

**Department for International Trade**  
DIT Consultation Team  
Submitted via webform

26 October 2018

**Dear Sir/Madam**

**Consultation on trade negotiations with the United States**

**Which area does your organisation represent?**

Health

**How many members does your organisation represent in total? (Please select only one item)**

More than 10,000

**Have any of your members been in contact with your organisation about the prospect of a free trade agreement (or related trade talks) with the United States?**

Yes

**What would you want the UK government to achieve through a free trade agreement (or related trade talks) with the United States, and why? Please supply your answer and any supporting evidence below.**

The BMA (British Medical Association) is a professional association and trade union representing and negotiating on behalf of all doctors and medical students in the UK. It is a leading voice advocating for outstanding health care and a healthy population.

The Association welcomes the opportunity to respond to this consultation on trade negotiations with the United States.

Our members have made clear their worries that Brexit poses a major threat to the NHS and the nation's health. Given what is now known about the potential impact of Brexit and especially the dangers a 'no deal' Brexit presents, it is BMA policy to oppose Brexit and to support the public having a final say on the Brexit deal. We support the UK remaining in the European single market and maintaining open border arrangements with free movement of healthcare and medical research staff.



We welcome the government's recognition that modern trade agreements act as global instruments driving policy on a range of issues, including environmental protections, intellectual property rights, labour rights and the procurement and provision of public services. We recognise that most sectors, including the healthcare sector, rely on global supply chains to deliver goods and services to the public. Trade Agreements are critical to fairly and safely managing this cross-border integration, and we are pleased that the UK Government has committed to keeping health protection and improvement central to its future negotiations.

Many areas within the scope of trade agreements impact on the healthcare sector as well as health equity and the wider social determinants of health, with significant implications for the health of people both within the UK and globally. As outlined in the consultation information pack, trade agreements have the potential to enhance health. However, this can only be achieved if controls are put in place to ensure that economic gain is not given priority over health.

Our key objective for any trade agreement or related trade talks between the UK and the United States is to safeguard the healthcare sector and ensure that the health of the public, both in the UK and globally, is prioritised. We have identified the following key areas in which protections are needed to achieve this outcome:

#### Appropriate scrutiny

Parliamentary scrutiny is a critical safeguard against the potential negative impacts on health and the healthcare sector of a trade agreement with the United States. At present, the UK Parliament does not have adequate powers to guide and scrutinise trade negotiations. Before the UK seeks to negotiate any trade agreement with the United States, we would therefore want to see Parliament equipped with such powers, including the right to set a clear negotiating mandate in advance of the discussions, access to negotiating texts and an automatic positive vote on the final text of trade agreements. These powers are in line with those of legislators in the United States, and with the oversight currently provided by EU legislators on behalf of the UK and other member states.

These changes would require an overhaul of the current process for making international treaties, including trade agreements. As part of its review process, in addition to greater parliamentary scrutiny, we would want the UK Government to give serious consideration to how the devolved administrations as well as other key stakeholders, including the health sector, can be involved in a meaningful, timely and transparent fashion. These stakeholders would provide vital expertise, which could minimise the risk of liberalising aspects of the UK's trade policy in ways that negatively impact health.

#### Inclusion of healthcare services

An essential protection for the healthcare sector is a hard 'carve out' on the provision of healthcare services, particularly the NHS. Allowing sections of the NHS to be outsourced to private companies based abroad would contribute to the worrying increase in publicly-funded care being delivered by the independent sector.

The UK needs to agree such a carve-out at the outset of any trade discussions with the United States. This was achieved in the TTIP (Transatlantic Trade Investment Partnership) negotiations between the EU and United States, so is achievable when negotiating a future trade agreement with the United States.

Alongside a 'carve out' on the provision of healthcare services, the healthcare sector should be exempt from rules on competition that could lock in competitive procurement of publicly funded healthcare services in England or extend it to the devolved nations. This approach is market-driven rather than health-driven and contributes to fragmentation of services. This creates significant barriers to innovative and cooperative models of care that can help improve the health of the country.

#### Investor protection and dispute resolution mechanisms

Investor protection and dispute resolution mechanisms should be excluded from any future agreement with the United States. This will protect the ability of all four nations of the UK to regulate in the interest of public health. These mechanisms are frequently used to challenge health and environmental protection measures in areas such as food safety and tobacco control, if investors believe their profits will be negatively impacted (2). They could also be used to block development of new models of care by preventing future rollback of privatisation in the English NHS.

The legal challenges brought under these mechanisms take place outside the normal court system and generally cannot be appealed. Investor protection and dispute resolution mechanisms were originally intended to protect foreign investors in countries where local legal systems were weak. The UK is known internationally for its strong and fair judicial system, and we therefore consider the risk of these mechanisms to outweigh their benefit in the context of an agreement between the UK and the United States.

Although we believe, for the reasons given above, that investor protection and dispute resolution mechanisms should not form a part of any agreement between the UK and the United States, we acknowledge that many modern trade agreements do include them. At a minimum, policies aimed at improving health should be excluded from the scope of any such mechanism and the text of the trade agreement should explicitly affirm the right to restrict trade in the interest of public health and the healthcare sector. This would ensure that the UK does not lose the protections provided under current EU trade agreements after Brexit.

#### Foods and other products with lower standards

The UK and the United States have conflicting approaches to risk assessment, product safety standards and regulation to promote public health. The UK, as an EU member state, uses the precautionary principle and requires manufacturers to prove a product is safe. The United States requires evidence a product is harmful before regulatory action is taken (3).

The UK's product safety standards, including on food items, are amongst the highest in the world. The current approach to the precautionary principle ensures that human, animal and plant health, and the environment, are at the centre of regulatory decision-making. Any trade agreement with the United States should preserve the UK position to ensure that our current high standards can be maintained.

For example, the UK is currently developing a comprehensive approach to addressing the childhood obesity crisis. Mandatory front of package labelling, taxation and reformulation of high fat, salt or sugar (HFSS) products and controls on advertising targeting children are possible approaches. The United States has a history of responding aggressively to such measures, including through legal challenges (4). Research on the United States' NAFTA (North American Free Trade Association) partners also shows that consumption of HFSS and rates of obesity in both Canada and Mexico have increased since they entered the trade agreement (5, 6).

The UK should not commit to any measures as part of a trade agreement with the United States that require regulatory cooperation between national and or commercial stakeholders on new regulations. This could greatly limit future Governments' freedom to implement new health improvement measures. We believe that the WTO's (World Trade Organization) rules on technical barriers to trade are sufficient to protect commercial interests from unduly trade-restrictive measures. Entering into any agreement that goes beyond these rules risks a race to the bottom on standards, in addition to restricting the UK's right to regulate in the interests of health.

#### Intellectual property rights and affordable access to essential medicines

It is vitally important that the UK retains its current ability to support lower-income countries to affordably access essential medicines using so-called 'TRIPS flexibilities' (i.e. special WTO provisions for lower-income countries to legally procure generic versions of medicines that are still under patent – and otherwise unaffordable). Timely access to new medicines is critical to effectively controlling established and emerging patterns of ill health globally. The UK Government should therefore ensure that new trade agreements reinforce generous TRIPS flexibilities, or at a minimum, do not restrict their use.

The UK is a major pharmaceutical-producing nation and a leading global health actor. The UK should not limit the freedom of future Governments to set and amend domestic legislation, or enter into agreements with other countries, regarding production and export of generic medicines under TRIPS flexibilities. To retain this flexibility the UK must not enter a trade agreement with the United States that includes measures that could strengthen patent protections for pharmaceuticals. These include restrictions on the situations in which TRIPS flexibilities can be used, which can undermine their use in low-income countries to support routine procurement of essential medicines (7).

#### References

- 1 Khan, et al. (January 2015) London School of Economics and Political Science  
The transatlantic trade and investment partnership: international trade law, health

systems and public health. Available online: <<http://www.lse.ac.uk/business-and-consultancy/consulting/assets/documents/the-ttip-international-trade-law-health-systems-and-public-health.pdf>>

2 Labonté, R., Schram, A., & Ruckert, A. (June 2016), Globalization and Health, The Trans-Pacific Partnership Agreement and health: few gains, some losses, many risks. Available online: <<http://doi.org/10.1186/s12992-016-0166-8>>

3 United States Chamber of Commerce (August 2010), Precautionary principle. Available online: <<https://www.uschamber.com/precautionary-principle>>

4 Office of the United States Trade Representative (2017), 2017 National Trade Estimate Report on Foreign trade barriers. Available online: <<https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf>>

5 Barlow, P. et al, (July 2017), Canadian Medical Association Journal, Impact of the North American Free Trade Agreement on high-fructose corn syrup supply in Canada: a natural experiment using synthetic control methods. Available online: <<http://www.cmaj.ca/content/189/26/E881>>

6 Guintella, O. (August 2018), National Bureau of Economic Research, Weight gains from trade in foods: Evidence from Mexico. Available online: <<https://www.nber.org/papers/w24942.pdf>>

7 Ellen, F.M, et al. (2018), Medicine procurement and the use of flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights, 2001–2016. Available online: <<http://www.who.int/bulletin/volumes/96/3/17-199364.pdf>>

**What concerns, if any, does your organisation have about a free trade agreement (or related trade talks) with the United States, and why?** Please supply your answer and any supporting evidence below.

While we welcome the UK Government's assurances that, following Brexit and in future trade negotiations, the NHS and the right to regulate public services will be protected, and that the same or higher standards will be maintained, we do not consider these assurances sufficiently concrete or binding.

We are concerned that, following Brexit and particularly in the event of a 'no-deal' scenario, the UK will be under significant economic pressure to secure new trade agreements that go some way to minimise Brexit's cost, even at the expense of policies that protect and promote health. This is of particular concern given that trade agreements are subject to strong commercial interests and there is frequently limited transparency around their negotiation. Once signed, they are legally binding, and their length and complexity means that they are difficult to change or reverse.

Without controls in place to ensure that economic benefits are not given priority over health when negotiating a future trade agreement with the United States, we believe there is a significant risk that such an agreement could undermine protections that the British public and the health sector have benefited from through membership of the EU. We provide further detail of our concerns, and the policy safeguards we have called for to mitigate them, below.

#### Appropriate scrutiny

At present there is a worrying lack of Parliamentary scrutiny over the process for negotiating international treaties, which currently leaves Parliament without any legal mechanism to directly influence or permanently block trade agreements (8). Scrutiny powers currently held by EU legislators must be returned to the UK Parliament, rather than retained by the executive, before beginning any trade discussions with the United States. We believe there is a risk of Ministers entering into agreements that promote economic benefits over health if these powers are not returned to Parliament after Brexit. Without these powers, UK legislators would also have less influence than their American counterparts, who are able to set negotiating mandates and have the automatic right to a positive vote on the final agreement.

We have further concerns about the limited role of the devolved administrations given that a future trade agreement with the United States is likely to affect devolved matters, including provision of healthcare services, animal welfare and environmental policies. We do not believe the current consultative framework set out by the Department for International Trade provides for adequate involvement of the devolved parliaments. We are similarly concerned that there is not a mechanism for formal engagement with the health sector, including health ministers but also civil society actors.

#### Inclusion of healthcare services

We have serious and longstanding concerns about the inclusion of healthcare services within the scope of trade agreements, which could open the NHS up to further creeping privatisation if healthcare service provision is outsourced to private companies based abroad. Our members – the UK's medical workforce – have consistently opposed such private sector provision of NHS care, which has a destabilising and fragmentary effect on NHS services, and frequently represents poor value for money.

We are also concerned that the inclusion of healthcare services in future trade agreements could prevent future rollback of competition and privatisation in the English NHS, and potentially lead to its expansion within England and to the devolved nations. We consider this risk particularly significant in an agreement with the United States, where healthcare is largely provided on a private basis.

#### Investor protection and dispute resolution mechanisms

We have significant concerns about legal challenges brought under investor protection and dispute resolution mechanisms. We believe that these mechanisms could be used by foreign investors to deter or block – or gain profits from – measures intended to improve public health. There are recent examples of this taking place in Australia and Uruguay, where the tobacco company Philip Morris used a dispute

resolution mechanism to sue the governments of both countries as a result of their tobacco plain packaging initiatives.

While we welcome the UK Government's assurances that the threat of investor protection claims will not alter its plans to introduce public health measures, and that it has never lost a challenge brought under such mechanisms, we are aware that even unsuccessful cases can be extremely expensive (9). We are concerned that this cost could be high enough to potentially deter future Governments from developing health promotions initiatives, similar to tobacco plain packaging and minimum unit alcohol pricing – and increase the burden of ill health if the introduction of such public health measures is delayed or prevented.

We also have concerns that these controversial mechanisms could be used to block future rollback of privatisation in the English NHS, and that they could negatively impact the development of new models of care. We note a recent precedent in which the Slovakian Government was ordered to pay €22.1 million in damages to a Dutch private health insurance firm under an investor protection agreement after it decided to reverse liberalisation of the national sickness insurance market (10).

#### Foods and other products with lower standards

We are extremely concerned that the United States has previously stated that divergence from the EU's high food standards would be a necessary condition of any future trade agreement (11). Product standards and regulations as well as sanitary and phytosanitary measures differ significantly between the United States and the UK. While variation in standards is sometimes considered purely technical, we have ongoing concerns that it can indicate weaker animal welfare and environmental standards, which can put human health at risk.

For example, chlorine treatment of chicken in the United States, which has received significant media attention, may not in and of itself be a health hazard, but the reasons for this practice are of greater concern. These include lower animal welfare and hygiene standards, which are linked to substantially higher rates of salmonella infection in humans in the United States than in the UK (12, 13). We are similarly concerned that the United States would seek to export hormone treated beef, which is banned in the EU for precautionary reasons, into the UK as part of a trade agreement.

In addition to the concerns such imports raise for human health, we are aware that accepting any imports into the UK, from the United States or other non-EU countries imported via the United States, which do not meet current high standards would raise significant barriers to trade with the EU. Such regulatory divergence would mean that UK exports would need to be physically inspected at a 'hard' border. Recent internal impact assessments from Dover and Kent councils reveal serious gaps in the legal powers, infrastructure, human resource and funding needed to adequately inspect supply chains at UK ports, which would take several years to resolve (14).

#### Intellectual property rights and affordable access to essential medicines

We are deeply concerned by the global increase in trade agreements containing provisions that limit the use of TRIPS flexibilities (15). These 'TRIPS-plus' provisions impose additional conditions that severely reduce their effectiveness, such as restricting the use of TRIPS flexibilities to emergency situations. Such provisions have been a feature of trade agreements between the United States and other countries, including Australia, which has severely curtailed the country's ability to amend its domestic legislation in the future (16).

Although we recognise that pharmaceutical manufacturers need financial incentives to develop new medicines, we note with concern that the pharmaceuticals sector in the United States has successfully lobbied the government to strongly oppose the use of these flexibilities (17). We believe there is a significant risk that, in a trade agreement with the United States, the UK may come under pressure to limit the scope of its future support for procurement of generic medicines under TRIPS provisions. The UK Government would risk undermining Britain's role as a global leader on health if a trade agreement with the United States curtailed its support for TRIPS flexibilities and strengthened intellectual property rights such that that lower-income countries were no longer able to affordably access essential medicines.

#### References

- 8 Lang, A. (February 2017), House of Commons, Parliament 's role in ratifying treaties. Available online: <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05855>>
- 9 London School of Economics Enterprise (April 2013), Costs and benefits of an EU-USA investment protection treaty. Available online: <<https://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf>>
- 10 Court of Justice of the European Union (March 2018), The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law. Available online: <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf>>
- 11 The Financial Times (November 2017), Wilbur Ross outlines US terms for post-Brexit trade deal. Available online: <<https://www.ft.com/content/92ad2ee0-c309-11e7-a1d2-6786f39ef675>>
- 12 US Centers for Disease Control and Prevention (March 2018) Salmonella. Available online: <<https://www.cdc.gov/salmonella/general/index.html>>
- 13 Public Health England (May 2018), Salmonella data 2007 to 2016. Available online: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/711972/salmonella\\_data\\_2007\\_to\\_2016\\_may\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711972/salmonella_data_2007_to_2016_may_2018.pdf)>

14 Dover District Council (July 2018), The potential impact of Britain leaving the European Union (EU) on the Dover district. Available online: <[https://www.scribd.com/document/385008556/Dover-District-Council-Brexit-impact-assessment?secret\\_password=cQlpLN1gw7zWwFRT6ixz#from\\_embed](https://www.scribd.com/document/385008556/Dover-District-Council-Brexit-impact-assessment?secret_password=cQlpLN1gw7zWwFRT6ixz#from_embed)>

15 The British Medical Journal (December 2011), Developing countries are not making the most of TRIPS flexibilities because of political pressure. Available online: <<http://www.bmj.com/content/343/bmj.d7706>>

16 World Health Organization (April 2013), Using TRIPS flexibilities to facilitate access to medicines. Available online: <<http://www.who.int/bulletin/volumes/91/7/12-115865/en/>>

17 Ellen, F.M, et al. (2018), Medicine procurement and the use of flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights, 2001–2016. Available online: <<http://www.who.int/bulletin/volumes/96/3/17-199364.pdf>>

**Which of these areas of a free trade agreement best describe the priorities that you have outlined above?** (Please select all that apply)

Custom Procedures  
Products Standards, Regulation and Certification  
Sanitary and Phytosanitary Measures  
Services  
Competition  
Public Procurement  
Intellectual Property  
Investment  
Labour and Environment  
Trade Remedies and Dispute Settlement

We hope that our submission is useful – please do not hesitate to contact us for more information if required.

Yours sincerely



Raj Jethwa  
Director of Policy