Ongoing controversies in this area regarding the competing approaches of China, the EU and the US suggest that this is an area where bespoke CPTPP plus (and potentially minus) commitments will be made in the future.³

In addition to requiring transparency in procurement processes, governments of CPTPP Parties commit to open up their central procurement market for goods and services contracts to suppliers from other Parties up to a certain threshold, exceeding offers made by parties to the WTO's plurilateral Government Procurement Agreement. Sub-central procurement may be covered at the option of the Party (as in the case of Japan which commits its prefectures).

The CPTPP contains a number of provisions which safeguard Parties' policy space in matters of public interest such as health care, including a broadly worded 'right to regulate' clause. This is moderated somewhat by the Regulatory Coherence chapter which essentially requires that regulations must work towards facilitating trade and investment between the parties. The concept of indirect expropriation is narrower than many FTAs, as is the controversial principle of Fair and Equitable Treatment through which foreign investors can challenge violations of due process rights by host governments. Furthermore, the Environment and Labour chapters prohibit the weakening of protections in these areas in order to attract investment or trade.

There is also an innovative SME chapter in the CPTPP which was designed to improve transparency and facilitate compliance obligations often seen as unduly burdensome for smaller commercial enterprises. It also creates a committee which has the objective of supporting SMEs engaging in trades and investment among the Parties' territories.⁴

Most of the CPTPP is enforceable through state-to-state dispute settlement, which consists of consultations followed by formal arbitration, as common in most FTAs. The agreement also provides for investor state dispute settlement (ISDS) through which investors

³ D Ciuriak, D. and M Ptashkina, 'Toward a Robust Architecture for the Regulation of Data and Data and Digital Trade', *CIGI Paper*, Volume 240, Issue 1 (2020)

⁴ Y Abe and D Collins, 'The CPTPP and Digital Trade: Embracing E-Commerce Opportunities for SMEs in Canada and Japan', *Transnational Dispute Management*, Volume 5, Issue 1 (2019)

from one Party can bring claims directly against the government of one of the other Parties based on breaches of the Investment chapter. This system of dispute settlement remains controversial since it enables a certain class of private citizen to bring legal claims in a dedicated international forum rather than in domestic courts. Some Parties have signed side letters to remove their investors from ISDS protections or restrict their availability, for example by precluding its application to disputes arising from investment contracts.

In terms of its structure, the CPTPP presents services and investment commitments together with negative list reservations contained in Annexes. The first set of reservations (Annex I) are those which may change in the future if Parties make improved offers to other non-CPTPP countries in new FTAs (triggering the CPTPP's MFN obligation) or if they choose to make unilateral improvements in services or investment regulations covered by the reservation. The second set of reservations (Annex II) are those which will not be adjusted for CPTPP members.

ii) Accession Process

Trade officials representing all 11 Parties of the CPTPP, known as the CPTPP Commission, stated at their first meeting in January 2019 that the agreement is open to all economies which accept principles supporting an effective, open, inclusive and rules-based trading system. The Parties further confirmed their determination 'to expand the Agreement through the accession of [the] new economies.'⁵ Given its economic size and its status as the first potential new entrant, the UK's application for accession expected to spur the application of other potential Parties, as has already been seen with the interest of South Korea, Taiwan, Ecuador and China.⁶

The process contemplated by CPTPP accession negotiations is severely lacking in detail, as is common in regional trade agreements, including NAFTA in its early stages. This is precisely why the establishment of practice, for example through the UK's accession, is so vital to the prospects of the agreement's enlargement in the future. Some commentators believe that the omission of the details from the treaty language is pragmatic given the dynamic

⁵ 19 January 2019 (Tokyo, Japan)

⁶ D Elms, D. 'How to Join the CPTPP', *Asian Trade Centre*, 2 February 2021. [online]. Available at: <http://asiantradecentre.org/talkingtrade/how-to-join-the-cptpp> (accessed October 2022)

evolutionary nature of the accession practice.⁷ Developed through experience of accession to the multilateral WTO which may have inspired it, the CPTPP's accession process may need to be modified over time to adapt to changes in global trade and investment patterns as well as the nature of each applicant state.

On the topic of accession, the text of the CPTPP states merely: 'After the date of entry into force of this Agreement, any State or separate customs territory may accede to this Agreement, subject to such terms and conditions as may be agreed between the Parties and that State or separate customs territory. Further details of the Accession Process are set out in an Annex to the main agreement which was also issued during the Commission's first meeting in January 2019.'⁸ This document outlines the steps a state seeking to join the CPTPP, which it terms an 'Aspirant Economy' must take

The process contemplates three stages. As a first step, Aspirants are encouraged to engage informally with all CPTPP Signatories regarding their interest in joining the CPTPP prior to submitting a formal request. This bilateral engagement with current membership is designed to ensure that any potential obstacles are identified and discussed with a view to their resolution. This is important because while many impediments are suited to group negotiation, in some situations an Aspirant may raise an issue which is of concern to only one Signatory.

The formal request is initiated through a notification to New Zealand, which is the depository state of the CPTPP, meaning that New Zealand holds the original texts and facilitates its signing. The UK has already performed this action by submitting its notification of intent letter to begin the accession process on 1 February 2021.⁹ The UK has now proceeded to the second stage of negotiations.¹⁰

There appears to be much emphasis on the initial aspect of the accession because it may be the best way to iron-out issues before the formal negotiations take place. Some

⁷ L Guglya, L. 'Technical Note on the CPTPP Accession Process: 'WTO Accessions 2.0 and More'', 3 February 2021. [online]. Available at: https://www.linkedin.com/pulse/technical-note-cptpp-accession-process-wto-accessions-leonila-guglya/?trk=read_related_article-card_title (accessed October 2022)

⁸ Annex to CPTPP/COM/2019/D002

⁹ UK Department for International Trade (2021) *Formal Request to Commence UK Accession Negotiations to CPTPP*. London: Department for International Trade: <<https://www.gov.uk/government/news/formal-request-to-commence-uk-accession-negotiations-to-cptpp>> (accessed October 2022)

¹⁰ UK Department for International Trade (2022) Trade Secretary secures major trade bloc milestone ahead of Asia visit. [online] <https://www.gov.uk/government/news/trade-secretary-secures-major-trade-bloc-milestone-ahead-of-asia-visit> (accessed October 2022)

commentators view that the informal discussions may require that bilateral concessions will be signalled or even offered by applicants before accession negotiations can take place,¹¹ suggesting that it may be more formal than is implied. Only the seven currently active Parties are required to be included in bilateral consultations.

The CPTPP Commission will then decide whether to go ahead with the formal accession process. This appears to operate as an initial filter before the accession process proper gets underway. The Aspirant is encouraged to maintain ongoing consultations with each of the Parties to the CPTPP with a view to addressing each Party's questions or concerns as they arise – although this is not considered formal negotiation. The process appears to envisage that the formal and informal processes will run in tandem and will be mutually reinforcing. This could help identify obstacles to accession and set a path for rectification.

In the second and apparently final stage,¹² once the Commission has decided to proceed with the application for accession, it will establish a Working Group to negotiate the accession formally. Here it is important to recognize that, since the CPTPP lacks a Secretariat, the agreement is managed through a rotating appointment of Commission Chairs (currently held by Japan to be followed by Singapore in 2022). The Commission Chair will help members decide on the composition of the Working Group to supervise the accession process, although all active parties of the CPTPP must be represented. The Chair of the Working Group itself will be decided by the members of the group.¹³ This approach may be feasible as long as the Parties remain relatively limited in number.

There is an attempt to clarify the role of Signatories as opposed to Parties in the accession process in a footnote in the Decision on Accession, however Signatories will probably have limited influence in the decision-making. It is thought that side-lining the non-ratifying states from the accession process, beyond pre-accession consultations, could help to encourage the Signatories to accelerate their ratification processes to become full Parties.¹⁴

¹¹ D Elms and HL Makiyama 'A Roadmap for Accession to the CPTPP' Initiative for Free Trade at 18 (October 2018)

¹² UK Dept of Int Trade 2022, above n 10

¹³ A Secretariat could facilitate accession negotiations in part because it would be able to offer expertise in the navigating the agreement's rules, which could be helpful to Aspirants. A permanent staff of experts would also be more familiar with the existing parties and their individual sensitivities. Secretariat staff might also serve as neutral parties, guiding applicants through accession: Elms, above n 6

¹⁴ Guglya above n 7

At the first meeting of the Accession Working Group, the Aspirant must demonstrate the efforts made to date, as well as identify any additional changes it will need to make to its domestic laws and regulations, in order to comply with the obligations of the CPTPP. Within 30 days of the first meeting of the Accession Working Group, the Aspirant economy must submit its market access offers / Non-Conforming Measures¹⁵ to the Accession Working Group (on goods, services, financial services, investment, temporary entry for business-personnel, government procurement (both central and sub-central) and state-owned enterprises).

If the offers of the Aspirant are considered to be in line with the established 'Benchmarks', the Parties will confirm their proposed market access commitments proposed to the Aspirant. The Aspirant economy will, through the Accession Working Group and bilaterally with other Parties as appropriate, negotiate its market access offers and demonstrate how it will meet the Benchmarks. In that sense the Aspirant is both making individually tailored commitments and having individually tailored commitments made to it.

The Benchmarks for accession to the CPTPP are set out in the Annex in sparse detail.¹⁶ It specifies that Aspirants must:

- (a) demonstrate the means by which they will comply with all of the existing rules contained in the CPTPP (the main text of the agreement, as outlined above); and
- (b) undertake to deliver the highest standard of market access offers on goods, services, investment, financial services, government procurement, State-owned enterprises and temporary entry for business-persons. These must deliver commercially-meaningful market access for each Party in a well-balanced outcome that strengthens the mutually-beneficial linkages among the aspirant economy and the Parties, while boosting trade, investment and economic growth, and promoting efficiency, competition and development.¹⁷

The Annex adds: 'The objective of comprehensive market access commitments agreed by CPTPP original Signatories through the elimination of tariffs and other barriers to goods and services trade and investment should guide the level of commitments offered by Aspirant economies.'¹⁸ This seems to suggest that the CPTPP is conceived as an instrument which will get better over time, perhaps implying that newer applicants will be held to a higher standard than those which came before.

¹⁵ That is, current laws and practices that do not conform to the commitments in the agreement and that the Aspirant wishes to carve out of its obligations.

¹⁶ Art 5

¹⁷ Art 5.1

¹⁸ Art 5.2

There is no clarification regarding how precisely the Aspirant ‘will demonstrate the efforts made to date, as well as identify any additional changes it will need.’ Furthermore, it is not clear how exactly market access offers as well as non-conforming measures on goods, services, financial services, investment, temporary entry for business personnel, government procurement, and state-owned enterprises will be negotiated, either within the Accession Working Group or bilaterally between the Applicant and the Working Group. The process for verification of adherence to benchmarks also lacks detail.

After the negotiations have concluded, the Accession Working Group will submit a written report to the Commission outlining the terms and conditions for the Aspirant’s accession to the CPTPP. This written report will be approved by consensus within the Accession Working Group. The Commission will determine, by consensus, whether to approve the terms and conditions for the Aspirant’s accession to the CPTPP as submitted by the Accession Working Group. It is noteworthy that the requirement of consensus means that the accession of a new Party can be blocked by only one existing Party. This could become problematic should the CPTPP’s membership grow in size significantly. It also adds a dimension to the order of accession of interested parties, as a new Party will be able to block the accession of Aspirants.

If the Commission approves the terms and conditions and invites the Aspirant to join the CPTPP, the Aspirant is accorded six months to accept by depositing an instrument of accession to New Zealand. In this final stage, the Aspirant should also demonstrate that it has completed all the changes in its domestic laws and regulations required to comply with its CPTPP obligations. The Aspirant will become a Party of the CPTPP 60 days after accepting the terms and conditions and depositing an instrument of accession.

An additional stage of CPTPP accession contemplates the extra step of ratification of the new arrangement by the existing Parties. Here the Parties included a vague safeguard which could be put into place in case such ratification leads to a significant delay. Paragraph 4.5 of the Annex states: “If there is a significant delay in the ratification process of one or more Parties, the Commission may determine a different arrangement.” It may be that the ratification requirement will be reconsidered in the case of growth in CPTPP parties or the creation of a Secretariat.¹⁹

¹⁹ Guglya, above n 7

From the above it is clear that the primary task of accession for Aspirants involves the submission of the following:

- its own specific schedules on tariff reductions including the scheduling of those which are incremental (for example Chile's tariff on fresh cheese starts at 9 per cent and drops incrementally to zero by Year 6)

- market access for services and investment, setting out those restrictions which will stay in place after accession (for example Canada specifies that no more than 25 per cent of the shares of the airline Air Canada may be owned by non-Canadians);

- restrictions on central government procurement that will stay in place after accession (for example Japan does not commitment procurement undertaken for the purposes of operational safety in public transport);

- the State-Owned Enterprises that will not be bound by CPTPP rules (for example Malaysia excludes Majlis Amanah Rakyat, an organization which facilitates development through enterprise and education);

- specific commitments on temporary entry of business personnel, such as inter-corporate transfers and other special categories (for example, Mexico has special rules for a category it terms: Professionals and Technical Professionals)

- any other additional Party-specific provisions that Parties agree to insert into specific chapters as footnotes or country-specific annexes as well as Party-specific Side Letters (for example New Zealand and Viet Nam exchanged a side letter regarding cooperation in cybersecurity).

In addition to the submission of its own individualized commitments in the above areas, the accession of a new Party provides an opportunity for CPTPP Parties to modify the main agreement, if all parties consent. Indeed, the CPTPP was conceived as a 'living agreement' which could be adjusted to suit the needs of its Parties as they evolve. Parties could also use the accession of a new party to alter their own commitments, such as further lowering of tariffs or eliminating market access restrictions on services. Given that the main text of the agreement is already more than five years old, some of the more innovative areas of the CPTPP, such as material on SOEs and government procurement look unnecessarily cautious from a

contemporary perspective.²⁰ In that sense there are opportunities to deal with market distortion issues presented by China as well as Russia in terms of supply chains.

The Decision on Accession appears to permit the reopening of the existing Parties' previous market access concessions in the accession negotiations. It is not clear how this will affect the accession practice of the CPTPP. The Decision does not set out an upper limit, allowing for the possibility that the commitments undertaken by Aspirants would not only comply with but exceed the benchmarks which have been set, again suggesting that the CPTPP was designed with a view to improving over time. The Decision refers instead only to "negotiat[ion] of market access offers."²¹ It is thought by some that the existing CPTPP parties will likely not be revising their own schedules in the process of future expansion. This would mean that the current CPTPP legal text and all CPTPP schedules for current members will not change regardless of the accession of new parties such as the UK in the near term. Instead, most of the negotiating energy will be spent on the scheduling of new parties, including side letters.²²

Additional general rules may also be undertaken by newly acceding Parties. Such new commitments which exceed baseline thresholds could result from the obligation of an Aspirant to provide detail on the measures taken to ensure compliance with the CPTPP obligations. The possibility of such "CPTPP-Plus" commitments on a bilateral basis is created by the Side Letters facility. Side Letters could also be used by parties to avoid, bilaterally, the otherwise applicable rules (so-called "CPTPP-Minus.") This approach was already adopted, for example, by New Zealand and the limit on the compulsory application of ISDS. Side Letters, which are structured as actual letters from government ministers, are bilateral in nature – they do not apply to all parties. The same bilateral commitments have been made with multiple parties in some cases under CPTPP, such as Vietnam's current exceptions to the e-commerce provisions for five years with almost all other parties. This feature is important because the CPTPP cannot negate commitments made in other international treaties. Aspirants must accordingly be mindful of how to integrate the CPTPP with existing international commitments when planning their accession.

²⁰ Elms above n 6

²¹ At [3.5]

²² IFT, above n 4 at 18

For the UK, a potential conflict has been identified in relation to Geographical Indications, which do not correspond to the UK's obligations under the UK-EU Withdrawal Agreement which requires the UK to protect “traditional terms” for wine. However, the CPTPP prohibits parties from restricting the use of some of these terms. Consequently, the UK would need to negotiate an exemption from this obligation. This is not impossible, though, since Canada secured an exemption from this provision previously. The UK-Australia FTA, by contrast, specifies only that GIs may be protected under the respective parties’ trademark laws.²³

In this regard it is important to note that the accession rules such as they exist do not appear to make a clear distinction between more ambitious outcomes for particular parties resulting from the accession process, and the modification of the core text of the CPTPP as a legal framework applicable to all its Parties.

The outline of the accession process for the CPTPP is based on the Commission’s dedicated decision, rather than on the text of the treaty itself, which says almost nothing. Still, commentators have praised this format for its flexibility which could prove useful going forward should the membership of the CPTPP grow and encompass states with more diverse economic interests.²⁴ The Decision on Accession to the CPTPP establishes benchmarks on both rules and market access while enabling deeper commitments. But it is imprecise in terms of its application, suggesting that many processes will be ironed-out through practice. The lack of a Secretariat to manage and assist with the accession process could be problematic as the number of Parties to the CPTPP grows. This is precisely why a clearer indication of what is expected of each step as adopted during the UK’s accession is significant in setting precedent for the accession process. Given the wide flexibility in the rules, the UK is in a strong position to be proactive about its approach to the accession and to proceed at its own pace.

The UK’s market access offers will likely mirror what was offered in the Australia and New Zealand FTAs. The commitments agreed in those treaties will be ported into the CPTPP without further concession being required by the UK. In that sense the Australia and New Zealand FTAs can be seen as market access chapter negotiations for the CPTPP. The UK must think strategically regarding which commitments it is prepared to make (for example zero tariffs on most goods) and which it is not (for example denial of recognition for certain

²³ Art 15.31 CPTPP

²⁴ Guglya above n 7

professional qualifications) and to consider which particular compromises it may be expected to make with each Party as it seeks consensus support for its accession.

III Political economy of UK accession

i) The UK's Offensive and Defensive Interests

The CPTPP developed over several years of negotiations between member countries, including an evolution from the Trans-Pacific Partnership as a result of the United States' withdrawal from the original agreement (before it had come into force) on the election of Donald Trump as president. In 2021, the UK began official procedures to negotiate its participation in the CPTPP. As an accession country, the UK does not enjoy the privileges of the founding signatories to draft the initial terms of the agreement, hence it is important to consider whether the UK's offensive and defensive interests are already sufficiently covered by the existing CPTPP terms such that those terms would be both politically acceptable and deliver gains to trade for the UK. As noted in Section II of this article, as no other country has joined the agreement after its founding members, and as very little has been published about the conduct of the negotiations so far, it is difficult to assess with confidence how the process will conclude.

Below is a summary of some of the CPTPP's provisions that seem most likely to provoke opposition and debate in the UK. The commentary seeks to critically analyse the merits of such concerns, and address some of the topics likely to be politically contentious. It is not a comprehensive examination of the chapters of the agreement and the sectors affected but gives a flavour of some of the issues likely to arise. The table below sets out sector by sector the relevant chapters, the UK's offensive interests (i.e. in improving access and contestability in export markets) and defensive concerns (i.e. areas where domestic interest groups will wish to protect their positions).

Sector	Relevant CPTPP Chapters	Offensive Interests	Defensive Concerns	Comments
Agriculture/ Poultry/ Fishing	CH 2 – (National Treatment and Market Access for Goods) CH 7 – (Sanitary and Phytosanitary Measures)	The UK’s leading food and beverage exports are currently whisky, salmon, pork and cheese.	The UK is interested in ensuring food safety standards and disease control whilst maintaining the competitiveness of domestically produced agricultural goods.	<p>Before the UK left the EU, around 52% of its food exports went to EU countries in 2015. The remaining 48% of food exports went to non-EU countries including current CPTPP member states such as Australia, Canada and Singapore, which are all among the top 20 export markets for UK agricultural goods. Accession to the CPTPP would allow the UK to further tap into these export markets.</p> <p>Chapter 2 of CPTPP provides for all tariffs to be eliminated ‘progressively’ based on an agreed schedule, so the UK could look to agree phased elimination of tariffs on sensitive agricultural goods. Safeguards under the WTO Agriculture Agreement are expressly preserved.</p> <p>The CPTPP’s Sanitary and Phytosanitary Measures align with standards of the WTO and the ‘three sisters’ – the World Organisation for Animal Health,</p>

				<p>the International Plant Protection Convention and the Codex Alimentarius Commission – which the UK is already bound to. In addition, Article 7.7 of the SPS Chapter outlines the fundamental principle of respecting regional conditions among CPTPP signatories.</p>
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<p>Financial Services</p>	<p>CH 11 – (Financial Services)</p>	<p>The UK performs strongly in international markets for financial services and has a substantial surplus in financial services exports. However, the sector is highly competitive between global financial capitals such as London, New York and Tokyo so improving market access and regulatory cooperation in fast growing CPTPP markets will be advantageous for UK firms.</p>	<p>Regulators may have concerns about financial stability from opening the UK market further to cross border service provision and investment from firms in CPTPP countries.</p>	<p>The CPTPP framework is compatible with existing UK cross-border trade. The UK’s trade in financial services is dominated by non-EU markets. 65% of the UK’s financial services exports went to non-EU states in 2020.²⁵ Based on static modelling, it is estimated that UK trade with CPTPP signatories will increase by £3.3 billion in the long run.</p> <p>The CPTPP has useful provisions on regulatory cooperation and recognition in some areas of financial services. It includes a ‘prudential carve’ out, customary in FTAs that deal with financial services, which expressly preserves the right for states to maintain and adopt measures necessary for prudential reasons (that is, to protect investors, depositors and policyholders and to maintain the integrity and stability of the financial system as a whole).</p>
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²⁵ G Hutton, A Shalchi, *Financial Services: Contribution to the UK economy*. [online] *Parliament, UK*, at 17. (2021) <https://researchbriefings.files.parliament.uk/documents/SN06193/SN06193.pdf>. (October 2022)

<p>E-Commerce</p>	<p>Ch 14 – (Electronic Commerce)</p>	<p>The UK is a global leader in e-commerce.</p>	<p>Data protection - concerns have been raised that the commitment not to impose arbitrary, discriminatory or disproportionate restrictions on international transfers of data will undermine the protections of the UK GDPR framework</p>	<p>The CPTPP includes at article 14.11 a commitment to ‘allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of [business covered by the agreement]’. The article specifically recognises that it will not prevent parties from maintaining measures that restrict cross border transfers of information when necessary for a ‘legitimate public policy objective’ as long as the measure is not arbitrary or unjustifiable discrimination, a disguised restriction on trade or disproportionate to the objective pursued.</p>
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<p>Investment</p>	<p>CH 9 – (Investment)</p>	<p>Protection of British investments from discriminatory treatment or expropriation without compensation and due process of law, and the ability to transfer out capital and profits. This does not only cover pure portfolio investment but also, for example the establishment of branches of a business in a territory.</p> <p>Possible benefits from encouraging investment in less developed countries which may otherwise be deterred due to legal and political risk and uncertainty.</p> <p>As well as protection for the investors themselves the UK’s financial and</p>	<p>There are widespread concerns that investment treaties and FTAs that include ISDS privilege foreign investors and constrain governments from undertaking legitimate actions that could give rise to an investment dispute.</p> <p>The CPTPP includes Investor State Dispute Settlement (ISDS) which is likely to be resisted in Parliament and beyond.</p>	<p>Section B of Chapter 9 outlines the mechanisms of ISDS. This is a mechanism that allows international investors to bring a damage claim against ‘host countries’ to an independent international tribunal. Unlike most provisions in FTAs, which can only be enforced and arbitrated by the state parties, it is common for investment commitments to include arbitration for private parties in dispute with a state party in respect of an investment.</p> <p>ISDS clauses are typical in a Bilateral Investment Treaty (BITs). The UK has ratified BITs with multiple countries and committed to ISDS provisions with over 90 trading partners, hence ISDS under the CPTPP is not a new commitment.</p> <p>ISDS concerns might be overstated, there has never been a successful ISDS claim against the UK. There are express safeguards in Chapter 14 for measures in pursuit of environment, health and</p>
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		<p>advisory services sector has an interest in investment flows between partner countries. London is a leading venue for arbitration and associated legal services. The LCIA (London Court for International Arbitration) is already recognised as a legitimate legal entity for ISDS arbitration in CPTPP.</p>		<p>other objectives and corporate social responsibility. Tobacco companies are expressly barred from bringing claims. No ISDS claim has been brought under the CPTPP to date.</p> <p>There are signs that the UK will seek to negotiate an opt out from submitting to ISDS under the CPTPP. It is also possible to include as ‘non-conforming measures’ matters that will not be subject to the main commitments in chapter 14. Neither of the UK’s new FTAs with Australia and New Zealand (both of which are CPTPP parties) contains ISDS, nor does the FTA with Japan (also a CPTPP party).</p>
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<p>Services</p>	<p>CH 10 – (Cross-Border Trade in Services),</p>	<p>The UK seeks to further promote its international competitiveness in legal services, fintech, engineering, technology and architectural services.</p>	<p>Maintaining full autonomy over healthcare and social services would be a key concern for the UK.</p> <p>Some occupations may resist liberalisation of recognition of qualifications for practising in the UK.</p>	<p>Articles 10.8, 10.9, Annex 10A have special reference to engineering, architectural and legal services, which are part of the UK’s key interests.</p> <p>The UK will likely negotiate a reservation for health and social services to exclude the NHS from commitments on market access and competition in healthcare. This, together with medicine pricing, is a key strategic priority in UK trade policy (as affirmed in the Strategic Approach to CPTPP accession published in 2021).</p> <p>The NHS has never been under threat in any UK FTA negotiation, despite widespread fears to the contrary. Even under EU membership with unparalleled market access and harmonisation in services, there was no challenge to the UK’s socialised healthcare model.</p> <p>There is precedent for signatories to include such reservations in free trade agreements. For example, in the 2020 Comprehensive Economic</p>
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				<p>Partnership Agreement (CEPA) between the UK and Japan, the UK's reservations include health and social services, aiming to exclude the sectors from commitments on market access, national treatment, senior management and boards of directors, as well as prohibition of performance requirements, which covers existing and future measures. It is unlikely that the UK will be unable to negotiate similar reservations for the CPTPP, not least as it would be known by present members to be a deal-breaker.</p>
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<p>Level playing Field</p>	<p>CH 19 – (Labour) CH 20 – (Environment)</p>	<p>The UK takes pride in its high labour and environmental standards and is keen to encourage other countries to adopt similar standards.</p>	<p>One of the key concerns among British producers is preventing undercutting by producers in countries with relatively lower labour and environmental standards. Which they consider to be ‘unfair’ competition.</p> <p>The British government has committed to not reducing legal protections in these fields so raiding the costs of compliance in other countries can help to level the playing field for British producers.</p>	<p>The CPTPP’s labour standards outlined in chapter 19 reflect standards of the International Labour Organisation, which the UK already subscribes to. The CPTPP takes into account the divergence in statutes and regulations between member states and prohibits the use of domestic labour laws for protectionism. Article 19.4 explicitly states that it is ‘inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party’s labour laws.’</p> <p>It is part of the CPTPP’s objectives to promote supportive trade and environmental policies whilst respecting national priorities of its signatories. Chapter 20 (Environment) regulates the emission of pollutants and toxic chemicals and seeks to protect endangered species. However, it allows signatories to domestically regulate worker safety and health standards, subject to the high-level commitment of ILO standards.</p>
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Manufacturing	-CH 2 (National Treatment and Market Access for Goods),3 (Rules of Origin and Origin Procedures),5 (Customs Administration and Trade Facilitation) , 6 Trade Remedies), 8 (Technical Barriers to Trade) and 18 (Intellectual Property).	- High-end manufacturing - Life sciences - Green technology	-Automotive -Steel -Ceramics - Medicines pricing	<p>The tariff liberalisation under Chapter 2 will benefit Britain’s consumers and exporters. The rules of origin provisions are also generally liberalising and include cumulation, allowing manufacturers to qualify for preferences based on content originating across all of the CPTPP countries. The customs and trade facilitation chapter will assist exporters to CPTPP countries with formalities that can constitute serious barriers to trade in many countries and will assist the UK government in cooperation to reduce the burden of formalities on imports. Intellectual property rights protections will support exports of pharmaceuticals and other innovative goods.</p> <p>The agreement includes provision for members to deploy trade remedies against each other. Trade remedies are susceptible to protectionist tendencies. From a free trade perspective, it would have been preferable if it had not been included (as WTO rules already enable trade remedies), but it will mitigate the concerns of</p>
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				<p>sensitive sectors such a steel and ceramics (as well as agriculture) that often lobby for trade remedies and could help underpin compliance with commitments of the parties.</p>
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ii) Some key battlegrounds

a) Food and agriculture

This will be a key interest for CPTPP members seeking to improve their market access and contestability in the UK market, as well as to drive liberalisation at a global level. As with the negotiations for the now concluded FTAs with Australia and New Zealand, domestic agricultural interest groups called for ‘protection of sensitive goods’ (namely agricultural goods produced by British farmers) and a ‘level playing field’ to protect them from competition by producers in countries that do not impose similar costly regulation on their farmers. The CPTPP commitments on food standards and regulations are broadly the same as those that the UK is already bound to under the applicable WTO agreements, and imports from CPTPP partner countries would still have to meet the UK’s regulatory requirements. To the extent such requirements do not meet commitments such as being science-based and non-discriminatory, they would already be vulnerable to challenge under WTO rules. The competitive threat that domestic producers are worried about is that agrifood that does meet UK rules will no longer be subject to tariffs or quotas, while producers in countries like Australia and New Zealand are not bound by the same production regulation as UK farmers. This is not a reason to enforce so-called ‘level playing field’ standards on other countries; if, as the NFU and other interest groups claim, British consumers value, for example, the animal welfare standards that UK farmers adhere to, they can continue to purchase British-reared meat. However, the preferences of affluent consumers, which in any event may not be substantiated by practice in the respective countries, should not be allowed to determine the availability of food for all consumers. If farmers are concerned that the burden of regulation prevents them from competing with producers in CPTPP countries, they should be pushing government to liberalise such regulations, in particular those concerning the use of modern biotechnology.

b) Healthcare and Medicines

The UK’s strategic objectives for CPTPP accession assert that the National Health Service (NHS), its services and the price it pays for medicines are not up for negotiation. The strategy document does not go into any further detail as to how the government proposes to ensure that these matters are off the table, but without further action in negotiations they could be affected. As noted in the table above, carving out healthcare services from market access and non-discrimination commitments has been standard practice for the UK in FTAs, and seems

unlikely to be problematic here. Concerns have been raised that the price the NHS pays for medicines could be affected by a provision in the Intellectual Property chapter, known as 'patent linkage'. This links market authorisation of medicines to applicable patents by requiring notification to patent holders if generic and biosimilar manufacturers apply for market authorisation using safety and efficacy information for a patented product, and opportunity for the patent holder to seek remedies if it considers the generic product infringes its rights. It is feared that this could lead to patent holders blocking the marketing of lower priced generic medicines, meaning less competition and reliance on higher priced, patent protected branded products. However, the commitment on patent linkage in the CPTPP is relatively weak,²⁶ and not even in force as between the parties at present, after the US exited the agreement. In any event, even if such a commitment were eventually required, it seems unlikely that would have a material adverse effect on the availability of generic drugs. It could be satisfied by greater transparency on market authorisation applications by the UK's Medicines and Healthcare Regulatory Agency (MHRA), which could itself be more generally beneficial. For example, New Zealand considered that its normal processes for publishing applications for market authorisations, and its existing procedures and publicly available information on enforcing patents were already sufficient to meet this requirement and no change to its law were required.

c) E-commerce

Digital services are a strategic priority for the UK, as can be seen in the new FTAs with Australia and New Zealand. Digital services underpin the delivery of all kind of services (such as financial, education and entertainment services) and goods to businesses and consumers in the fast-growing markets of CPTPP countries. Organisations like the Open Rights Group (ORG) have raised concerns that the e-commerce provisions in Chapter 14 concerning data protection laws will lead to a lowering of standards. The ORG effectively concedes that the GDPR framework for international transfers of personal data is susceptible to challenge for being arbitrary (subject to political influence) and discriminatory. The EU has resisted such provisions in its FTAs as it wished to preserve sovereignty in data protection and privacy law making; it is not willing to defend its restrictions against challenge on these grounds. The EU may well be right that as a matter of sovereignty, a territory or state should be entitled to maintain disproportionate or discriminatory rules if it wishes, or at least should not have to

²⁶ Son 2018

submit to have the legitimacy or propriety of such measures evaluated by other states and arbitrators. But this could apply to any commitment on domestic regulation (which admittedly the EU does not make many of in any field), and the requirements for public policy measures that will not violate article 14.11 are not onerous. It is specifically recognised that parties will have different requirements for regulating international data transfers to there is no expectation of conformity to any particular approach, other than by taking due account of guidelines from relevant international bodies.

If this debate reveals that the GDPR, as currently implemented by the UK, is vulnerable to challenge for being arbitrary, discriminatory or disproportionate it is surely better to reform the regulation so that it is not²⁷, especially as the UK is committed to tackling barriers to digital trade. If supporters of data protection and privacy law cannot think of ways of achieving their objectives in ways that are not arbitrary, discriminatory or disproportionate then they should admit this and be prepared to make the case for maintaining their preferred system accepting these costs. It is more usual for privacy advocates to claim that strong data protection laws actually facilitate e-commerce. Both surely cannot be true.

d) Investor-State Dispute Settlement (ISDS)

The substantive commitments that may be subject to dispute and taken to ISDS, as briefly described above, should in some ways be uncontroversial: arguably investors who have been expropriated without compensation or disadvantaged compared to local businesses should have recourse, if they proceeded with their investment on the understanding that they would be protected by commitments made in an FTA.

The UK, in particular, would not expect to undertake any of the prohibited actions in Chapter 14 in any event and has domestic legal safeguards against them and a strong tradition of protecting legal rights, including property and intellectual property rights. Arguably this means that the UK should not be expected to agree to ISDS in FTAs, as there is a stable domestic legal system that foreign investors would have recourse to without it. Similarly, most of the CPTPP countries have high judicial standards and access to legal systems to protect

²⁷ Some of the reforms proposed in the Department for Digital, Culture, Media and Sport consultation on reforms to the UK's data protection regime may go some way towards this <https://www.gov.uk/government/consultations/data-a-new-direction> (October 2022)

property rights and investments, so the offensive interest in ISDS may not be as strong as in agreements with developing countries. This means that if the political landscape threatens to derail CPTPP accession entirely on the basis of the inclusion of ISDS, it may not be a significant loss to the UK, and the existing members may not consider that it is a vital interest of theirs to have ISDS available against the UK. On the other hand, ISDS can be important for smaller firms who do not have the political power to persuade their governments to bring claim on their behalf. Not all CPTPP countries have robust domestic legal systems.

Notably, the Trade and Cooperation Agreement between the EU and the UK does not include ISDS (although the EU has included a form of ISDS²⁸ in its other recent FTAs), perhaps to avoid the protracted negotiations and political battles that it may have provoked. In a clear indication of the UK's likely negotiating position on ISDS in CPTPP, the FTAs between the UK and Australia²⁹ and New Zealand³⁰ do not include ISDS. The Regional Comprehensive Economic Partnership (RCEP), recently signed by parties including several CPTPP members, also does not include ISDS, indicating that ISDS is falling out of favour more generally.

e) Effect on trade with EU

It has been argued by those who supported leaving the EU that the UK should prioritise accession to the CPTPP as it would preclude subsequent commitments to align to EU rules, and may even compel the UK to move away from some of the EU's more contentious rules, in particular on food, agriculture and data protection. Conversely, those who favour a closer relationship with the EU are concerned that accession would lead to incompatibility with EU rules and threaten both future alignment and trade with the EU. Both positions seem overstated.

The EU has trade agreements with several CPTPP members, and has not been forced to change its rules on, for example, antimicrobial rinses on poultry or GMOs. On the other hand, it has resisted commitments on data protection that would have committed it to objectively non-discriminatory measures. It is possible that some countries have held off challenging the EU's rules under their FTAs for broader strategic reasons and would think

²⁸ The EU's FTAs with Viet Nam and Canada respectively include the EU's preferred model of an investment court, rather than the usual arbitration model (which it declares for the EU, "is dead"). https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf (October 2022)

²⁹ UK-Australia FTA Chapter 13: Investment <https://www.gov.uk/government/publications/uk-australia-fta-chapter-13-investment> (October 2022)

³⁰ <https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-new-zealand> (October 2022)

differently about challenging the UK, a much smaller market with less leverage in other areas. One of the reasons that the UK is viewed as an attractive CPTPP partner is precisely because it would diverge from the EU in relation to sanitary and phytosanitary (SPS) rules. Should the UK not do so, this could impact adversely on its accession.

In terms of the UK's trade with the EU, it will always be necessary for exports to meet the requirements of the destination market, so the fact that the UK may in the future, allow imports to its territory that do not meet EU rules does not necessarily affect the ability of UK producers to supply the EU market. However, if the EU were to grant recognition and facilitations to the UK based on regulatory alignment (for example, waiving or reducing border check on meat products), this could be threatened by the UK allowing non-conforming products into its territory. However, at present the EU has granted no such recognition or facilitation, and in fact has more mutual recognition with CPTPP members like Canada and Japan than with the UK, so it would seem that the UK has little to lose in this respect. CPTPP membership will not compel the UK to change its regulations and standards, and the potential for the UK to pivot supply chains further away from the EU towards CPTPP partners may incentivise the EU towards a more constructive dialogue on regulation and trade facilitation.

The intellectual property chapter of CPTPP includes an obligation to disregard disclosures of information made during a 'grace period' of 12 months prior to the date of a patent application account in determining whether the invention is novel. This conflicts with the European Patent Convention, which the UK is party to and is committed to remaining part of, and provides that an invention will not count as 'new' if it has been disclosed to the public. It is a relatively minor aspect of the intellectual property chapter so the other parties may be open to negotiating a UK waiver from it. As noted in Part 1 of this paper, there is also a potential conflict between the intellectual property commitments of the CPTPP and the provisions of the UK-EU Trade and Cooperation Agreement (TCA) concerning protected geographic indicators.

IV Conclusion

The UK should pursue trade policies that prioritise consumer welfare as free trade is the best way to bring about economic growth and protections and mercantilist policies should be avoided, whether directed towards the EU or global trade partners. Overall, the CPTPP can be considered to be a net-liberalising trade agreement – some of its provisions are mercantilist, and have been criticised for protectionist tendencies in intellectual property and trade remedies,

but the overall effect of the elimination of tariffs and non-tariff barriers is positive.³¹ The UK's accession to the CPTPP will further open up market access for its exporters in emerging and developed economies in Asia and the Americas, which can potentially help the UK navigate through the early stages of having left the EU.

Existing CPTPP terms fit in a standard framework for FTAs. Apart from the ambition in the initiative itself, none of the negotiated clauses are particularly ground-breaking though there are some ambitious provisions in areas like e-commerce and financial services. The stress on equality between member states, recognition of their respective legal systems, local legislation, and private corporate structures all indicate that the UK's defensive and offensive interests will be furthered by accession. Any such benefits will, however, take several years from accession to be established, as value chains respond and develop, and more countries may join. As even, domestic policies, such as on tax and regulation, will be key to ensuring that British businesses and consumers are well placed to derive benefits from CPTPP accession. Finally, greater transparency from the British government would be welcome, to allow Parliament, businesses and civil society to engage with the accession process and evaluate the strategy being pursued.

³¹ D Ikenson, S Lester, S Lincicome, D Pearson, and K Watson, K.W. (2016). Should Free Traders Support the Trans-Pacific Partnership? 'An Assessment of America's Largest Preferential Trade Agreement'. *SSRN Electronic Journal*, [online] (2016) at 76. https://www.cato.org/sites/cato.org/files/pubs/pdf/working-paper-39_3.pdf. (October 2022)

