THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

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Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – SPS Standards, Equivalence and "Regulatory Chill"

LSE Research Briefing

Summary

- The House of Lords International Agreements Committee recently published a report on the UK's accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The Committee drew on the evidence of LSE Assistant Professor of Law **Dr Giulia Claudia Leonelli** to make important recommendations about the equivalence procedure included in the CPTPP Chapter on sanitary and phytosanitary (SPS) measures.

- Dr Leonelli argues that this procedure could see UK regulators pressured into recognising other countries' less stringent food safety standards, or other SPS standards, as "equivalent" to the UK's own, and could potentially lead to regulatory chill where the Government is discouraged from regulating in the UK's interests for fear of legal challenge.

- Her research and evidence to the Committee was cited by both Labour and Liberal Democrat shadow ministers in a House of Lords debate on Tuesday 19 March to ask the Government to provide reassurance about safeguarding the UK's SPS standards.

Key Points

- One concern about the UK's accession to the CPTPP regards SPS measures. The Government has stated that such standards – which regulate human, animal and plant life or health – will continue to be set by the UK and will not be influenced by trade agreements.

- However, Dr Leonelli explains in her written and oral evidence to the International Agreements Committee that the CPTPP's equivalence procedure relating to SPS measures could **indirectly undermine the UK's precautionary approach to food safety and risk regulation**.

- Under the equivalence procedure, the UK must accept another state's standards as "equivalent" to its own – and therefore import the products that they relate to – if that state can "objectively" demonstrate that they achieve the **same level of protection** as the UK's standards.

- Unlike the UK's trade agreements with both Australia and New Zealand, the CPTPP's SPS Chapter does not specify that the final judgment on equivalence rests with the importing party. Further, state-to-state dispute settlement does not apply to the SPS Chapters of the UK's trade agreements with Australia and New Zealand, but it applies to the SPS Chapter of the CPTPP.

- The question of whether the two levels of protection are indeed equivalent under the CPTPP would be assessed in the light of the interpretative approach followed by the World Trade Organization's dispute settlement organs – but **this is not necessarily compatible with the UK's precautionary approach**.

- The UK's precautionary approach does not require regulators to provide conclusive scientific evidence of a hazard – for example, carcinogenicity – and materialisation of a specific risk to be able to take regulatory action. However, in order to justify a rejection of equivalence in the event of a dispute brought under the CPTPP, the UK must give conclusive scientific proof of the existence of a specific hazard and risk.

- Dr Leonelli believes, therefore, that the CPTPP procedure could be applied in the future to **pressure UK regulators into recognising another state's less stringent food safety or other SPS standards as "equivalent" to more stringent UK standards**.

- She argues that this could make regulators less likely to enforce standards in order to avoid legal challenges, or lead to "**regulatory chill**": where the fear of legal challenge prevents the Government from regulating in the public interest.

- The International Agreements Committee therefore concluded that although the UK's standards on human, animal and plant health protection will not change as a result of acceding to the CPTPP, they may be open to challenge. Consequently, the Committee recommended that the Government should **"set out how it intends to address the potential risk of equivalence provisions leading to 'regulatory chill'**".

Real-world Implications

- In her evidence to the Committee, Dr Leonelli cited the example of **maximum residue limits (MRLs)** of pesticides to demonstrate the impact of the equivalence procedure.

- If, she argues, the UK adopted lower – that is, more stringent – MRLs than it previously had, another state with much higher MRLs may object to the new limit because it would restrict its access to the UK market. Under the rules of the CPTPP, the other state could ask the UK to recognise its MRLs as "equivalent" to the UK's – **and if the UK refused the request, it would open itself up to state-to-state dispute settlement**.

- In such a case, a dispute settlement panel may find that the UK's MRLs **do not provide a higher level of protection** than the exporting party's MRLs – for instance, on the grounds that very low levels of exposure to pesticide residues are not conclusively proven to have adverse effects on health, or on the grounds that the UK's prudential risk assessment is not "sound" in scientific terms.

Policy Recommendations

- The Government should commit **to safeguard the UK's levels of human, animal and plant health protection in the future**, and commit to **reject any equivalence requests relating to non-precautionary or less stringent standards.**

- The Government should clarify what procedures it will follow and what category of statutory instruments will be employed to accept or reject requests of equivalence from exporting CPTPP Parties. **This will enhance transparency and public scrutiny.**