

# A ROADMAP FOR UK ACCESSION TO CPTPP

IN CO-OPERATION WITH:



ASIAN TRADE CENTRE

## Authors

**Dr Deborah Elms** is Founder and Executive Director of the Asian Trade Centre – an organisation that works with governments and companies to design better trade policies for the region. Dr. Elms is also Vice Chair of the Asia Business Trade Association (ABTA) and sits on the International Technical Advisory Committee of the Global Trade Professionals Alliance and is Chair of the Working Group on Trade Policy and Law.

Dr Elms is a senior fellow in the Singapore Ministry of Trade and Industry's Trade Academy. Previously, she was head of the Temasek Foundation Centre for Trade & Negotiations (TFCTN) and Senior Fellow of International Political Economy at the S. Rajaratnam School of International Studies at Nanyang Technological University, Singapore.

Her projects include the Trans-Pacific Partnership (TPP) negotiations, the Regional Comprehensive Economic Partnership (RCEP), the ASEAN Economic Community (AEC) and global value chains. Dr. Elms received a PhD in political science from the University of Washington, a MA in international relations from the University of Southern California, and bachelor's degrees from Boston University. Dr Elms publishes the *Talking Trade* Blog.



Asian Trade Centre

41A Ann siang road singapore 069717

T +65 6536 3415 U [www.asiantradecentre.org](http://www.asiantradecentre.org)

**Hosuk Lee-Makiyama** is the director of European Centre for International Political Economy (ECIPE) and a leading author on trade diplomacy, EU-Far East relations and the digital economy. Prior to joining ECIPE, he was an Senior Advisor at the Ministry of Foreign Affairs of Sweden, also representing its EU Presidency at the WTO and the UN, including WIPO and UNECE. Lee-Makiyama is also a Fellow at the department International Relations at the London School of Economics.

October 2018

## Contents

<b><i>Executive Summary</i></b> .....	<b>3</b>
<b><i>What is the CPTPP?</i></b> .....	<b>5</b>
Overview.....	5
TPP to CPTPP: what’s the difference?.....	6
<b><i>Why join the CPTPP?</i></b> .....	<b>10</b>
1: Comprehensive FTA spanning 3 continents .....	10
2: Access to new markets .....	10
3: Supporting an integrated marketplace (Rules of Origin) .....	11
4: Modernizing clearance and reducing costs at the border .....	11
5: New opportunities in services .....	12
6: Protects intellectual property .....	13
7: Expands the digital economy .....	13
8: Opportunities in government contracts .....	14
9: Interlocking nature fits business needs of today and tomorrow .....	14
Case Study: Candle Making in the Asia Pacific.....	15
<b><i>How to join the CPTPP?</i></b> .....	<b>17</b>
<b>Demands of membership</b> .....	<b>17</b>
Tariff rates and WTO schedules .....	19
Services Schedules .....	20
Regulatory Divergence.....	21
Sanitary and Phytosanitary measures.....	22
Regulatory Coherence .....	23
Geographical Indications .....	24
Dispute Settlement .....	25
<b>Recommendations</b> .....	<b>27</b>
<b><i>Brexit and CPTPP?</i></b> .....	<b>29</b>
Scenario 1: FTA relationship with Europe, or trading on WTO terms.....	29
Scenario 2: Remaining in the Customs Union .....	30
Scenario 3: Common regulations with Europe (“EEA” or the Norway option).....	31
<b><i>Conclusion</i></b> .....	<b>32</b>

## Executive Summary

On July 6<sup>th</sup> 2018, after a crucial cabinet meeting at the Prime Minister’s country residence, Chequers, a “future framework” was hatched regarding post-Brexit relations between the UK and EU. As part of the Government’s statement following this meeting, one particular trade agreement was singled out:

*“In summary, the position we reached today would... deliver an independent trade policy – the UK would have its own seat at the WTO, be able to set tariffs for our trade with the rest of the world, and have the ability to secure trade deals with other countries – including potentially seeking accession to the **Comprehensive and Progressive Agreement for Trans-Pacific Partnership**.”*

This paper seeks to assess this ambition, based on an assumption that the UK will set out its own trade policy in the near future: outlaying the content of the CPTPP agreement; the demands one can expect from membership; and the compatibility of these demands with varying Brexit scenarios.

Today, the CPTPP agreement comprises of 11 countries, 500 million people, and 13.4% of global GDP, making it the world’s third largest free trade agreement, after US-CMA and EU-Japan EPA. But CPTPP is significant for its ambitious liberalism, as much as its economic weight: the agreement distinguishes itself from most other plurilateral agreements to date, by its **breadth and depth**.

As the United Kingdom pursues its future as a “global champion of free trade”, it will seek to endorse and innovate liberal trading practices – and it will also need like-minded partners. CPTPP will supplement the partnership that UK will retain with Europe under any scenario in the future, and form the Asian-Pacific leg of UK trade policy.

The central question explored in this paper is simply: how does the UK get there?

There has been widespread commentary in the UK media that the primary obstacle for accession would be the issue of regulatory divergence: firstly, that we must be able to deviate from EU standards in order to accede; and secondly, that such deviation would anyway lead to a lowering of standards politically unacceptable to the UK. Our report reveals that neither of these claims – which are both used to promote different visions of Brexit – are correct.

**In fact, the CPTPP’s demands toward regulatory divergence are extremely modest – and designed to address obvious cases of discrimination.**

Instead, our report reveals one far more pressing obstacle: namely, the determination of the UK’s “baseline settings” at the World Trade Organization, which are contingent upon establishing clarity of the UK’s future customs policy. Because the CPTPP builds upon WTO commitments and

because the UK currently does not have its own tariff rate schedules, this is the most urgent obstacle to a speedy accession to the CPTPP.

While the members in CPTPP are likely to welcome the UK's application in principle, nothing can be done until the final separation from the EU is clarified with the World Trade Organization (WTO). It is not enough for the UK and EU to agree between themselves on these terms; the WTO membership still needs to approve of divisions in agricultural tariff rate quotas (TRQs) between the UK and EU, and the terms of the UK's specific tariff schedules.

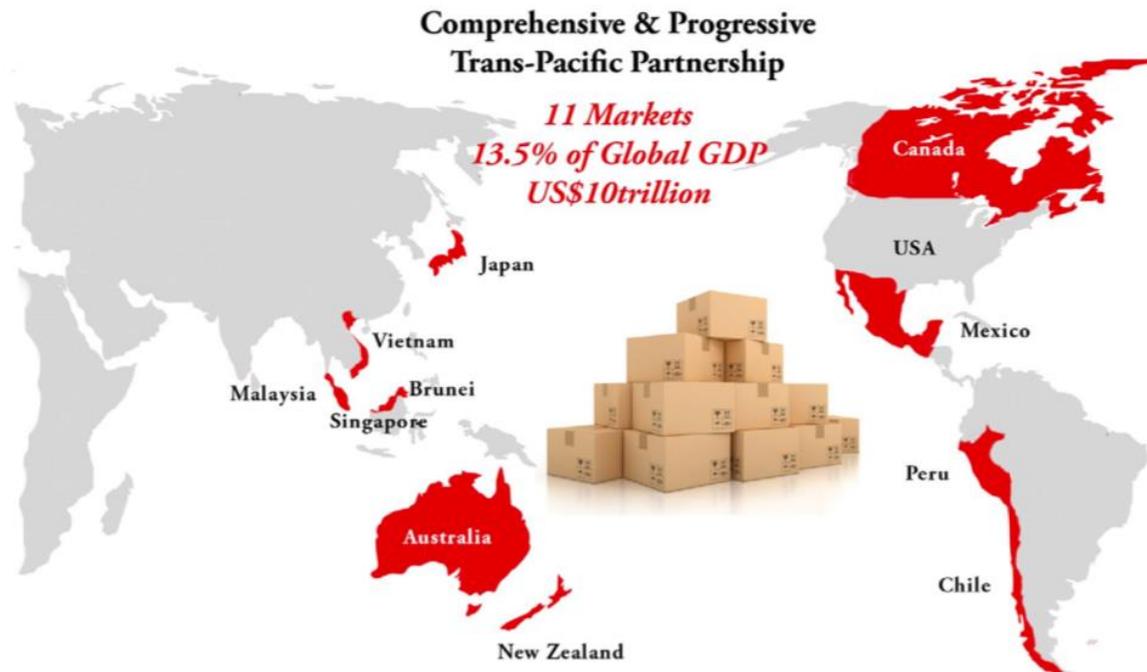
While it would be nice to imagine that all 163 other WTO members will automatically concede to whatever arrangements the EU and UK work out for themselves, this is unlikely to proceed quite so smoothly.

In any Brexit scenario which continues any institutional ties to the EU – especially a customs union with the EU – a special membership category would have to be developed and agreed by existing members, because the UK's external commitments, in these latter pathways, would be different from all other CPTPP members.

Because of the extent of the ties that a customs union would impose, we find the suggestion that the United Kingdom could accede to CPTPP while remaining a member of a customs union is, while theoretically possible, likely to be impossible in practice.

In any event, **before CPTPP members can make any decisions at all regarding potential UK membership, the final terms and conditions of Brexit need be to completed with both the EU and the WTO membership.**

## What is the CPTPP?



### Overview

The CPTPP has seen many changes over time. It started life in 2009 with just four members; expanded to 12 under the name of Trans-Pacific Partnership; and collapsed back to 11 members after the US' withdrawal, under a new name "Comprehensive and Progressive Trans-Pacific Partnership". It is likely to enter into force with a subset of these members in January 2019.

Negotiations on the Trans-Pacific Partnership (TPP) trade agreement started in Australia in March 2010 and were concluded in 2015. The 12 negotiating parties of the TPP (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam) managed to lock together 30 chapters covering a wide array of topics.

Joining the CPTPP would give the UK preferential access to up to 11 new markets in three continents at once.

It distinguishes itself from most other trade agreements, because:

- *It is broader.* The agreement covers 30 chapters including provisions opening markets to goods, services, and investment provisions; but also includes new rules on intellectual property rights; opens up government procurement markets; balanced rules on state-

owned enterprises that allow such enterprises to continue, while minimising market distortions they cause; creates common understandings for e-commerce trade; and includes some new regulations for food, food safety and other types of technical standards.

- *It is deeper.* While past free trade agreements (FTAs) have traditionally opened up trade in goods, the CPTPP promises to reduce barriers further. This includes opening up highly sensitive agricultural markets that are traditionally carved out, or excluded entirely from FTAs. Even in areas where coverage is incomplete and duties do not drop to zero, products are included that are normally not discussed or where existing FTA reductions can be extremely modest (like rice, dairy, and sugar).
- *It includes shared norms and commitments for all members.* Unlike many other FTAs, the CPTPP rules apply equally to everyone. Developing country members may have received longer time frames to implement some of the commitments, but the same basic rules will apply. Members opted to join the CPTPP and, by doing so, signalled their own internal commitment to implementing high quality pledges in every aspect of the agreement.

The CPTPP includes three key elements:

- 1) the 30 chapters of rules or legal text,
- 2) country-specific schedules that apply to some of the chapters including goods, services and investment, government procurement, state-owned enterprises, business mobility (or commitments for temporary movement of service providers), and
- 3) a handful of side letters that apply to some of the members.

Like all FTAs, the agreement only applies between members. It is not possible to use the agreement to ship goods, as an example, from the EU to Singapore and then on to Peru using the benefits of the agreement. It is also not possible to “hopscotch” between deals by putting together, as the previous example shows, one deal, like EU-Singapore and then another, Singapore-Peru under CPTPP.

### [TPP to CPTPP: what's the difference?](#)

The CPTPP includes all of the originally negotiated rules and commitments from the original, 12 party TPP (except for 20 changes noted below).

The primary difference between the original 12 party Trans-Pacific Partnership (TPP) and the 11 party Comprehensive and Progressive TPP (CPTPP) version<sup>1</sup> is a set of “suspended” provisions. This is a list of 22 items: 19 that officials from the member countries have agreed to remove temporarily from the free trade agreement texts; 1 that has been changed; and 2 that clarify terms in the deal.

The CPTPP agreement contains two elements: a nine-page document and the original TPP agreement. Revised from the TPP, the CPTPP text has:

- A new preamble;
- A provision to incorporate by reference the entire original TPP document;
- An agreement to suspend provisions listed in the Annex until members agree to end the suspension of one or more of the items;
- New entry into force procedures;
- New language on withdrawal;
- New language on accession that drops the more explicit reference to APEC;
- A review clause;
- A note that the deal is in English, Spanish and French (although English is the official language); and
- The Annex with specific suspended provisions.

The suspended provisions may be reinstated at some future date. Between now and then, member governments are not required to implement these rules at the domestic level.

Many commentators with an unclear understanding of the TPP have assumed that these suspended provisions are a significant proportion of the document. The removal of both the United States and the 22 elements, therefore, has been said to make the CPTPP less relevant.

But in fact, the CPTPP remains extremely important for companies and continues to set a benchmark for future trade agreements globally.

The withdrawal of the United States from the agreement does, of course, impact the overall size of the economic pie. However, given the generally open nature of the US economy, most companies inside the CPTPP already have reasonable levels of access to the United States’ market. American tariffs are quite low for most products besides, notably, textiles, footwear and some agricultural products.<sup>2</sup> TPP companies can enter the services markets in the US and have the ability to invest right now. And the CPTPP rulebook is congruent with existing US laws.

More importantly, the new CPTPP has *no* changes to any of the current member schedules or commitments in areas like market access for goods, services, investment, temporary movement of business persons, government procurement, or state-owned enterprises.

In other words, all tariff cuts will take place on schedule as planned. All services open as originally intended. All investment is opened as indicated for CPTPP firms. All procurement access that was originally scheduled will continue.

Furthermore, there are *zero* changes to the legal texts at all in the original chapters for 1-4 (definitions, market access for goods, rules of origin, textiles), 6-8 (trade remedies, sanitary and phytosanitary, technical barriers to trade), 12 (temporary movement of business persons), 14 (electronic commerce), 16-17 (competition, state owned enterprises), 19 (labour), 21-25 (cooperation and capacity building, competitiveness and business facilitation, development, SMEs, regulatory coherence), 28 (dispute settlement).

What is especially striking about this list is what has not been touched. Despite some general discomfort by several members over the course of TPP talks, several important chapters came through completely unscathed. For example, the e-commerce chapter was left intact. The investor-state dispute settlement (ISDS) provisions in the investment chapter are still included. The controversial chapter on state-owned enterprises remains. The overall government-to-government dispute settlement provisions are untouched.

The acceptance of TPP provisions on ISDS, SOEs and other controversial topics even after the US withdrawal from the agreement signals the pragmatism of the original TPP language. The CPTPP coalition include countries with very strong interests in fundamental rights or retaining the right to regulate; several of the countries also have public healthcare systems and high-quality public services that operate in commercial markets, including broadcasting.

However, some of the institutional and administrative issues found in the last chapter have been altered with new procedures for things like withdrawal and accession in CPTPP.

If the changes to Chapter 18 on intellectual property rights are excluded for the moment, the remainder of the alterations in the document generally amount to a sentence adjustment from an entire chapter. For instance, Chapter 5 on trade facilitation is intact in CPTPP *except* for the second sentence of Article 5.7.1(f). The second sentence would have obligated members to consider further from time to time the amount of duty applied to express shipments below a certain fixed amount.

The original TPP legal text ran to 622 pages. The greatest number of changes can be found in the investment chapter (9) which temporarily removes two kinds of agreements from CPTPP coverage (essentially those covering mining and raw materials) and in the IP chapter (18).

With all the adjustments, the CPTPP text is approximately 10 pages shorter, plus the IP chapter changes, which reduces the length by another 18 pages. Thus, the agreement still runs to 584 pages, plus all the thousands of pages of associated member schedules which are intact.

In short: suspended elements constitute only a very small fraction of the overall agreement. The amendments do not devalue the merits of the agreement, while the suspensions on intellectual property (notably concerning the term extension on biologics with two years; copyright by twenty) will not require any law changes in the UK, and likely not objected to by civil society groups in the UK.

## Why join the CPTPP?<sup>3</sup>

### 1: Comprehensive FTA spanning 3 continents

Accounting for about 500 million people, and 13% of global GDP, the TPP/CPTPP will help integrate member markets by reducing barriers to goods and services trade, protecting investments and intellectual property rights, establishing rules for e-commerce, and promoting fair competition.

Many CPTPP members already have free trade agreements in place with other participating countries. But the CPTPP is significant because it:

- Upgrades existing arrangements;
- Creates new FTA relationships
- Establishes new networks, including supply chain networks.

Fully enforceable, the TPP/CPTPP is a legally binding agreement, supported by a system of dispute settlement, to bring rule of law and greater transparency and predictability to the regional trading regime. The UK had already signed FTAs (via its membership in the EU) to Canada, Chile, Japan, Mexico, Peru, Singapore and Vietnam. The EU is also in the process of negotiating with Australia, New Zealand and Malaysia; the Union has also signed and actively negotiating with two of the accession candidates (Korea, Indonesia). The CPTPP would upgrade these existing commitments of the UK in the Asia-Pacific region.

### 2. Access to new markets

The CPTPP creates new market access for goods by eliminating duties and non-tariff barriers that often prevent imports from competing with domestically produced goods.

Duties or tariffs—many of which are currently high—will be completely eliminated for close to ninety percent of all products as soon as the agreement enters into force. For most of the remaining sensitive products, duties will be reduced over time.

This is good news for CPTPP's exporters who currently face significant duties in particular markets. For example:

**Agriculture:** Beef imported into Japan currently faces duties of 38.5%. Dairy products into Canada can face duties as high as 250%. Farmers trying to export poultry products into Mexico struggle to be competitive with duties of up to 234%.

**Automotive:** Passenger vehicles into Vietnam may be charged duties up to 83% under the current rules. Pumps and compressors exported to Malaysia are charged up to 30% in duties.

**Footwear and Apparel:** Producers of footwear and apparel face import duties when entering many CPTPP markets.

**Info-Communication Technology (ICT):** Duties remain for many information-communication technology products that have been developed since 1997 despite global agreements to eliminate duties. Duties for more than 200 new categories are expected to be eliminated, provided origin criteria is met.

**Remanufactured Goods:** The agreement also guarantees equal treatment of remanufactured or refurbished goods critical to producers of aircraft components, automotive parts, electrical and electronic equipment, engines and components, medical equipment, office furniture, printing equipment, and restaurant & food-service equipment

### 3. Supporting an integrated marketplace (Rules of Origin)

Critical to the establishment of a regional free trade agreement like the CPTPP, are rules of origin (RoOs) that support integrated sourcing, in line with modern production patterns where parts and components are produced from multiple countries for final assembly and delivery to market. **RoO is one of the areas where CPTPP offer simpler and more permissive rules than EU FTAs.** Under the CPTPP, regional cumulation of rules of origin is allowed so exporters can include materials, parts and components from throughout the CPTPP to qualify for preferential duty rates or duty-free entry in other CPTPP markets. To date, only one agreement – the EU-Japan EPA allow for a “diagonal” cumulation with inputs from a third country, bound by FTAs with both.

### 4. Modernizing clearance and reducing costs at the border

To address the needs of modern supply chains and e-Commerce, the CPTPP includes new rules on Customs clearance to reduce paperwork, increase transparency of processes, and help move goods more expeditiously and seamlessly across borders.

Some key trade facilitating features available through the CPTPP are:

*Self-Certification of Origin:* Under several existing FTAs, firms have to apply for Certificates of Origin (COs) to prove that products meet specific rule of origin criteria in order to qualify for preferential duties. These COs are usually issued by Chambers of Commerce, have limited validity periods, and require a fee. The CPTPP introduces *self-certification of origin*, allowing

importers and exporters to self-declare that they have met rule of origin criteria, eliminating a potentially cumbersome and costly process.

*Advanced Rulings:* To enhance predictability of cross-border trade, the CPTPP creates an Advanced Ruling mechanism allowing importers and exporters to attain critical determinations on tariff classification, valuation, and origin which would be binding throughout an applicable period. For many companies, this is expected to reduce the number of shipments held at the border, while important decisions impacting the duties owed are made.

*Time Guarantees for Express Shipments:* To facilitate the timely clearance of express shipments, the CPTPP includes commitments allow pre-arrival processing, guaranteeing release within six hours, provided the shipment has arrived. These rules will improve time-in-transit, shorten lead times and support just-in-time manufacturing practiced throughout the world to enhance competitive supply chains.

## 5. New opportunities in services

The CPTPP has important benefits for services companies. Firms should find it easier to provide services across member countries in areas like banking, insurance, construction, logistics, accounting, travel & tourism, consulting, app and games development, and graphic design.

Trade in services constitutes an increasingly important part of global trade. Services make up as much as 40-80% of the value contained in manufactured goods. They are important catalysts that enable manufacturing, and allow SMEs to access critical tools such as cloud-based digital tools, and e-Commerce retail and distribution services.

The TPP includes rules to ensure market access, non-discrimination, and fair competition for services from CPTPP parties. These include:

### *Negative List Approach to Scheduling Market Access Commitments*

TPP Parties have scheduled their market access and national treatment (granting non-discriminatory treatment) commitments in Annexes to the agreement. These annexes are laid out using a *negative-list* approach, identifying only services that are subject to exceptions or restrictions, or ‘non-conforming measures’. This approach not only enhances transparency and predictability, as service descriptions can sometimes be unclear, but also allows new services and solutions access unless expressly stated otherwise.

The EU, and thereby the UK, transitioned into a negative list approach starting from CETA and later FTAs. In practice, positive or negative lists matter little for the UK’s own commitments on

services. However, the negative list approach plays a role in the openness of future online services that are not yet invented and cannot be described in a services schedule.

### *Mutual Recognition of Qualifications*

Unless otherwise stated, TPP Parties commit to recognising the education or experience obtained, requirements met, or licenses or certifications granted in a particular country for purposes of the fulfilment, in whole or in part, of standards or criteria for the authorization, licensing, or certification of services suppliers. In contrast, EU FTAs (since CETA) let competent authorities or associations (that are normally in charge of issuing qualifications) to negotiate recognition of the qualification amongst themselves.

### *Business Mobility*

The TPP also includes a chapter on *Temporary Entry* to facilitate transparency in processes enabling the travel of skilled people between TPP markets for the purpose of doing business. However, all movement of temporary personnel remain subject to final approval from relevant immigration authorities.

## 6. Protects intellectual property

The TPP extends robust protection to intellectual property, with commitments reinforcing and going beyond current commitments made through the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), while making a shared commitment to Doha Declaration on TRIPS and Public Health.

## 7. Expands the digital economy

Recognizing the growing importance of business conducted over the internet or electronically, CPTPP countries have committed to critical disciplines facilitating the new digital economy.

These include:

- A commitment to not impose duties, fees or other charges on digital products;
- Electronic authentication and recognition of electronic-signatures;
- Online consumer protection;
- Access to and use of internet including benefit of competition among network providers;

Such provisions are also included in the UK's already existing commitments via the WTO or EU FTAs. However, the approach differs significantly on cross-border information flows, where CPTPP prohibits *data localisation*, i.e. where governments require businesses to store data on their territory unless it can be justified by public policy objectives (such as privacy protection). CPTPP also acknowledges the importance of personal information protection, and require each jurisdiction to have an effective enforcement of privacy rules.

Meanwhile, the existing EU FTAs are void of equivalent clauses on data flows, data localisation or privacy, for political reasons. However, the EU privacy rules (GDPR) would fall within the exception granted for measures pursued for legitimate public policy objectives that are not arbitrary discrimination and proportionate for their objectives.

## 8. Opportunities in government contracts

According to OECD calculations, the TPP procurement market is a \$1.9 trillion opportunity for TPP members. TPP commitments on government procurement ensure that procurement by governments is conducted in a fair, transparent, and non-discriminatory manner.

Under the CPTPP:

- Governments commit to opening up the procurement market for TPP goods and services contracts of up to a certain threshold.
- Ensure procedures are made more transparent, making it easier for businesses to understand contracts that are available for tender, eligibility and criteria, and the application process.

## 9. Interlocking nature fits business needs of today and tomorrow

The most important element of the CPTPP is the hardest to see and measure. It is the interlocking nature of the agreement. With 30 chapters binding together the 11 members, this trade agreement actually fits business practices of today. It is also set up to accommodate changes in the economy for tomorrow without the need for complicated renegotiation. This includes helping firms large and small.

## Case Study: Candle Making in the Asia Pacific

The CPTPP is difficult to quantify and to show exactly how much companies will benefit. As an example, however, consider a firm that makes candles in one CPTPP country and currently exports to just one other member. Like any trade agreement, the CPTPP benefits only flow between members—companies cannot use the CPTPP, for example, to export to Europe.

The hypothetical candle company will be able to take advantage of at least a dozen different chapters in the CPTPP agreement. As a result, even a small candle company should see sales boom.

How? First, candle tariffs, which act like a tax on exports, are set to fall in the agreement. For instance, in Vietnam, the tariff is currently 24% and will fall over four years to zero. Canada's 5.5% tariff falls on the first day of the agreement. Mexico's 30% falls to zero across ten years. Malaysia charges 15% which will be eliminated in even steps across 6 years. Each of these tariff reductions allow the candle company to become more competitive in these markets compared to non-TPP firms.

Second, candle companies, like all CPTPP members, can take advantage of the rules of origin. In brief, it means that once the company meets the criteria for making the product inside the CPTPP, it can be shipped to all other CPTPP members without any changes in manufacturing. It can also add up or "cumulate" content from across all CPTPP countries to count towards origin. The candle company, as an example, could add citrus from Vietnam and lavender from Mexico with wax derived from chemicals in Singapore.

The resulting candle can be shipped more easily using the trade facilitation rules in CPTPP, which allows self-certification, or shipment without a specific piece of documentation called a certificate of origin. Firms can also get customs officials to classify the candle using something called an "advance ruling" so the company can be confident that the candle will be classified as a candle and not as a product called "other" and subjected to higher tariffs or different rules of origin at the border for up to three calendar years.

The firm making candles can also more easily supply and access the key services to sell the product. Marketing, distribution and retail are critical to the success of the product. This includes online distribution of advertising and, potentially, the use of e-commerce channels.

Another critically important issue for the candle company is protecting the intellectual property investment behind the product, including the brand, packaging and even the scent. The CPTPP protects these investments and provides for enhanced enforcement to stop counterfeit products appearing in the marketplace.

Markets that were not attractive before, because the tariffs were too high, because freight was too costly, because border delays were inevitable, or because retail investments were not possible, may suddenly look much more attractive.

Similar examples of CPTPP benefits can be found in nearly every type of company in nearly every CPTPP member. This agreement is the single most important trade deal in decades. It will set the rules of the game for trade in the future, as elements are replicated in other trade agreements going forward.

## How to join the CPTPP?

The CPTPP permits accession by new members. While the original 12 party Trans-Pacific Partnership (TPP) contained an explicit link to the Asia Pacific Economic Cooperation (APEC) in the membership criteria, the revision to the CPTPP removed this point. Hence the CPTPP is more open to accession by the UK than the original TPP agreement might have been.<sup>4</sup>

One other change between the TPP and CPTPP involved adjustments to the entry into force provision.<sup>5</sup> Now, the CPTPP requires that at least six countries complete domestic level ratification procedures. Sixty days later, the CPTPP legally enters into force for these members.

The first country to ratify was Mexico, followed by Japan, Singapore, New Zealand, Canada and on October 30, Australia became the sixth, in turn triggering the sixty day count-down. The CPTPP will therefore enter into force on December 30, 2018.<sup>6</sup> Vietnam is putting the document before their legislature in the October/November parliamentary session.

The specific criteria for accession have not been clarified. The CPTPP text states:

*“Article 5: Accession. 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.”*

One “carrot” used to encourage CPTPP members to ratify quickly is to allow the first members a say on the institutional structure of the new agreement.<sup>7</sup> This includes provisions on accession.

During the course of negotiations, the TPP expanded. Talks began in March 2010 with seven participating countries (Australia, Brunei, Chile, New Zealand, Singapore, United States and Vietnam). This grew later in the year with the addition of Malaysia. Expansion took place later in 2013 with Japan’s entry, followed by Canada and Mexico. When the US withdrew from the completed agreement in early 2017, the TPP was renegotiated as the CPTPP with 11 members.

## Demands of membership

To join the TPP, member states had to first meet individually with current members and discuss any existing “bilateral irritants.” These may or may not have been required to be addressed in whole or in part prior to further discussions on entry into the group. Then a **unanimous decision** by the entire membership had to decide on whether or not to allow the new applicant to join.

Informal procedures used during negotiations that governed accession dictated that new entrants were not allowed to reopen rules texts that had been completed. They could join discussions on any ongoing rules. And, of course, new members had to negotiate over the terms and conditions of their own market access schedules for tariffs, services, investment, government procurement, state-owned enterprises, and business mobility.

As an example of the types of scheduling discussions, while all members in the TPP were required to open every tariff line to all TPP members, the exact timing of tariff cuts were subject to negotiations. A member might opt to put fresh peaches into a category that dropped tariffs to zero duty rates immediately on entry into force but put fresh apples into a staging category with duty rates dropping in even instalments over six years or falling quickly in the first year and then holding until the final drop in year six. Such commitments were subject to negotiations with other members, since some might have wanted faster or different market opening commitments for apples.

**The explicit procedures for entry into CPTPP and negotiations under the expanded agreement have not been confirmed.** However, it is likely that potential members will first notify New Zealand, as the current official repository country of the agreement, of an intention to join. As of October 1, 2018, only Columbia has done so, although many other countries have publicly stated intentions to join the CPTPP in the future.

Once accession gets under way with new members, the same informal rules regarding the texts and schedules are likely to hold, i.e. **new members will not be permitted to reopen existing CPTPP legal texts.** It might be possible to discuss additional rules or expanded trade rules beyond what currently exists. But most of the negotiating energy will be spent on new member scheduling and, potentially, side letters.

Existing CPTPP members will not be revising their own schedules in the process of future expansion. In other words, the current CPTPP legal text and all CPTPP schedules for current members will not change regardless of what happens with accession in the near term.<sup>8</sup>

The CPTPP's side letters, it should be noted, do not currently apply to all members. Instead, they are bilateral in nature. 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 nearly all CPTPP member governments.<sup>9</sup>

In effect, the conclusion from the unanimous CPTPP accession procedure is that direct, bilateral negotiations must be undertaken with each of the signatories of the CPTPP, and it cannot be precluded that concessions may have to be signalled, or even offered upfront before accession negotiations can take place. It is important to stress that the gains of CPTPP (compared to, say, a network of bilateral FTAs) is not about any time-saving aspect of negotiating a regional trade

agreement with multiple partners at once: It is foremost about the efficiency of managing several commitments within one framework that is applied to all the members in an uniform manner.

In fact, the vast majority of the relationships between the original TPP countries (with important exceptions, such as US-Japan) were tied together by existing FTAs, which the CPTPP agreement builds on.

### Tariff rates and WTO schedules

For the UK to join the CPTPP, it is critically important that the terms and conditions of Brexit are clarified. As with most free trade agreements, CPTPP uses the World Trade Organization's (WTO's) Most Favoured Nation (MFN) tariff rates and GATS services commitments as the base levels in negotiations. All preferential access granted to FTA partners is predicated on these commitments.

For TPP, some members (particularly the United States) used existing FTA commitments as the base levels and made cuts from there. The reason for doing so was to ensure that TPP members always received improved market access from the TPP over and above any existing agreements.

By way of explanation, consider the following hypothetical example. Under MFN rates, the tariff on fresh peaches into Country A is set at 10%. This means that all WTO members exporting peaches into Country A currently pay 10% tariffs. But Country A has a few FTAs in place, including one with a CPTPP member, Country B, that provides the preferential tariff rate of 5% for fresh peaches. If the CPTPP base rate were set at 10% and subsequent cuts were made from the MFN rate downwards over a period of 5 years, Country B would suddenly face *higher* tariffs under CPTPP than the existing FTA on entry into force. This would be quite confusing for peach exporters and would make it less likely that firms would start migrating to the CPTPP as soon as possible.

This is a particular challenge under the CPTPP, as most of the existing member countries were already linked by various free trade agreements. None of the past FTAs are cancelled, voided or allowed to lapse, allowing firms the opportunity to choose to use older agreements.

Over time, as all tariff rates under CPTPP fall to zero, the benefits of existing FTAs and CPTPP should come into alignment. In general, CPTPP should provide better benefits to firms than existing regional agreements, but there could well be specific instances where companies have existing arrangements that are working well, particularly where tariffs are already at zero in key markets.

Without a baseline to determine tariff rates it will be impossible to schedule preferential access to CPTPP member firms. The point of an FTA, after all, is to provide better access and stable benefits to markets for companies inside the agreement than firms receive for countries which are not included in the deal.

It is therefore critically important to know what the UK base rates will look like post-Brexit. This requires an understanding of various Brexit scenarios and a clear separation from the EU at the WTO.

**Until the independent WTO schedules are set for the UK, it is not possible to determine CPTPP market access schedules.** Existing CPTPP members will not want to just assume that the UK will automatically receive the current EU MFN tariff rates either, as it is highly unlikely that this will happen so seamlessly in Geneva.

While much of the tariff schedules for the EU presumably will hold for the UK and, under existing WTO rules, no country can be made worse off under the new commitments, it is possible that some WTO members will demand improved market access to the UK. Such an opportunity to receive new market liberalization for such an important market rarely happens. WTO members are well aware of the prospect of gaining new access in one or two tariff lines of primary importance to their own firms compared to the status quo. The WTO operates by consensus. It could not take very few members to hold up the entire process in Geneva, pending satisfactory resolution of their particular desires for better market access in a handful of tariff lines into the UK post-Brexit.

UK entry into the CPTPP is therefore likely to be held back pending the final commitments of the tariff schedules at the WTO. This could take some time to work out as all 163 WTO members will need to confirm the final UK schedules once the Brexit situation is resolved between the EU and UK and all existing agricultural subsidies and tariff rate quota (TRQ) issues have been settled.

Tariffs schedules is probably the area where the future relationship with the EU has a significant impact on the prospects of an UK CPTPP membership (see page 30-33 for analysis of the implications of Brexit on accession)

### Services Schedules

Fortunately for the UK, the EU's schedules at the WTO under the General Agreement on Services (GATS) have remained country-specific. In other words, the UK already has commitments in its own name under the GATS. In whatever form Brexit happens, untangling the EU/UK schedules for GATS will be less problematic.

In addition, for CPTPP, the GATS schedules are less relevant. Because the CPTPP uses a different form of noting individual country commitments, the CPTPP does not “build” on existing WTO pledges to the same extent as goods. CPTPP cannot contradict WTO commitments but can provide improved services access for FTA members.

**The CPTPP uses “negative list” scheduling – just like the current UK services schedule, that is integrated in the EU FTAs .** Put simply, under CPTPP, every single service sector and subsector (all 160) are assumed to be opened now and into the future, unless the member takes a reservation which is acceptable to all other members. Under GATS and old EU FTAs under positive list schedules, only those sectors and subsectors that are listed are considered opened for competition by members.

The CPTPP bundles services and investment commitments together. The first set of reservations (Annex I) may change in the future, if member states make improved offers to other countries in new FTAs or other trade settings or even opt to make unilateral improvements in services or investment regulations covered by the reservation. The second set of reservations (Annex II) will not be adjusted for CPTPP members. The UK will need to decide which types of services and investment laws, regulations and practices are likely to be out of alignment with CPTPP commitments and which could be considered in the future. These lists, of course, will be subject to negotiations with CPTPP members before the final deal with the UK is approved by all.

It is again worth noting that no FTA, including CPTPP, can negate promises made elsewhere. Instead, FTAs like the CPTPP provide additional benefits that go beyond existing schedules for members. These commitments are also under MFN (most favoured nation) principle – i.e. if the UK, Japan or any other member would make a better schedule offer bilaterally to a non-CPTPP member (like the United States), it would have to offer the same market access to the other CPTPP countries. The MFN commitment has very little meaning in practice, as most services liberalisation take place through technical regulations (rather than schedules)

However, CPTPP rules are not without its limitations: The commitments on financial services contain several country-specific exceptions, while several commitments in other chapters (notably e-commerce and data flows) have general exemption for financial services, contrary to the interests of the UK financial sector.

## Regulatory Divergence

**While there is some concern in the UK that regulatory divergence between the UK/EU and the CPTPP is likely to be a significant impediment to joining the CPTPP, this is unlikely to be the case.** There are several reasons for this.

First, CPTPP and other FTAs do not contain provisions that actually set regulatory standards, but ensures the sovereigns regulate in the most non-discriminatory fashion possible. In other words, CPTPP and other trade agreements voluntarily bind its members to refrain from certain, specific discriminatory practices, like a rulebook against discrimination in national legislation – but do not replace the national legislation itself. This is how CPTPP (and other FTA texts) deal with a complex matter like food safety in just sixteen pages, while the national legislation often runs several hundred pages long – the current UK law, implemented via EU regulation (Regulation No 882/2004) on feed and food runs 196 pages in the Official Journal.<sup>10</sup>

Second, six members of the CPTPP have existing agreements with the EU. In order to ensure consistency between agreements, these countries had to be certain that none of the commitments in their bilateral FTAs with the EU could or would contradict potential TPP pledges. In other words, these countries have already scrubbed commitments which could cause potential conflicts between the CPTPP text and the EU FTA template, as they have signed up to both. In addition, Japan, New Zealand and Australia also had comprehensive mutual recognition agreements (MRAs, based on conformity assessment) with the EU, even prior to their EPA/FTAs. In highly regulated sectors, such as on motor vehicles, Japan and Australia have also unilaterally accepted or incorporated European standards into their systems.

Evidently, as nothing in the CPTPP agreement precluded Japan and other CPTPP countries to conclude a comprehensive FTA with the EU as well, the UK would in theory be able to pursue both. However, in the opposite direction, whether the EU body of law in its entirety would pass CPTPP commitments, is a different question that is discussed in the following sections.

### Sanitary and Phytosanitary measures

Chapter 7 is the agreement's Sanitary and Phytosanitary chapter: covering provisions relating to the protection of human, animal or plant life or health in the territories of the Parties. This 16 page document contains a total of 18 provisions.

The first 3 pages define the terms, scope, definition of the chapter and establish a committee to administer the rules. Because there were wide gaps among participants on existing regulations for sanitary and phytosanitary (SPS) from the beginning, there was some hesitation about legally binding commitments by some members.

Much of the chapter, in fact, like much of the overall agreement, is about increasing transparency between members. For example, provisions 7.7 on adaptation to regional conditions or 7.8 on equivalence is largely about getting members to agree to inform other CPTPP members of domestic policies and regulations.

The most important part of the chapter is 7.9 on the use of science and risk analysis. This section, while critical, does not go substantially beyond the WTO's SPS commitments. But it does clarify the conditions and remind members that SPS rules must not be made on an arbitrary basis where equal conditions prevail. Also, any risk assessment must be based on reasonably available and relevant scientific data. This approach is often contrasted with the EU's "precautionary principle" approach. Where CPTPP takes the more permissive "allow or explain" approach, the EU generally prescribes "wait and see". However, this is not a concern in the light of the CPTPP agreement, but the canon of international trade law. The EU ban on hormone-treated beef was contested under the WTO rules as unscientific.

Members are allowed to conduct audits and import checks. The agreement urges members to limit the use of certificates and ensure that requirements are, indeed, necessary. Section 7.13 and 7.14 deal with transparency and emergency situations. Since these conditions do occasionally take place, it is important for members to follow certain procedures to avoid using SPS measures imposed during an emergency situation as an excuse to permanently stop the flow of food or food products.

Sections 16 and 17 are about how information shall be exchanged. The final section notes that the chapter is legally binding, with the key element of 7.9 binding after 2 years (and sections on equivalence, audits and import checks exempt).

**What is clearly not covered in the CPTPP are specific details about SPS regulations.** There is nothing in the agreement to date about appropriate or inappropriate pesticide levels, about hormones, or myriad other details that are covered exhaustively in EU agreements. CPTPP members are free to regulate for human, animal and plant life and health, within the boundaries of the WTO SPS and CPTPP frameworks, as long as the regulations are not arbitrary or openly discriminatory for equal conditions. This leaves considerable room for domestic level policy space.

## Regulatory Coherence

The original intention of some TPP members involved a high degree of regulatory coherence. While the final agreement includes a chapter on the topic, the extent of difference between existing members is significant and many regulatory issues were simply unable to be bridged.

As a simple example of the problem, while many members wanted rules governing online consumer protection in the e-commerce chapter, not all TPP countries had existing offline consumer protection laws. The final e-commerce chapter, therefore, says that members should move towards having adequate online consumer protection laws in place.

The regulatory coherence chapter is largely about using good regulatory practices in drafting new rules. For some CPTPP members—and particularly for some potential new entrants—this is a very helpful framework of commitments to drive better governance in the future. For the UK, however, it already follows and will continue to follow, sensible regulatory practices.

Thus, the extent and reach of regulatory convergence is not as high as originally planned. Over time, this is likely to change. But for the UK joining in the near to medium term, regulatory challenges are not the biggest hurdle. In addition, a similar institutional set up for regulatory coherence with the EU does not preclude further cooperation with the CPTPP, as both Japan and Canada have set up more closely aligned “regulatory councils” for their future regulations with Europe through their respective FTAs.

### Geographical Indications

The one area of divergence that did prove more difficult for members involved in both EU FTAs and the TPP involved geographical indications (GIs). This was ultimately solved in the TPP by requiring the use of compound names (explained below). The intellectual property (IP) secured by the use of GIs – which are protected in the EU to a much greater extent than in most TPP member countries – took extensive discussions to resolve.

GIs are a type of IP protection granted to some types of products based on the specifics of where goods are produced. The concept began with wines, which were assumed to be endowed with particular characteristics and qualities as a result of the raw materials from a certain location that could not be recreated in any other physical location. Hence, champagne could not be produced from grapes grown outside of Champagne, France, and have the same characteristics of French Champagne. The argument is that to imply otherwise would be to mislead customers.

Over time, this concept of GIs has spread beyond wine products to include diverse items like cheeses and even mushrooms. Many TPP member countries did not want to encourage further use of GIs, but had to accept the existing commitments of EU FTA partners. The solution has been to allow CPTPP members to use “compound names” for GI protection. An example is the use of “*Parmigiano-Reggiano*”, instead of simply “*Parmesan Cheese*” or “*Italian Parma*”. In addition, a section (18:36) explicitly provides for members that already use GIs to continue to do so.<sup>11</sup> Therefore, the UK should be able to comply with this outcome.

## Dispute Settlement

The CPTPP has two types of dispute settlement. Most of the agreement is subject to government-to-government dispute settlement.

There is no “standing” court system in the CPTPP. Instead, members are meant to work with a complicated committee structure across the CPTPP, culminating in the Trans-Pacific Partnership Commission. The Commission is made up of Ministers or other senior officials and meets regularly.

The dispute settlement chapter (28), covers the provisions for handling disputes between members. While there is currently no standing body to review disputes, like the World Trade Organization, there are panels and procedures in place to handle disagreements between governments.

This system, as it currently stands, does not look particularly amenable to changes in the direction that the European Union has proposed in some recent FTAs. However, Article 27.2.e allows the Partnership Commission to amend model rules of procedure for arbitral tribunals, should the Members so prefer.

The second form of dispute settlement embedded in the CPTPP is what is known as investor-state dispute settlement (ISDS). Crucially, under the revisions from TPP to CPTPP, some governments have signed side letters to remove their investors from ISDS protections. This is important, given the political resistance to the concept. Indeed, it is a topic which divides free trade thinkers, and not one considered by IFT to be essential or desirable<sup>1</sup>.

Notwithstanding these reservations it is a standing feature of CPTPP, and so deserves our attention.

First of all, governments always have the right to regulate in the interests of public health, as well as animal and plant health. This right is enshrined in the multilateral trading system under the World Trade Organization (WTO) and has been carried through in every preferential trade agreement since then.

There is nothing in CPTPP or any other trade agreement that will fundamentally undermine the government’s sovereign right to ensure the safety of its citizens. No government would ever agree to an agreement that would abrogate this right.

Second, a good ISDS clause does **not** give companies the right to sue governments over being given an “unfair advantage.” The TPP/CPTPP ISDS provisions run to 30-60 pages and spell out, as

---

<sup>1</sup> In the Cato-IFT Ideal US-UK Free Trade Agreement, ISDS was not included.

specifically as possible, exactly what constitutes an example of government expropriation of rights under which a foreign investor could consider launching an ISDS suit.

The basic issue that ISDS is trying to address is *expropriation*. The clearest example is when the government decides to build a road through a shop. In many countries, the rules that govern what happens in this situation are murky. Investors may suddenly find their property seized without warning or without receiving fair compensation for the loss of the shop.

ISDS is designed to make clear provisions around expropriation. A good clause explains in detail what sort of conditions must be in place when a government decides to act. Note that ISDS does not prevent the government from acting—if the road must be built through the shop, the government has the right to do so. Instead, ISDS rules spell out how firms are to be notified about this decision, how they will be compensated, and what they can do if they want to appeal what they think is an arbitrary decision or an unfair amount of compensation.

A firm can, of course, use local courts. But the reason why a *foreign* investor might want to use an outside arbitrator to resolve a potential dispute with the government is that an investor may not always be confident that the court system in the other country will rule fairly in a dispute. Remember that the issue is whether or not the government has followed the proper procedures. Not every judge in every country will be willing to find against its own government.

An investor cannot simply claim to be losing revenue somehow because other products get an “unfair advantage.” ISDS does not say anything about making or losing money.

Globally, there are more than 3,000 different bilateral investment treaties (BITS) as well as hundreds of free trade agreements. Of these, more than 90 percent contain ISDS provisions. The total number of disputes using ISDS is quite limited, particularly given the volume of foreign investment covered by this welter of treaties.

What makes this relatively small number of disputes even more impressive is that the earlier versions of ISDS were much broader than later ones. In other words, the earlier ISDS rules were quite expansive, allowing investors to use the arbitration system comparatively easily. Yet, most businesses do not resort to an outside system but continue to use the domestic court procedures to resolve disputes.

In part this stems from a lack of certainty about how any given arbitration case will be resolved which adds an element of risk to a decision to sue. Plus, most investors would prefer to remain in their host country and recognize the chilling effect that suing the government tends to have on their business operations. Hence, few investors are likely to sue, even if their case would likely be ruled in their favour.

Recent trade agreements have narrowly defined the scope of potential lawsuits. This is the main reason why ISDS provisions have grown in length over time, as governments have tried to strike a more appropriate balance between their right to regulate and the right of investors to ensure that their investments are not unfairly seized.

## Recommendations

Since the WTO scheduling is likely to be a lengthy process, in the meantime, the UK can get started on various elements related to future CPTPP entry that will be required.

1. There are several areas where the UK can plan ahead for potential CPTPP accession. First, the UK government can begin the **gap analysis** using the existing CPTPP agreement to determine where challenges are likely to be found between the UK and the current FTA document. This will include identifying any legislative and regulatory changes that may be necessary to bring the UK into compliance with CPTPP rules in the future. In general, these are likely to be limited for the UK, since much of the CPTPP broadly follows existing UK practices. As a reference point, Australia was required to make only two legislative changes to bring CPTPP into force. Malaysia needs 18 changes.
2. The UK can continue to develop the negotiating skillsets of its officials. In particular, the CPTPP uses “negative list” scheduling for services and investment. Since the EU has only recently started to switch to this process and since the CPTPP goes considerably deeper in both areas than existing EU agreements, the UK will need to think carefully about its existing and future regulatory landscape in services and investment. Under a negative list, the UK will be identifying a very small set of rules that it will not be changing to allow CPTPP firms to access the services and investment markets of the UK.

The gap analysis will help clarify the types of services and investment provisions that other CPTPP members chose to protect. Many of these elements will not apply to the UK. For instance, the UK is unlikely to worry much about the role of scriveners (notary public officials) like Japan, or investment into amusement parks (like Vietnam). But it may opt to clarify its position on health care providers in the public space, as a possible example or reconfirm the role of investment screening for critical technologies in the future. The investment and services commitments are part of the negotiations with other CPTPP members.

3. The UK will need to think about the **State-Owned Enterprise (SOE) provisions**. This is an entirely new set of rules unique to the CPTPP. Governments involved in the talks took some time to clarify their own potential SOEs and reflect on any changes that might need

to be adjusted in the wake of CPTPP entry for these firms. The UK can also begin this process now by drawing up a list of its own SOEs and determining which fit the criteria of providing commercially competitive goods or services.

4. The UK can begin some of the **informal bilateral discussions** needed prior to entry. Fortunately, the UK is unlikely to have many “irritants” that are viewed as problematic by current members, but these should be identified as quickly as possible with a pathway for addressing such issues in place.
5. The UK will need to assess what CPTPP entry will mean for UK firms. This may be the most difficult task. Brexit is delivering a whole new set of opportunities and challenges to the business environment in the UK. Sectors that had competitive advantages in the past may no longer have the same set of comparative strengths. Those that were less competitive in the EU context could be quite successful in the CPTPP. Sorting out the positions for goods, services, investment and the like for UK firms post-Brexit will be challenging.

The existing CPTPP members, as well as any potential new members that may be negotiating for accession alongside the UK, will be demanding market access commitments from the UK in all areas under negotiation. Thus, officials need to understand the likely areas of demand from each CPTPP member country and determine whether or not such requests can be accommodated and under what sort of time frames.

To accomplish this task, the UK should begin forming trade and investment groups now in various high commissions in respective CPTPP member countries to reach out to existing UK firms to more effectively understand the current market situation in each member country. These working groups, with both DIT and FCO staff members, should also consider potential changes to market conditions for UK firms post-Brexit and factor these shifts into positions that are communicated back to headquarters. Working groups should also be tasked with uncovering likely demands from CPTPP member states from the UK for market access in each of the areas under negotiation.

## Brexit and CPTPP?

Once Brexit has been completed, the UK will become eligible for membership of the CPTPP. However, the form of Brexit will have a significant impact on how easy or difficult it will be for the UK to join CPTPP and other FTAs. Here we consider four different Brexit end-state scenarios and the implications on CPTPP negotiations for each.

As noted earlier, while the form that Brexit takes is extremely important, the final package of commitments for the UK within the WTO remains critical as well. The two elements cannot be separated for future FTA negotiations: the form and shape of separation from the European Union and the nature of commitments for a more independent UK within the WTO context.

Like any other new member, under CPTPP entry the UK will not be negotiating over rules, only over its own specific schedules or commitments. These schedules include:

- Market access and national treatment for goods (tariff schedules in Chapter 2)
- Services/investment (Annexes I/II for Chapters 9 & 10)
- Financial services (Chapter 11)
- Temporary entry for business persons (Chapter 12)
- Government procurement (Chapter 15)
- State-owned enterprises (Chapter 17)
- Any other country-specific provisions that parties agree to insert into specific chapters as footnotes or country-specific annexes
- Country-specific side letters

At the time of writing, the Withdrawal Agreement is yet to be ratified. In any event, the United Kingdom will be leaving on 29 March 2019, and will then turn to negotiating a future framework with the European Union. Rather than considering the pros and cons of each proposal in their entirety, this section seeks only to comment on the implications of each scenario with regards to the particular issue of CPTPP negotiation and accession.

### Scenario 1: FTA relationship with Europe, or trading on WTO terms.

Under this option, the UK has no residual trade-related institutional ties to the EU at all, and the future relationship between the EU and the UK is governed by what is in essence a “simple” trade agreement (despite the numerous alternative names with superlatives or plusses). Alternatively, the UK and the EU trade on MFN-terms as stipulated by the WTO. In either case,

the UK can take its own commitments on tariffs, services, government procurement and investment schedules, as well as the chapters on rules and sectoral annexes.

As highlighted in the previous sections, there are no conflicting commitments between CPTPP and EU FTAs, as evident from the seven CPTPP members who also have FTAs with the EU.

An accession assumes that the UK establishes its own WTO schedules, including settling its agricultural TRQs with third countries, which forms the baseline for any future negotiations on request and offers.

### Scenario 2: Remaining in the Customs Union

Under this second scenario, the UK would permanently remain inside a customs union with the EU, such that the UK would continue to be bound by a common external tariffs for virtually all industrial goods while retaining the competence to negotiate all other aspects. Similar to Turkey, the UK would seek to negotiate its own agreements with EU FTA partners in order to receive reciprocal access, and negotiate chapters outside of industrial tariffs; while the EU would maintain control over the UK's industrial tariff lines, granting UK market access to third parties as it sees fit, without shared decision making from the UK. Further such broader issues with this scenario do not fall within the scope of this review – only its compatibility with CPTPP accession.

For the CPTPP members that have existing FTA arrangements with the UK via Europe – i.e. Canada, Chile, Japan, Mexico, Peru, Singapore and Vietnam – a UK-EU customs union may not be a fatal complication. These countries will continue to access the UK under duty-free terms negotiated with the EU. However, for the remaining four CPTPP countries who are yet to conclude FTAs with the EU – Australia, New Zealand, Malaysia and Brunei – their access to the UK is hinged on a successful outcome of their respective negotiations with the EU.

It would be unprecedented for the CPTPP (or for any agreement) to allow a party to accede without having complete clarity on its accession terms, and so accession may only be possible once all CPTPP members have concluded their EU negotiations. Alternatively, the CPTPP would need to split into two “classes” of membership: a full membership, and one restricted for the UK only covering agriculture, services, government procurement, investment and rules.

In addition, this arrangement would complicate future accessions of countries that are less likely to have FTAs with Europe, even make the EU a gatekeeper to the CPTPP agreement. While several CPTPP members mostly have their offensive interests in agricultural products, both current and future CPTPP members (like Malaysia, Indonesia or Thailand) also maintain offensive interests against Europe and the UK on certain industrial goods, especially on textiles and clothing. For these reasons, the suggestion that the UK could accede to CPTPP while remaining a member of a customs union is, while theoretically possible, is likely to be impossible in practice.

### Scenario 3: Common regulations with Europe (“EEA” or the Norway option)

Under this scenario, the UK would be outside the customs union, and would therefore negotiate tariff concessions for all goods. Whether this scenario or the Chequers proposal (which is essentially a “customs agreement” on goods with common regulations) is actually politically feasible falls outside the scope of this review. Nonetheless, the scenario raises interesting questions whether the EU (and EEA) regulations would actually pass the CPTPP disciplines.

This review has highlighted a number of policy areas (that would continue to apply in the UK under this scenario) without necessarily identifying an irreconcilable conflict between EU regulations and CPTPP disciplines – including areas like SOEs and public health, cross-border data flows and privacy, or SPS.

By and large, the EU regulatory system could accede to the CPTPP agreement with some very minor possible exceptions, including those that have already led to concessions by the EU under the WTO system. Also, no jurisdiction in the world – including CPTPP members – is entirely WTO consistent. There are several country-specific exceptions or transition periods that have been agreed for by some CPTPP members.

## Conclusion

Joining the CPTPP would fulfil several important imperatives for the UK in the Asia-Pacific region and its long-term objectives on future global economic governance. The UK's decision to attempt an accession to the CPTPP is one of its key post-Brexit strategies.

There are three geometries that have emerged as pillars in the world economy: CPTPP, USMCA and the gradually expanding network of EU FTAs, where the latter two (and many other FTAs) are now building on the pioneering provisions of CPTPP. Joining CPTPP is to partake in a regional trade agreement that effectively forms the benchmark – or “the gold standard” – of the current generation of trade agreements.

Given the architecture of CPTPP, it will be necessary for the UK to negotiate market access with each of the current eleven members. Hence, the gains of CPTPP are not necessarily about saving time or managing with scarce negotiation resources. Such concerns are anyway short-sighted - the real gains of CPTPP are more long-term and structural: the establishment of a common framework that covers an entire value-chain (featuring very different economies and comparative advantages) that unleashes a great amount of efficiency.

While CPTPP accession is technically feasible under any Brexit scenario, remaining in the customs union would put a constraint on the accession process that is already likely to require an arduous diplomatic effort, given the need for unanimous consent. Since CPTPP members would not be able to reduce UK industrial tariffs without first completing their own negotiations with the EU, for this model to work, the CPTPP would be required to change into a two-tier membership. Given these issues, the notion that the UK could join CPTPP while being a member of the customs union is likely to be impossible.

The United Kingdom's future framework with the European Union will therefore have major implications on the prospect and shape of her accession to the CPTPP. This paper has sought to delineate the realities of these implications, in order to assist the UK government in its deliberations over its future framework with the European Union.

## References

<sup>1</sup> These benefits remained largely intact in the transition from the original TPP negotiations to the CPTPP, as noted further below. This section is taken from the Asian Trade Centre’s booklet, “Ten Benefits of the CPTPP,” 2018, Additional TPP/CPTPP materials can be found at [www.asaiantradecentre.org](http://www.asaiantradecentre.org).

Note that, in the revisions to CPTPP, some member governments signed “side letters” that exclude these investor protections.

The CPTPP texts and schedules can be found at: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/>

<sup>2</sup> Or were, prior to the administration of US President Donald Trump.

<sup>3</sup> These benefits remained largely intact in the transition from the original TPP negotiations to the CPTPP, as noted further below. This section is taken from the Asian Trade Centre’s booklet, “Ten Benefits of the CPTPP,” 2018, Additional TPP/CPTPP materials can be found at [www.asaiantradecentre.org](http://www.asaiantradecentre.org).

<sup>4</sup> However, even the original TPP accession footnote merely stated that the agreement was open to APEC economies and others “as agreed by members.”

<sup>5</sup> The original TPP required the United States, as members accounting for 85% of the total GDP from 2013 needed to be included.

<sup>6</sup> When the CPTPP comes into force, it may not include all 11 members, as not all will have completed domestic ratification procedures at the same time. Members made an informal commitment to one another to aim for ratification by February 2019.

<sup>7</sup> There is an informal commitment to get the CPTPP ratified domestically no later than February 2019 between the current 11 parties.

<sup>8</sup> Unless, of course, the accession is taking place at some considerable time lag from the original signature. As an example, a future accession procedure in 2030 could conceivably trigger changes to the legal text for all members if provisions need to be updated or modified at that time and all CPTPP members are in agreement on this point.

<sup>9</sup> Because the CPTPP is not currently in force, all of the CPTPP side letters are also not currently in force and are not visible.

<sup>10</sup> See the relevant documents at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1406801253868&uri=CELEX:02004R0882-20130701> Accessed on September 29, 2018.

<sup>11</sup> <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/18.-Intellectual-Property-Chapter.pdf>

While this chapter underwent some significant revisions in the transition from TPP to CPTPP, the GI elements in Section E are untouched.