HOUSE OF LORDS

International Agreements Committee

Uncorrected oral evidence: UK Accession to the Comprehensive and Progressive Trans-Pacific Partnership

Tuesday 17 October 2023

4 pm

Watch the meeting

Members present: Baroness Hayter of Kentish Town, Lord Goldsmith (The Chair); Lord Grimstone of Boscobel; Lord Howell of Guildford; Lord Kerr of Kinlochard; Baroness Kingsmill; Lord Marland; Lord Razzall; Lord Udny-Lister; Lord Watts.

Evidence Session No. 1 Heard in Public Questions 1 - 7

Witnesses

I: Dr Giulia Leonelli, Assistant Professor of Law, LSE Law School; Professor Christopher Dent, Professor in Economics and International Business, Edge Hill University.

Examination of witnesses

Dr Giulia Leonelli and Professor Christopher Dent.

Q1 **The Chair:** Good afternoon, and welcome. My name is Dianne Hayter, and I apologise that you are not seeing who you expected, which was Lord Goldsmith. Unfortunately he is detained abroad. I hope that he will be able to join us, but it is easier to have someone chairing us in the room.

As everybody knows, this is an evidence session of the International Agreements Committee, where we are looking at the agreement on CPTPP. We will introduce our members as they pose questions to our two witnesses. I welcome Professor Christopher Dent, who is joining us online, and Dr Giulia Leonelli, who is with us in person.

The meeting is being broadcast live on the parliamentary website. There will be a *Hansard* record and the witnesses will be able to look at a draft of that before it goes live just to make corrections; I am afraid that we cannot completely rewrite them.

Before we start the formal meeting with questions, could you introduce yourselves so that you are there on tape?

Dr Giulia Leonelli: Thank you very much for inviting me. I am assistant professor of environmental law in the LSE Law School.

Professor Christopher Dent: I am professor of international political economy, Edge Hill University.

The Chair: Thank you. Could I start with a general question? What are your overall thoughts on the terms of UK accession to the CPTPP? Do you consider that the UK achieved its objectives that it set out in the negotiations and what concessions has it had to accept?

Dr Giulia Leonelli: I am speaking as an environment lawyer. There had been media reports that Canada, during the assessment by the CPTPP accession group, had raised some objections regarding the UK's compliance with the chapter on sanitary and phytosanitary measures. In particular, according to media reports, Canada had an interest—it is a long-standing trade issue for Canada—in the UK lifting its ban on meat containing residuals of hormones administered for growth-promotion purposes. The Government have not lifted this ban and have not changed the standards.

I believe this is very good because the Government had pledged that they would not compromise on their food safety standards. I still believe that accession to CPTPP can be problematic in terms of sanitary and phytosanitary measures, but at least this problem has not materialised prior to accession.

The Government had also announced that they would protect the UK's right to regulate in the national interest to achieve public policy objectives under the investment chapter of CPTPP. I do not know whether this is a concession, but I believe that this point has not been fully addressed. The UK has agreed side letters with Australia and with New Zealand regarding the non-application of investor-state dispute settlement. This is unsurprising overall given that the UK-Australia and the UK-New Zealand free trade agreements do not include investor-state dispute settlement. Also, Australia and New Zealand had previously agreed on the non-application of investor-state dispute settlement with other CPTPP members.

The UK could have perhaps attempted to get an agreement on the non-application of investor-state dispute settlement with other CPTPP parties, such as Mexico, Chile, Peru, Singapore, Vietnam and Malaysia, but this may not have changed much because there are bilateral investment treaties in place with those CPTPP parties that include investor-state dispute settlement.

I am not too sure about the position with Japan and with Canada because the UK-Japan free trade agreement does not include investor-state dispute settlement and the UK-Canada continuity agreement—the part regarding investor-state dispute settlement—is suspended; its application is suspended. The provisions are being renegotiated and the position of the Government was not to include investor-state dispute settlement. However, there was no opt-out via a side letter with Canada during the accession to CPTPP.

The Chair: Thank you. We may come back to ISDS later on. You may have covered some of the questions that we were going to ask. Thank you.

Professor Christopher Dent: If you mean by "the terms of UK accession" to the agreement the general norms of the CPTPP provisions, I can go into more detail later about how they are relatively US-centric, and in many chapters' cases very US-centric. A lot of the provisions derive heavily from US trade regulatory norms that you find in other trade agreements, and in certain chapters derived quite heavily from US domestic regulations, such as from its own intellectual property regime.

I can talk later about that. I did some macro-level research about the whole of the agreement and how we could map the text of the CPTPP agreement on to other US-centred agreements, such as the United States-Mexico-Canada agreement.

However, when the UK acceded to the CPTPP it had in some way to be a regulation taker rather than a regulation maker. It had to accept the agreement as it was, essentially. That could change; I would like to discuss that later. There are some key questions about what the CPTPP could become in the future and the UK's role in shaping the future of the agreement, because it is supposed to be a living agreement and it is supposed to evolve and develop. I am not sure if the committee has heard from experts on more specific technical terms that the UK entered the CPTPP on in different chapters, as my colleague Giulia has just explained.

If you look at the 68-page-long UK accession protocol to the agreement, it is largely about establishing compatible terms of reference between the UK and the agreement’s different chapters and some party-specific tariff schedules for the UK in the annex section. Yes, of course, it had to negotiate on particular technical issues but it had to generally accept the terms of the agreement overall. As I can explain later, those terms are very US-centric in their normative nature.

Regarding the objectives of the negotiations and what concessions the UK had to accept, one got a general feeling that the UK Government’s objectives were not exactly clear, or at least were not made publicly clear during the negotiation process. Many people put that down to the fact that the UK does not have a well-formed, coherent trade strategy overall. That is still something that it needs to work on.

There are signs that the UK could be innovative going forward. As I will explain later, there is a lot of scope for the UK to be a trade policy innovator within the CPTPP and shape its future terrain. The joint statement on climate change, the environment and sustainable trade, which was announced when the UK formally joined the CPTPP in July this year, provides some insight and idea of how the UK could be a trade policy innovator within the CPTPP. However, we will see how things go. Now that the UK has its foot in the door, so to speak, what role can it play in the CPTPP’s future development? That is the key question for me.

The Chair: You say the UK could be a shaper or an innovator. Is that because of our relative size or is it because of our particular terms and pattern of trade?

Professor Christopher Dent: The CPTPP is unusual in the sense that it is led by middle powers. It does not have a large trading power like China, the US or the EU. It is a coalition of middle powers. What I mean by that is that you have Japan, the UK, Canada, Australia, New Zealand, and Singapore in particular. The UK is the second-largest economy in the CPTPP. Therefore, it does have some scope for leveraging its influence as the second-largest economy in the group. It has a very good working relationship with Japan and the other middle powers as well, so I do see some promise, some optimism, because of that.

Q2 **Baroness Kingsmill:** Professor Dent, this is an opportunity for you to amplify some of the comments that you have just made. You said that you would broaden them out later, but what exactly are the implications for the UK? We are a bit late for the party, so I suppose that has had an impact, but could you give some more clarity about the implications of this for the UK?

Professor Christopher Dent: You may have had sight of a table from recent research that I have done on the similarity of the texts of the UK’s bilateral agreements that it has recently signed with Australia and New

Zealand—the two bilaterals that were in a way a leadup to joining the CPTPP. You know the history of the agreement itself.

Baroness Kingsmill: Indeed, and I should declare an interest in that I am a New Zealander.

Professor Christopher Dent: Wonderful That is excellent to know because New Zealand has become a very interesting trade policy innovator, not just in recent years but going back some time. I have been tracking what has been happening in Asia Indo-Pacific trade relations for the past 20-odd years, especially around free trade agreements.

The TPP, the progenitor to the CPTPP, was led and negotiated by the US. Research that has been done by other scholars and me has clearly shown how closely the TPP/CPTPP text is to other US-centred agreements, like NAFTA and the US-Mexico-Canada agreement. Do you have the table that I forwarded to the committee? There is a table of the different chapters that one found in those agreements that I have just mentioned.

You can see that I have ranked them in terms of what I call their derivative similarities. For example, you can see at the top of the table the state-owned enterprises and monopolies chapter and then you have the investment chapter. You can see, in those percentage number terms, just how close the text of the UK's Australia and New Zealand FTAs is with the CPTPP and the USMCA. There is a very close similarity as well, as you can probably deduct from the numbers, between the CPTPP and the USMCA; in the high 90s% sometimes.

What we have signed is three agreements, the two bilaterals and the CPTPP, that are very heavily oriented towards US trade regulatory norms, with implications for domestic policy in the UK, like, for example, on patents, healthcare, IP, digital and data regulation. I know the House of Lords International Agreements Committee has done some deep research into this. It was very helpful in my own research, writing about these matters.

The UK has joined an agreement that is very heavily influenced by US trade regulatory norms, but where do we go from here? The US is not signing any new free trade agreements under the Biden Administration. That is likely to continue for some time, whoever becomes President after Biden. They are moving towards a new paradigm of trade agreements and trade policy-making. However, that does not mean to say that the UK is not left with these trade regulatory norms shaped by the US in the CPTPP.

For reasons that I will explain later, there will be pressures on the CPTPP to evolve and to reflect new imperatives and risks in the international trade environment. Therefore, there is an opportunity here for the UK, in a collaborative, innovative effort, to work with other leaders of the agreement to shape it into something quite different to what it looks like at the moment.

Baroness Kingsmill: Would you like to highlight any particular areas where you think that the UK will have an advantage?

Professor Christopher Dent: In the area of the trade-climate nexus and, for example, the carbon pricing of trade, the promotion of environmental goods and services liberalisation and reform on fossil fuels and fishing subsidies. There are a number of trade-environment areas where the UK could play a lead with willing others within the CPTPP group. There are probably a number of other areas like finance services. I would need to think a bit more about that, but there are a number of fronts on which the UK could play an innovative role.

Baroness Kingsmill: Regulatory practices perhaps?

Professor Christopher Dent: Yes, indeed, and standards such as on agriculture, where the UK has very high standards relative to most other countries, and perhaps also on new technology frontiers like artificial intelligence and digital technology.

The Chair: Thank you. I am going to ask Dr Leonelli to comment on what Professor Dent has just said, but before that—I am not sure how it deals with this—if *Hansard* wants to use the table that you have submitted to us, can it go in in some form? Otherwise, this discussion would be a little odd for anyone reading it.

Professor Christopher Dent: Yes, I would be very willing. This is a published table in an article that came out in a journal.

The Chair: We could just do it by reference then.

Professor Christopher Dent: Yes, that is absolutely fine.

The Chair: Dr Leonelli, would you like to comment on anything that Professor Dent said?

Dr Giulia Leonelli: Yes, from the environmental and climate change mitigation law perspective, CPTPP is not particularly ambitious. It is relatively outdated as a free trade agreement, so there may be scope for the UK to take a leadership role and try to steer other CPTPP parties towards more environment-friendly practices, including via the joint declaration that Professor Dent mentioned. However, it is worth mentioning that these are mere aspirational statements that neither identify any specific commitments, targets or benchmarks nor provide for funding streams or any specific remedies.

Generally, the stringency of environment chapters in free trade agreements depends on the coverage of the areas. In this respect, CPTPP is relatively good. The application of state-to-state dispute settlement and remedies, which applies in the context of the CPTPP environment chapter, is also good. Then there is the language, whether we are looking at mandatory obligations or aspirational statements and commitments and the substance of the relative obligations.

Overall, I believe that CPTPP is not particularly ambitious. The clauses are standard clauses that can be found in every free trade agreement. There are several aspirational and unenforceable provisions regarding future levels of protection and no regression. There are several clauses relating to compliance with public international law that simply reaffirm pre-existing commitments that the parties had taken on when signing and ratifying the relevant environmental treaties.

The Government's impact assessment refers to what are known as non-derogation and effective enforcement clauses, which indeed are mandatory—clauses that prevent parties from non-enforcing their environmental laws in a manner affecting trade or investment, or waiving or otherwise derogating from environmental laws in order to encourage trade or investment. These are mandatory and enforceable but again they are circumscribed—as is always the case in free trade agreements—by these economic limits in order to encourage trade or investment or in a manner affecting trade or investment. Therefore, they are not particularly ambitious in environmental protection terms.

It is fair to acknowledge that, with this, I do not mean to suggest that the UK cannot take a leadership role and try to push other parties towards more environment-friendly practices and non-product-related process and production methods, in particular deforestation and so on.

I also want to clarify that it is very difficult to exercise environmental leverage in the context of free trade agreements. In its trade and sustainable development review, the EU itself pledged that it would apply state-to-state dispute settlement and remedies in the context of its trade and sustainable development chapters, but this has happened only in the EU-New Zealand free trade agreement. All the others that are either being negotiated or have been negotiated do not include state-to-state dispute settlement and remedies. The scope of the environmental obligations has not really broadened, so it is very difficult to have an environmentally ambitious free trade agreement.

Q3 **Lord Howell of Guildford:** Professor Dent, you mentioned the concept of global trade's "new risk agenda". What exactly are you talking about there? Are you talking about the information revolution and the rise of services and knowledge-based products in world industry and world trade—which is even contracting now—and are you talking about protectionist trends, or are you talking about the UK as a European power among not entirely Asian powers but mostly, or the regulatory dissonance? Tell us what is in your mind about this concept.

Professor Christopher Dent: It is more or less a shameless plug for the current research that I am doing, where I have come up with this term. It is a combination of many of those things that you have outlined. There have been some very important, fundamental changes in trends in the trade policy and trade diplomacy landscape over the last couple of years, where you can see interesting new kinds of trade agreements and trade-centred strategies and policies emerge, especially among the major powers—the US, the EU and China—but also others like Japan and South Korea.

I am looking at the concept of risk, especially a concept in academia called risk society, which has been around for some time. It is about how we are living increasingly in the epoque or era of human-made risks and how human civilisation addresses them, because many of them are very existential.

To try to simplify the framework of this new risk agenda, I have identified four generic risk domains, which are very strongly overlapping. The first is economic security risk, which relates especially to issues around supply chain resilience, securing access to critical materials and strategic resources, like energy and food. The second is geopolitical friction risk, which centres on the long rise of China, the hegemonic challenge this poses to the US, Russian aggression, the Russia-Ukraine war, the impact internationally of nationalist populism, and a growing domestic pushback against globalisation. The economic security risk and geopolitical friction risks are very closely linked.

In addition to that, you have climate and environment risk, which is centred on the long crisis of climate change and environmental degradation generally around planet. Last is what I call technology control risk, which is controlling key strategic technologies, such as semiconductors and others, which are underpinning the fourth industrial revolution that we are currently undergoing, such as artificial intelligence, digital technology generally, mobile connectivity around 5G technology, biotech and renewable energies—including electric and autonomous vehicles—and how trade plays a role in that process of trying to adopt risk-averse strategies. Therefore, the risk agenda is shaping trade policy and new kinds of trade agreements but also trade as a way of mitigating or averting those risks.

This is a culmination of multiple factors, some of which have been very long-standing trends such as climate change and the rise of China, but also it combines with more recent crisis events, like Covid-19 and the Russia-Ukraine war and China moving increasingly towards a more aggressive stance on the international stage.

You can see how trade policymakers are becoming increasingly preoccupied with this and you can look at the trend in two ways. First, there are new kinds of trade agreements that are emerging. You are seeing hybrid types of trade agreements such as—and our friend from New Zealand will like this—the agreement on climate change, trade and sustainability.

The Chair: Professor Dent, we are very specifically looking at the CPTPP and the interesting question is: does CPTPP help or hinder your bundle of risks?

Professor Christopher Dent: It is going to be shaped by this new risk agenda. There are new kinds of trade agreements that are emerging and

FTAs are possibly on the way out, and the CPTPP is an FTA. We had peak FTA activity some time ago, back in the mid-2010s. You can see the numbers. They are not becoming the conventional route of trade diplomacy. That is the key point that I am making here. This new risk agenda is shaping the international trade environment in which the CPTPP will be evolving. Therefore, we will have to address these vectors that are shaping the future of trade policy-making.

Lord Howell of Guildford: You are really talking about the whole tumultuous geopolitical agenda, with plenty having happened already and a lot more to come. For instance, if President Trump gets back into the White House, we will have another huge upheaval. However, as the Chair asks, is the CPTPP any more or less relevant than any other trade alliance or group? Are there some special qualities that it will have to be more resilient in the face of all those things or less resilient?

Professor Christopher Dent: As Giulia said, the CPTPP is already looking quite dated in many respects. I completely concur with her assessment of the environment chapter, for example. The CPTPP is, in essence, the TPP and that was negotiated eight years ago. It is a very fast-changing trade policy and trade strategy-making environment at the moment and some profound things are happening. This is the environment in which the CPTPP now finds itself. It will have to respond if it is to stay relevant and not be overshadowed by new multipurpose trade agreements in the Indo-Pacific such as IPEF and the RCEP agreements.

Lord Howell of Guildford: In this completely new world—and here we are, a European power among mostly Asiatic and Latin American powers—do you think that the fact that when we join more than half the members of the CPTPP will be part of the Commonwealth network has any relevance to the way that we are able to influence things and develop the shape of the CPTPP in the future?

Professor Christopher Dent: That is an important and valid point. The UK is still the most globally connected European nation and it does have very long-standing ties, political, cultural, economic and otherwise, in south-east Asia and other parts of the Asia-Pacific region. That provides it with some diplomatic capital to leverage in its trade relations and in the future of the CPTPP.

However, the UK has to be careful not to come across as too Commonwealth 2.0 and a bit too neocolonial. It has to work in partnership with other middle powers. I mentioned Japan earlier. The Anglo-Japanese relationship is going to be very important to UK interests in the region, so it is not just other Commonwealth powers but that is an added advantage to the UK. There are other Anglo-Pacific countries as well in it—New Zealand Australia and Canada; that is also helpful to the UK.

Q4 **Lord Razzall:** The question I think you thought that I was going to ask I am not going to ask because you felt—for whatever reason; I do not quite understand—that you are not equipped to answer it. However, I will ask a general question about services, which are obviously very important for the UK economy. Do you think that this agreement provides the services industry in the UK right across the board with new market access or does it simply confirm where we are at the moment?

Dr Giulia Leonelli: I am afraid this is beyond my area of expertise as an environmental lawyer.

Professor Christopher Dent: I can offer some answer to that; I am sorry that I cannot answer this question in the fullness that it deserves. Services are very important to the UK. It has a number of other continuity deals with many of the CPTPP members bilaterally. Research that I have looked at would suggest that the added value of the CPTPP in terms of our GDP and growth in trade is not that great, certainly not as much to offset the loss of trade that we have experienced since leaving the EU and the single European market.

However, many service industries are very important to the UK, financial services in particular. There are also other service industries that will probably undergo quite profound sociotechnical change, like cultural industries, for example, that we are very good at—media, television, art, sports. There may be quite radical changes in those areas where the CPTPP will have to keep up pace technologically with them. This is another area where the UK has some opportunity, some scope, to be a policy and regulatory innovator.

Lord Razzall: However, as it stands, you do not think that there is an immediate uplift for services once we sign it?

Professor Christopher Dent: No, if I am honest. If you look at the data and all the research done on the value-added trade that the CPTPP will bring, you will see that it is a few billion pounds. Most studies have suggested that.

Lord Razzall: 0.008% of our GDP.

Professor Christopher Dent: Yes, it is something like that. It is expected that the whole agreement will increase our GDP up until 2040 by 0.06%.

Q5 **Lord Grimstone of Boscobel:** Dr Leonelli, you mentioned in your opening remarks the sanitary and phytosanitary chapter. In particular, you thought that the approach of the CPTPP might be a threat to our UK precautionary approach. I also read with great interest your evidence where you elaborated on that point. Could you say some more about that and how you see that manifesting? If it were to manifest itself, how would that happen? Would this be challenges at the WTO? What would happen in practice if your fears came to fruition?

Dr Giulia Leonelli: When talking of sanitary and phytosanitary measures, we are speaking either of measures that aim to protect human or animal life or health from risks arising from additives, contaminants and toxins in foods, beverages and foodstuffs, or of measures that aim to protect human, animal or plant life or health from the entry, establishment and spread of diseases or pests. All agri-food products imported in the UK have to comply with existing UK sanitary and phytosanitary standards, and CPTPP does not change this. These are all points that I have acknowledged in my written evidence.

Nonetheless, I believe that there are some specific risks associated with the SPS, sanitary and phytosanitary, measures chapter in CPTPP, which are associated with two elements. The first element is that CPTPP parties follow very different approaches to the regulation of uncertain risks to public health and the environment compared to the UK. The second is that there are some specific clauses and provisions in the CPTPP chapter that are very different from clauses in other free trade agreements to which the UK is a party.

However, the impact of the SPS chapter of the CPTPP can be fully appreciated only by taking into consideration that it has to be interpreted and applied in the light of the WTO agreement on the application of sanitary and phytosanitary measures.

The UK approach to risk regulation, which it inherited from the EU, has three distinctive features. The first distinctive feature is a prudential approach to risk assessment. It is a very cautious approach to the technical and scientific assessment of risks in terms of, for instance, establishing a hazard such as carcinogenicity and hazard characterisations—so to what extent a substance is carcinogenic based on probabilistic modelling on exposures, exposures in real-life conditions, multiple exposures, and variability. It is the application of safety factors to take into account the vulnerability of specific constituencies.

Then the precautionary principle applies at the risk management stage, so that regulators need not provide conclusive scientific evidence of the existence of a hazard and the pathway by which a risk materialises prior to taking regulatory action. Even where there is no conclusive scientific evidence, for instance, that a product is carcinogenic or of the specific pathway by which a disease may spread in a jurisdiction, regulatory action may be taken. Thirdly, when hazards and risks have been established, UK regulators pursue enhanced rather than baseline cost-benefit effective levels of protection.

The way in which the WTO agreement on the application of sanitary and phytosanitary measures has been interpreted and applied by the WTO dispute settlement organs is very difficult to reconcile with this protective approach, because WTO members are encouraged to base their own standards on the minimum cost-benefit effective baseline of international Codex Alimentarius commission standards. They can invoke their ALOP, or appropriate level of protection, to enact standards that are more stringent, but the precondition for WTO members to invoke their appropriate level of protection is establishing a hazard and a risk—providing conclusive proof of a hazard and a risk—and via a sound scientific risk assessment. The soundness of the risk assessment is the object of substantive scientific review. There are very limited margins within which scientific insufficiency can be invoked under WTO law.

The CPTPP chapter on sanitary and phytosanitary measures is directly informed by the WTO law approach that I have just explained. This is problematic, at least in two respects. Article 7.9.2 of CPTPP stipulates that parties shall ensure that their measures either conform to the international standards or that they are based on documented and objective scientific evidence in accordance with Article 5 of the WTO agreement on sanitary and phytosanitary measures. This is not subject to state-to-state dispute settlement but it provides interpretative context and it informs the interpretation of all the chapter in CPTPP.

There are some procedural provisions, some fora, that are provided for that are problematic because I believe that they provide opportunities for other CPTPP parties that have very different regulatory approaches to lobby the UK towards a sound rather than a prudential risk assessment, and adherence to some science rather than recourse to the precautionary principle. For instance, Article 7.13 requires a party to notify proposed SPS measures to the other parties, other interested persons and the public, and if that proposed measures does not conform to the minimum baseline of international standards, that party must provide scientific evidence and a risk assessment. These are all potential avenues for other CPTPP parties to lobby the UK, potentially resulting in regulatory chill.

There are other provisions such as Article 7.5 and 7.17 that provide other procedural fora of this sort, but in my view the most dangerous provision is the equivalence provision, the equivalence clause of Article 7.8. I will provide a practical example. My reading of the chapter is that it would be quite difficult for a CPTPP party to directly challenge a precautionary measure of the UK. However, what they can certainly do is try to ask for the recognition of equivalence of their non-precautionary measures under Article 7.8.

I will take a hypothetical scenario. The UK adopts some revised maximum residual limits for pesticides. We can imagine that it is 0.5—a low one. Another CPTPP party is unhappy about this because its maximum residual limits are 1.5, so much higher, and then it cannot export its agricultural products to the UK. This party could ask for the recognition of equivalence of its higher non-protective maximum residual limits to the UK. The UK presumably would reject this request for equivalence. However, this is open to state-to-state dispute settlement. The provision says that a party shall make a determination of equivalence of an exporting party’s sanitary and phytosanitary measure if the exporting party objectively demonstrates that its own measure achieves the same level of protection.

The other CPTPP party at the state-to-state dispute settlement stage could argue that the risk assessment of the UK is not sound, that it is prudential, or that at such low levels of exposure no risk will materialise or that the hazard has not been conclusively established, and so on. There can be several potential arguments. I believe that on the basis of the WTO dispute settlement organ's interpretative approach, its claim would be successful, which would result in remedies against the UK or, if the UK accepts the recognition of equivalence, again regulatory chill.

There are a few technicalities, which I will not mention, regarding the interpretation of this article—a few problematic aspects. If compared to the text of the SPS agreement and if compared to UK-Australia, for instance, the wording of this article is riskier for a precautionary approach. I believe that this can be very problematic.

Another question, which is not really for an environmental lawyer to answer but for a UK public lawyer, would be: who would make the determinations of equivalence? Would Parliament be involved? What kind of statutory instrument would it be—affirmative or negative procedure and so on? This is another important point in terms of transparency.

Lord Kerr of Kinlochard: The concrete example was very helpful, and thank you for your memorandum, which was very useful. I want to make sure that I have understood. The risk that you are warning us about is that we come under pressure, collective or individual pressure, to admit something into this country that at present is banned here under our prudential rules. We come under pressure to admit it. However, we are not required by the terms of CPTPP to accept it; you are warning about a future risk of being lobbied and being pressurised. Let us suppose we stand firm and say, "No, under our prudential approach, we are going to apply the precautionary principle and we are going to stick to our ban". That carries the day, does it not? There is nothing in CPTPP that overrules us. Am I right?

Dr Giulia Leonelli: Absolutely. The only potential remedy that CPTPP parties could have would be in case, as I mentioned before, they have recourse to Article 7.8, the equivalence procedure. If the UK rejects a request to recognise equivalence and at the dispute settlement stage it is found that the approach is not consistent with the chapter in CPTPP, the other party can at some point throughout the dispute settlement procedure ask for compensation or suspend benefits, suspend concessions, just as it happens under WTO law. There is absolutely nothing that forces the UK to change its standards, of course.

Q6 **Lord Watts:** You touched on some of the points that I was going to ask about, but in your view what are the implications of CPTPP for environmental policy and regulation in the UK and elsewhere and for global climate policy and its relationship to trade?

Dr Giulia Leonelli: I mentioned before a few points regarding the environment chapter in CPTPP. There is absolutely nothing that curtails the right of the UK to regulate in environmental and climate change mitigation terms, but at the same time it is not particularly ambitious, as I mentioned before, in environmental and climate change mitigation terms.

Another aspect to take into account is the liberalisation in goods that could be environmentally problematic. I am thinking in particular of deforestation. Malaysia and Brunei are the only two parties to the CPTPP that the UK did not previously have a free trade agreement with. The prediction is that Malaysian exports to the UK will increase quite a lot. In particular, the tariffs on Malaysian palm oil used to be 12% and now they will be 0%.

This is potentially problematic because there is a joint declaration of the UK and Malaysia—which I have not been able to find online on the UK Government's website—against deforestation. However, the UK regulatory approach in terms of due diligence procedures is to check that products that are imported do not come from land that has been deforested. This approach is not as ambitious as it could be, because it is based on the legality principle, which means compliance with the local laws. However, the local laws are usually not sufficiently ambitious and they are also very often not enforced; enforcement and compliance are not effective. Therefore, there is a risk that Malaysian palm oil and other commodities will be increasingly imported and they are associated with deforestation and forest degradation.

Similar considerations apply to greenhouse gas emission intensity and potential carbon leakage. This is more of an environmental problem, with increased imports of products that are more carbon intensive compared to UK corresponding products. The Government claim that additional carbon leakage risks are limited and that is probably correct. Of course, very sophisticated data would be necessary to make a statement in this respect. Carbon leakage materialises when firms relocate to other jurisdictions in order to face more lenient greenhouse gas emission reduction standards or when greener and, on average, more expensive products are displaced by cheaper and more polluting imported products. The extent to which carbon leakage is reflected in economic competitiveness is probably limited but it is still environmentally problematic if more products are imported that are considerably more carbon intensive than UK corresponding products.

The Chair: Professor Dent, do you want to comment on that or are you in agreement?

Professor Christopher Dent: I am in agreement. All I would say is that the CPTPP does not have anything on climate change or climate action, as a legacy issue of the Americans being a lead negotiator of the TPP. It lacks a lot of areas that the UK's agreements with Australia and New Zealand have; for example, on circular economy and on sustainable forest management on trade.

The CPTPP does have a provision, Article 20.15, on transition to a low-emissions and resilient economy but, as Dr Leonelli has articulately explained, the depth of legalisation—that is the legalised commitments to implement laws that are enforceable that leads to precise, specific actions—is very, very shallow in the CPTPP. It is all about statements of intent that, "We will do this and that and we will co-operate on this", so the whole environment chapter of the CPTPP, both in its ambition and in its coverage, needs a major revamp. That opens up scope for the UK in a collaborative manner to work with other willing members to upgrade this chapter to make it more aligned with current emerging norms on trade climate governance.

Q7 **Lord Marland:** My question, which you have largely answered, is what the other aspects are that we have not thought about that should be covered. I am struck by the fact that you said earlier that it is a dated agreement and you have amplified on that. You have also mentioned the omissions of circular economy and the sustainable forest agreements. I am also struck by some of the comments that Dr Leonelli made about some non-enforceable conditions. Are there any other things that you should flag now that you have not done so to guide us through this rather dated and antiquated agreement?

Professor Christopher Dent: Maybe Dr Leonelli should take a lead on this, as she is more the expert.

Dr Giulia Leonelli: It is not part of the environment chapter, but I would like to mention the investor-state dispute settlement in the investment chapter. The application of the investor-state dispute settlement system is also associated with two risks—regulatory chill and the possibility of being challenged in conditions where even if the defence is successful the arbitral proceedings are very time and resource intensive. This is also an investment chapter that is relatively outdated and that reflects US practice from many years ago.

For instance, indirect expropriation can be used by investors to challenge decisions that remove all the substantial value of the investment. Article 9.8 of the CPTPP must be interpreted in light of Annex 9, which stipulates that, "Non-discriminatory regulatory actions … that are designed and applied to protect legitimate public welfare objectives, such as … the environment, do not constitute indirect expropriations, except in rare circumstances".

More recent bilateral investment treaties or other agreements clarify what the rare circumstances are. This reference "except in rare circumstances" enables investors potentially to bring a challenge to make a case that environmental action is tantamount to an indirect expropriation. It may be, for example, a decision to phase out coal-based power generation or, as happened in Rockhopper v Italy, a prohibition of oil and gas exploration within a specific distance from the coastline, even though that case was a case of direct expropriation.

It is the same for the international minimum standard, Article 9.6. I will not go into the technicalities, but this is relatively outdated. For instance, there is no clause specifying the conducts that violate the standards. These are all problems, potentially, in terms of investor-state dispute settlement. The UK has never lost a dispute under this system, but it could happen. As I mentioned before, there are opt-outs with Australia and New Zealand but not with the other parties to the CPTPP.

The Chair: We are running out of time, but it is an important issue. If you do not have ISDS, what do you have instead? Presumably there is some need to protect investors, particularly our investors going to those other countries. They need the protection so that they do not suddenly find that they cannot continue to do their investment there. What I do not understand is what the alternative is.

Dr Giulia Leonelli: There are potential alternatives. For instance, in the UK-Australia and UK-New Zealand free trade agreements, there is state-to-state dispute settlement for the investment chapter.

The Chair: The problem is that a company then has to go its Government. If you are small company, it will never happen. When we came out of the EU we argued, on behalf of businesses, that they were losing their access to the European Court of Justice where a company that felt it was being discriminated against, or whatever. Therefore, I am interested in how you protect a company's investment. I am not saying that ISDS is right, but what is the alternative?

Dr Giulia Leonelli: Some of the EU agreements include reference to something that looks more like a multilateral investment court. This is the project, which is different from an arbitral tribunal. It operates more transparently and there is more consistency, more rigid standards. Otherwise, there are some proposals that have been made in the literature in investment law. Investment lawyers have proposed either excluding from protection fossil fuel investments, which is something that the UK and the EU had negotiated in the context of the revised, modernised energy charter treaty, and the UK will take a decision on this in November, because the EU has announced that it will withdraw. However, there are always sunset clauses, or it must be done with agreement otherwise there are sunset clauses.

The other option, as also suggested in the literature, would be a carveout for measures taken with climate change mitigation purposes. An argument made by Dr Paine from the University of Bristol and Liz Sheargold was that such carveouts would ensure that when measures were taken in good faith for the genuine purpose of mitigating climate change, there was no claim and the claims of the investors were withdrawn.

The Chair: Thank you. We have come to the end of our hour, but for us this is only part of a process. We will have other evidence sessions and we will be able to accept any written evidence you would like to put in, having heard the questions that we are posing. If you would like to follow up with anything, that would be helpful to us as we take our work forward.

However, for the moment, we thank you very much for your time today. We have slightly gone over the hour that we asked you to come here. To both of you, thank you very much. You will get a draft transcript of the *Hansard*, if you would like to make any clarifications at that point, and then it will go online. Thank you very much to both of you.