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A Model COMMONWEALTH Free Trade Agreement

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INSTITUTE FOR FREE TRADE

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Executive Summary

Her Late Majesty the Queen once used her annual Christmas messages to highlight that the Commonwealth is the "face of the future". With more than a billion people aged under 25, she noted, "it is important to keep discussing issues that concern us all - there can be no more valuable role for our family of nations".

This voluntary family of nations to which we are bound by language and law, by culture and kinship, by history and habit, will at some point this decade collectively overtake the European Union in terms of GDP. Yet the immense opportunities of Commonwealth trade are often neglected in member states, largely due to the complexity and bureaucratic costs associated with negotiating such a large number of agreements.

This paper describes the provisions of a 'model' agreement which can serve as a baseline which can be added to or subtracted from in order to meet the individual needs of as many countries as possible. The series of FTAs this paper recommends will reflect different levels of openness to liberalisation, and will facilitate the maximum degree of cooperation, including investment, intellectual property and competition, at minimum bureaucratic cost.

This paper argues that it is through this pragmatic and flexible approach that free trade can be promoted within the Commonwealth, and can deliver its full benefits to prosperity, jobs, health, environmental protection and peace.

Lord Hannan of Kingsclere
President of IFT

Introduction

The Commonwealth is well positioned to capture the forecast economic growth in services, with 54 countries spanning the world which speak English as a first or second language and who mostly use the common law legal system. The Commonwealth's population of 2.5 billion people, 60 per cent of whom are under 30 years old, grows at over 50 million per year.

The Commonwealth Heads of Government, at their 2005 Summit, endorsed the idea of pursuing trade agreements among Commonwealth member states. This was in part due to the failure of progress in liberalization through the WTO's Doha Round. There are many challenges still facing the WTO, including dealing with fishing and agricultural subsidies as well as a dysfunctional Appellate Body. The Ministerial Conference of 2022 sought to address some of these and there was some limited progress.[1] Difficulties with multilateralism, or even mega-regionalism is precisely why preferential trade agreements among smaller groups of countries is essential to capture the efficiencies which can be derived from economic integration.

This report will recommend a series of Free Trade Agreements (FTAs) pursued between and among Commonwealth countries. It will do so by discussing a core 'model' FTA which can be either added to, or in some cases, subtracted from, to adjust to the needs of as may Commonwealth countries as is possible.

In 2016, Winston Peters, the leader of the New Zealand First political party, called for a Commonwealth Free Trade Area modelled on the FTA between Australia and New Zealand, among the most comprehensive FTAs in the world. Wilson suggested that the free trade area would include the UK, Canada, Australia and New Zealand, with the possibility of adding South Africa, India, also joining. He called it the 'Closer Commonwealth Economic Relations' area, or CCER. Since the UK departed from the EU and regained its own capacity to conduct its own independent trade policy, FTAs with the Commonwealth have been high on the government's agenda, and rightly so.

In terms of economic prosperity, Commonwealth cultural and historic ties has led to what has been described as the Commonwealth Advantage or Commonwealth Effect enhancing in-group trade and investment.[2] It enables member countries to trade up to 20 per cent

1 Peter Ungphakorn, 'Touch and Go at the WTO: Is the Director-General's Optimism Justified?' Trade Blog (9 June 2022).

2 Sarianna Lundan and Geoffrey Jones, "The 'Commonwealth Effect' and the Process of Internationalisation" The World Economy, 2001.

more with each other than with non-members, at a 21 per cent lower cost, on average.[3] This point was recently made by UK Prime Minister Boris Johnson who has advocated that the UK sign more bilateral FTAs with Commonwealth Members.[4] Liz Truss, one of the candidates to succeed Johnson to become PM at the time of writing, has also emphasized the need to sign more Commonwealth trade deals.[5]

A Commonwealth-wide FTA is an attractive goal. Exporters of natural resources such as Canada, Australia, and most of the Caribbean and African Commonwealth countries have complimentary interests to importers of resources like the UK and India. Countries such as Bangladesh, India, Malaysia, Nigeria, and Pakistan have young, skilled populations which are poised to prosper with investment from countries like the UK.

A single 'mega-regional' FTA for all 54 Commonwealth countries is likely beyond reach. Even an agreement with most Commonwealth countries would be difficult because Commonwealth countries' interests are not always aligned as a consequence of their varied economic profiles. Some are more open to trade than others. India in particular has resisted liberalization efforts at the WTO, both in relation to agricultural subsidies and digital trade. An FTA across all 54 Commonwealth countries would not be legally possible firstly because two Commonwealth countries are Member States of the EU (Cyprus and Malta) and therefore not able to negotiate their own trade agreements as this is an EU-level competence.

Negotiations of FTAs can be costly and time consuming, particularly among larger groups of countries. This is even more difficult if a "single undertaking," format is used, as is typical for FTAs. If nothing is agreed until everything is agreed, then areas where agreement is possible among all signatories, are often left until the last minute, unresolvable until the most politically difficult matters are addressed. Suspending agreement until the end could expand the capacity for negotiating trade-offs, leading to a more balanced outcome, but it does not always work, as is often the case at the WTO.

Yet integration of the Commonwealth economies, and the ensuing market expansion, will remain sub-optimal if the laws and regulations governing commerce differ markedly. Therefore, some level of harmonization of product standards, equivalence of regulations and intellectual property protections, as well as coherence among various domestic frameworks that govern or affect commerce is needed.

To achieve this, multiple agreements may be required among different groupings of Commonwealth countries due to their particular needs and developmental status. Consequently, this report recommends a series of FTAs containing different levels of liberalization and variable market access. In order to do this effectively, a core 'model' agreement can be constructed as a baseline upon which various inter-Commonwealth bilateral, or tri-lateral agreements can be constructed. It is this the provisions of this model agreement which is the focus of this report.

Turning to the trade agreement itself, the model Commonwealth FTA should be a so-called Deep Trade Agreement (DTA) covering not just trade but additional policy areas such as investment and labour, intellectual property and competition. The goal of these kind of instruments, whether bilaterally or among multiple parties, is to enhance economic integration, establishing the five economic integration rights: free (or freer) movement of goods, services, capital, people, and ideas. DTAs also include enforcement provisions that circumscribe the discretion of importing governments in these areas, as well as provisions that limit the behaviour of exporters.[6]

The model Commonwealth FTA would remove all border barriers and behind-the-border barriers to trade and investment across all sectors as possible, as soon as possible. The FTAs which subsequently build upon this core agreement can be categorized as 'deep integration' agreements as they go beyond traditional market access provisions and deal with a broad range of trade-related issues, namely, services trade, digital trade, behind-the-border policies, domestic regulation, good regulatory practices, competition policy, environment, trade and gender equality, transparency, and anti-corruption.

This report will outline the contents of the model Commonwealth FTA on a chapter-by-chapter basis, drawing attention to potential points of conflict.

3 'We Must Leverage the Commonwealth Advantage" 27 April 2020 (www.commonwealth.org).

4 Boris Johnson, 'The Commonwealth Gives Britain a Boost' The Telegraph (20 June 2022).

5 'Liz Truss Calls for More Commonwealth Trade Deals' The Times, 28 July 2022.

6 Aadiya Mattoo, Nadia Rocha and Michele Ruta, Handbook of Deep Trade Agreements (World Bank Group, 2020) At 3.

Chapter 1

Initial Provisions and General Definitions

This chapter sets out the structure of the FTA and how it relates to the obligations of the parties under other trade agreements. It also provides general and technical definitions.

Here it is important to recognize that almost all of the Commonwealth countries already have obligations to each other as WTO members. There are at present 49 WTO members and one observer government among the 54 members of the Commonwealth.[7] This chapter accordingly acknowledges that inter-Commonwealth FTAs are compatible with those obligations and does not intend to create any new obligations that would be inconsistent with those agreements. The FTAs with Commonwealth countries who are also WTO Member States, will lead to deeper and broader liberalization outside the WTO, thereby further strengthening some of the principles of the WTO.

7 The non-WTO members of the Commonwealth are: The Bahamas, Kiribati, Nauru, and Tuvalu.

Chapter 2

Trade in Goods

This chapter establishes the basic rules for trade in goods between the parties. In this chapter parties commit to extending national treatment to the goods of the other party under the laws and regulations of all levels of government (central, sub-central and municipal). Parties further commit to eliminate tariffs and tariff-rate quotas on imports of all goods from all other parties that meet the Rules of Origin (ROO) requirements.

Regarding tariffs, the FTA should seek zero tariffs on all manufactured goods immediately. One of the key areas of the FTA with developing countries is access to their agricultural products. Ideally, the FTA should eliminate tariffs on agricultural products as quickly as possible.

In the likely event that zero tariffs on all goods for all Commonwealth members is not immediately possible, the FTA could call for tariffs to be eliminated 'progressively' based on an agreed schedule. The UK has done this for sensitive agricultural goods in its FTA with Australia, for example. Each country is likely to have sensitive goods for which it is unwilling to commit zero tariffs with a view to protecting domestic industry. Canada, for example, is unwilling to grant zero tariffs in its dairy sector.[8] Limited exceptions from the obligation of no tariffs/ no tariff rate quotas will be granted through party-specific annexes. Each of the FTA parties will list products (by Harmonized Tariff Schedule code) that will continue to be assessed with tariffs. Ideally zero tariffs will be achieved by the end of the tenth year (or, even eighth year depending on the country in question – developing country/ emerging economy/ less developed) of the entry into force of the FTA.

This chapter will also establish rules on import and export licensing to ensure that these rules operate transparently and in a non-discriminatory manner. Any administrative fees and formalities associated with importation or exportation must be limited to the approximate cost of the services rendered. Parties must publish promptly any changes to the rules governing the importation or exportation of goods.

8 "Canada's Objectives for Negotiations for a Canada-United Kingdom Free Trade Agreement" Canada Department of International Trade, December 2021.

Chapter 3

Trade Remedies

Trade remedies are provisions designed to deal with responses to unfair trade practices of subsidization (government support for exports) and dumping (export sales below normal value). The most frequently used trade remedy provisions are i) anti-dumping (AD) measures, ii) countervailing duties (CVDs), and iii) safeguard measures. While AD measures and CVDs are designed to sanction exporters who engage in 'unfair' trading practices that cause material injury to domestic producers,[9] safeguard measures are intended to deal with unexpected circumstances arising during 'fair' trade.[10]

While trade remedies have been the source of many disputes in recent years and some commentators consequently have advocated for their removal from FTAs, the Commonwealth FTA should preserve them by reference to relevant WTO obligations. Anti-subsidy and anti-dumping duties hey act as a check on economically distortive trade practices and, in the case of safeguards (tariffs imposed on fairly traded products which cause harm in the importing country), provide a "safety valve" for countries which may not be able to adapt to free trade as readily without facing significant economic or social harms. In addition to general WTO safeguard disciplines, safeguards under the WTO Agriculture Agreement should also expressly be preserved but subject to strict conditions – only clear evidence of serious injury will enable use of safeguard duties.

Investigations pursued under this chapter in relation to all trade remedies should be subject to enhanced transparency and disclosure (beyond that envisioned in the applicable WTO agreements), as seen for example in the UK-Japan CEPA.

The availability of trade remedies will mitigate the concerns of sensitive sectors in many countries such as steel and agriculture, that tend to lobby for anti-dumping duties. They could help achieve compliance with commitments of the parties.

Resistance to subsidies disciplines could be problematic for Commonwealth countries such as India which has expressed its desire to continue to subsidize fishing and agriculture in order to retain food security (securing a long phase in period under the new multilateral agreement concluded at the WTO Ministerial in June 2022).

9 Unfair practices identified here can relate to selling products below their "normal" price, *i.e.*, dumping (addressed by AD measures), or of benefiting from government subsidies (addressed by CVDs).

10 Safeguard measures can be imposed, where imports have increased to such a degree that it leads to domestic producers suffering serious injury. Safeguard measures can be imposed even if trade is not "unfair".

A trade remedies committee, composed of representatives of all Commonwealth countries, should be established in conjunction with the FTA to oversee anti-dumping, anti-subsidy and safeguard actions taken against developing country members of the Commonwealth. In keeping with WTO rules, there should be some room for exemptions for the imposition of trade remedies against developing countries where such actions could be severely harmful to their economy. Parties should cooperate through this committee in relation to the notification of trade remedies in order to enhance participation into the investigation and challenge of these actions where necessary.

Chapter 4

Rules of Origin and Origin Procedures

This chapter sets out the rules for customs authorities to determine whether an imported good "originates" within the Commonwealth free trade area and thereby qualifies it for the preferential treatment afforded under the agreement.

Rules that permit higher thresholds of non-originating inputs tend to be more trade liberalizing than more proscriptive rules, which impose greater restrictions on qualification for the agreement's preferential treatment. Furthermore, complicated ways of assessing origin also to generate higher compliance and verification costs, undermining the benefits of preferential duties.

RoO help determine the 'economic nationality' as opposed to the geographical nationality of the finished product traded in international commerce.[11] GATT does not have a specific set of rules to determine the country of origin of goods in international commerce. *The Kyoto Convention 1973* defines rules of origin (RoO) as '…specific provisions, developed from principles established by national legislation or international agreements applied by a country to determine the origin of goods'.[12]

Article 1 of the WTO Agreement on Rules of Origin[13] defines non-preferential rules of origin as '…those laws regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods'. Likewise Annex II, Paragraph 1 the Agreement on Rules of Origin defines preferential rules of origin as '…those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph a of Article 1 of GATT 1994'.

RoO are necessary for the implementation of trade policy instruments such as imposing import duties, allocating quotas, or for the collection of trade statistics. RoO specify the

11 Currently, there are no international conventions on RoO, and as a result, the State administering the FTA establish their own set of RoO.

12 *See* Annex D, currently Annex K to the revised Kyoto Convention.

13 *See* Annex 1A to the Marrakech Agreement establishing the World Trade Organization 1995.

conditions under which a particular good/ commodity becomes eligible for zero tariffs, or if import duties are to be imposed. In cases where two or more countries have contributed to the production of the good, the rules of origin will define the methods to determine the country where the substantial work/ transformation[14] was undertaken in the production process.

Preferential RoOs are viewed as being integral in FTAs to ensure that only goods originating in participating countries enjoy preferences. Ergo, it is essential to prove that the product was produced or obtained in the trade partner's country to gain tariff concessions. Preferential RoO are to be used as an instrument to avoid trade deflections, or transhipment re-routing.[15]

For the UK-Commonwealth FTA, a minimum accumulated Commonwealth content threshold of 25% ad valorem for all manufactured goods would be required to obtain originating status. This comparatively low threshold (some FTAs have thresholds as high as 50-60%) will enable countries to enjoy the benefits of preferential tariffs which rely extensively on production chains composed of inputs from outside the Commonwealth.

The RoO provisions in the Commonwealth FTA must include cumulation,[16] allowing manufacturers to qualify for preferences based on content originating across all Commonwealth countries.

The Commonwealth FTA RoO provisions should also not permit tariff circumvention by third countries. Also, the RoO provisions in the Commonwealth FTA are not to be convoluted and at odds with the methods of production in GVCs, as it could result in depriving the benefits of the FTA.

14 Substantial transformation gives the good it's essential character.

15 Rerouting takes place where products from non-preferred countries (*i.e.*, countries which are not parties to the FTA) are redirected through a free trade partner to avoid the payment of customs duties.

16 Cumulation occurs where the provisions of an FTA permit producers (for the purposes of determining), to consider materials procured from sources outside of the free trade area as originating from within the free trade area.

Chapter 5

Customs Procedures and Trade Facilitation

Delays resulting from customs formalities at borders constitute significant barriers to trade, raising costs and encouraging corruption, a significant problem in a number of Commonwealth countries. FTAs should therefore ensure that customs procedures should be minimized so that they do not inhibit trade unnecessarily.

Commonwealth FTAs should eliminate as far as possible all impediments to expeditious customs clearance procedures for both imports and exports. Customs duties should be eliminated entirely on smaller shipments, such as those valued under $1000. As part of this objective of improving trade facilitation, the FTAs should promote the use of modern communication and tracking technology to streamline the movement of goods across borders.

Chapter 6

Sanitary and Phytosanitary Measures

This chapter will prohibit the use of non-tariff trade restrictions, such as bans, on food products which are based on scientifically unsubstantiated public health concerns. Such regulations can impose significant barriers on trade in goods, in many cases undoing the benefits of lowered tariffs. Their use must therefore be strictly minimized.

It would make sense also to explicitly preclude the application of the overly cautious Precautionary Principle, which permits health and safety restrictions where there is limited to no scientific justification. The chapter should specify the need for scientific "evidence" rather than merely information or opinion, a requirement which is increasingly common in modern FTAs.[17] A stricter approach to scientific evidence as the basis of policy-making has also been advocated by the OECD.[18]

SPS commitments in the FTAs should align with those specified by the WTO: standards set by the World Organization for Animal Health, the International Plant Protection Convention and the Codex Alimentarius Commission are presumptively valid.

While clear scientific evidence is required for SPS regulations, the SPS Chapter should, however, outline the fundamental principle of respecting regional conditions among FTA signatories (an approach adopted, for example, in the SPS Chapter of the CPTPP). This allows for some divergence in terms of levels of tolerated risks, again provided that there is sound scientific justification.

The SPS Chapter should grant mutual recognition for conformity assessment procedures for SPS compliance on all products across the Commonwealth, meaning that additional checks are not required by the importing country if they have satisfied the requirements of the exporting country, reducing the burden of duplicative assessment procedures.

SPS regulations and standards are designed i) to protect human beings, or animals from risks which may arise from *additives, contaminants, toxins, and disease-causing organisms in their food*; ii) to protect human life from *plant- or animal carried diseases*; iii) to protect animal or plant life from *pests, diseases, or disease-causing organisms*; and iv) to prevent or limit other damage to a country from the entry, establishment, or spread of pests.[19]

SPS provisions cover a variety of different substantive SPS areas focusing on mutual recognition of regulations, compliance techniques, and the regulation's enforcement techniques. As a result, a product that is lawfully produced in the exporting country will be accepted in the importing state. The above mutual recognition is again strongly premised on transparency[20] of any SPS measures that are sought to be introduced by the parties.

Transparency in SPS standards in FTAs is very essential for both businesses and consumers. The chapter on SPS measures are to include provisions for assessment of risk to human, animal or plant life, or health, to ensure that the risk assessment techniques used are developed by relevant international organizations.

There should also be a commitment to cooperate on standards, certification, and conformity assessment issues in the FTA with Commonwealth countries in the introduction of any SPS measures. These commitments envisage, in the long run, economic integration through the phased elimination of standards-related barriers.

It is also proposed that a committee be created that is charged with addressing SPS rules that are viewed as having the potential to create trade distortions, and coordinate on technical cooperation programmes.

17 Margherita Melillo, 'Standards of Scientific Evidence in Preferential Trade Agreements,' *Journal of International Economic Law*, 2022 <https://doi.org/10.1093/jiel/jgac014> (visited 4 July 2021).

18 OECS, 'Governing better through evidence-informed policy making – OECD', https://www.oecd.org/gov/governing-better-through-evidence-informed-policy-making.htm (visited 5 October 2021).

19 *See* Andrew L. Stoler, 'TBT and SPS Measures, in Practice,' in Jean-Pierre CHauffour and Jean-Christophe Maur (eds.) *Preferential Trade Agreement Policies for Development* (World Bank Publishing, 2011) 217-233; generally, Jae Sundaram, *WTO Law and Policy: A Political Economy Approach* (Routledge Publishing, 2022).

20 Transparency is defined by the WTO as 'the degree to which trade policies and practices, and the process by which they are established, are open and predictable'.

Chapter 7

Technical Barriers to Trade

This chapter will contain strict prohibitions against the use of technical regulations and standards on all manufactured products which are based on scientifically illegitimate safety concerns. Like SPS measures, non-tariff TBTs can create distortive barriers to trade in goods.

As with previous chapter, a high standard must be applied for scientific evidence regarding TBTs in keeping with modern the FTAs. In order for this chapter to gain traction across as much of the Commonwealth as possible, there will be a need for some flexibility in terms of country-specific approaches to risk tolerance, provided again that there is scientific justification and that the Precautionary Principle is not followed.

Also, like the SPS Chapter, the TBT Chapter should grant mutual recognition for conformity assessment procedures for TBT compliance across the Commonwealth, meaning that additional checks on goods are not required by the importing country if they have satisfied the requirements of the exporting country.

Economic theory and evidence suggest that the extent to which TBTs are included in FTAs is dependent on the level of development of the trade partners. The success of trade liberalisation strongly hinges on negotiated reciprocal commitments between trade partners.

However, parties must not introduce any 'behind-the-border' barriers through the use technical regulations and other conformity assessment procedures to protect domestic producers from imports.[21] The FTAs with the Commonwealth countries should ensure that such technical regulations introduced by the trade partners are in conformity with existing relevant international standards, and do not pose a major obstacle to international trade.[22]

There should also be a commitment to transparency in the FTA with Commonwealth countries in the introduction of any TBT measures.[23] It is also proposed that a committee be created that is charged with addressing TBT measures that are considered as having the potential to create trade distortions, and coordinate on technical cooperation programmes.

21 *See* Jae Sundaram, *WTO Law and Policy: A Political Economy Approach* (Routledge Publishing, 2022).

22 *Ibid.* Any technical standards, or product standards, that are intended to surreptitiously introduce trade barriers will cause additional losses that make them more inefficient than traditional instruments of protection.

23 Transparency reduces costs and makes it more difficult for trade partners to introduce discriminatory regulation.

Chapter 8

Cross Border Trade in Services

Services already forms a large and growing portion of the economies of many Commonwealth countries (comprising 80% of the UK's GDP, for example).[24] Unlike goods, barriers to trade in services remain stubbornly high.[25] This chapter will ideally go beyond that which Commonwealth countries have offered under their schedules to the WTO General Agreement on Trade in Services (GATS), offering zero discriminatory non-tariff barriers (full market access and national treatment) on all services across all four modes of supply. No discrimination will be permitted by any FTA parties in the content or application of their laws which affect the provision of services by suppliers from any other party.

Services are a growth engine, and currently dominate economic activity in most countries around the world irrespective of their level of development. Services include, financial, telecommunications, transport, health, education, to name a few. The services industry currently dominates the economic activities in most countries around the world, whether they be developed, developing, or emerging. Services industry is part and parcel of the GVC and can also be the key inputs and determinants of the stock and growth of human capital.

Since the formation of the WTO, the services trade has more than quadrupled, from US$1.2 trillion in 1995 to US$4.9 trillion in 2014. The services share is on average higher in developed economies than in developing and emerging economies. The growth of services industry in the developing economies grew by 8% in 2017,[26] and it currently accounts for almost one third of the global trade in services.[27] Also, trade amongst developing countries has seen an increase from 8% in 2000 to 13% between 2000 and 2012.

The GATS ushered in a stable set of rules for trade in services thereby setting a benchmark which was hitherto unavailable. That said, the services liberalization commitments enshrined in the Schedules of the GATS Agreement have become increasingly outdated. This has led countries to pursue more dynamic strategies to reap the benefits from the expansion of

24 *See* Office for National Statistics <https://www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/servicessectoruk/2008to2018> (accessed 2 April 2019).

25 "OECD Services Trade Restrictiveness Index: Policy Trends up to 2022" OECD, February 2022

26 *See* WTO, *World Trade Statistical Review 2018.*

27 China, India, and Singapore account for a disproportionately high share of trade in services.

their services industries. As a result, much of the recent and current international agreements addressing trade in services has occurred through FTAs.

Recognizing that full commitments on services is optimistic, even bilaterally, it may be appropriate to enable parties to set out derogations from pure liberalization. Services commitments could accordingly be set out by sector and mode of supply *via* a negative list – parties commit to full liberalization of every sector that has not been expressly excluded. Such restrictions should be minimized as much as possible. The services trade chapter/ provisions should encompass WTO-plus liberalization commitments and offer the UK WTO-plus[28] concession from Commonwealth countries permitting UK to establish joint-ventures, *e.g.*, hospitality industry, maritime transport industry *etc*.

Intangibility and non-storability, which are characteristics of services trade affects its tradability. But advances in technology/ information technology have greatly reduced the costs and increased the feasibility of services trade. The process of modernising services, for a some of the Commonwealth nations, who fall under the category of emerging economies, or less developed countries, will require them to undertake necessary investment in modern IT networks, and design appropriate domestic and regional regulatory structures for the services sector. This initiative will also require rolling out training for personnel.[29]

This chapter will further require parties to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. The chapter will also prohibit local presence requirements. These are conditions that require service suppliers of another party to have an office or branch to qualify as a cross-border supplier of services.

As with the WTO GATS, the provisions of the services chapter will relate to services supplied in the exercise of governmental authority or on a non-commercial basis, leaving out government services such as health care. Parties would be free to make commitments in these areas should they wish, provided that this is extended to all other parties on a non-discriminatory basis.

Keeping with the provisions of the GATS Agreement, parties to the FTA will be required to grant national treatment to services and services suppliers of the other party in respect of all measures regarding the supply of services.

However, unlike FTAs such as US-Singapore FTA, the agreements among Commonwealth countries need not incorporate a most favoured nation (MFN) principles, or the MFN clause of GATS Article II. This means the parties are not required to give their trade partners the same preferential treatments they afford to non-parties. As some of the Commonwealth nations fall under the category of developing countries, emerging economies, or less developed countries, it will be in the best interest of the parties to given special and differential treatment and flexibility for newer and less developed countries. This will require them only to grant fewer concessions. This provision moves away from the one-size-fits-all model.

To increase participation from emerging and less developed countries of the Commonwealth, the FTAs should be facilitated through negotiated specific commitments (based on individual traits, capacity and development situation) on i) strengthening of domestic services capacity, its efficiency and competitiveness; ii) the improvement of their access to distribution channels, and information networks; iii) liberalisation of market access in sectors and modes of supply of export interest to the country in question; and iv) progressively extending market access in line with their respective development situation.

28 Market access commitments can be over and above the general commitments made under GATS Agreement.

29 This presents the UK, which is a leader in modernising services trade, with the opportunity to offer training, sell necessary IT packages, *etc*.

Chapter 9

Financial Services

The chapter on financial services, of particular interest to the UK given its dominance in this sector, will contain the same kinds of commitments to non-discrimination and liberalization that are found in the cross-border trade in services chapter. There should also be provisions on regulatory cooperation and recognition in some areas of financial services. The CPTPP is a good model for these types of provisions.

Parties will not be required to maintain a commercial presence in order to engage in financial services trade. This should help foster the return of correspondent banking should, enabling banks in Commonwealth countries access global financial markets without needing branches overseas. Many of these were closed in Commonwealth developing countries because of Financial Stability Board and Basel III Regulations, severely harming the economies of some of these countries.[30]

The chapter should include a 'prudential carve' out, found in many FTAs, which expressly preserves the right for states to maintain and adopt measures necessary for prudential reasons, meaning those which protect investors, depositors, and policyholders and to maintain the integrity and stability of the financial system as a whole.

There should also be provisions on regulatory cooperation and recognition in some areas of financial services, notably in relation to new areas such as crypto-currencies and fintech.

30 "Defining Britain's Post-Brexit Role in the World" *Centre for Brexit Policy*, (June 2022) At 56.

Chapter 10

Professional Services and the Recognition of Professionals

In some FTAs, such as the UK-NZ this chapter is entitled "Domestic Regulation." Disciplines on domestic regulation aim to reduce behind the border barriers to trade in services. These commitments ensure that businesses have greater certainty in regards to the authorization procedure for obtaining or amending a licence to allow them to supply services in each other's markets. Building upon the agreed disciplines of the WTO Joint Initiative on Services Domestic Regulation, this includes commitments on publication of information, authorization fees, processing of applications, allocation of limited numbers of licenses, and appeals of administrative decisions.

Legal services are a key area for which liberalization should be achieved in the FTA and the fact that most of the Commonwealth uses the Common Law legal system should help achieve this objective. Parties should therefore recognize professional legal qualifications obtained in one jurisdiction. It was mentioned earlier that Malta and Cyprus cannot sign a Commonwealth FTA, or any FTA for that matter, because they are EU Member States. But recognition of professional qualifications remains within the competence of individual EU Member States. Accordingly, Malta and Cyprus are free to grant mutual recognition of professional qualifications, such as the right to practice law, to other Commonwealth countries, much as they do for other EU Member States under the Lawyer's Establishment Directive.[31] A full FTA is not necessary for liberalization of domestic services regulation.

Turning back to legal services under the model Commonwealth FTA itself, the treaty should at a minimum specify that lawyers from each party have the ability to advise clients on home-country laws international law; provide advice through commercial presence for firms, temporary practice (fly-in fly-out), establishment rights for individuals, as well as digital provision. There should also be a clear, transparent and proportionate path to requalification into the host state profession. Lawyers from one party should also be able to partner with, employ and be employed by local lawyers.[32]

31 *See* Directive 98/5/EC.

32 See further David Collins, *The Public International Law of Trade in Legal Services* (Cambridge University Press, 2018).

More broadly, for all professions, there should be recognition of existing home country qualifications and experience for the purposes of requalification into a host state profession where possible. Otherwise, the market access and non-discrimination commitments contained in the services chapter will be illusory. This can take place through an automatic recognition system, compensation measures (aptitude examination or supervised adaptation period) or partial licensing. A sensible precedent for this is the Trans-Tasman Mutual Recognition Agreement of 1997 or the EU's Professional Qualification Directive which allows anyone who is registered to practice an occupation in one country to practice in another partner country.

Mutual recognition on this scale might be a hard-sell for the Commonwealth since the quality of education and professional experience is variable across the member countries. It may therefore be necessary to create bodies, such as a committee on professional accreditation, to monitor this process, ideally on a case-by-case rather than country-by-country basis. Industry-specific annexes which may expand or restrict the scope of recognition for certain services providers from certain countries may be necessary. Focus on transparency and minimization of obstacles to recognition or requalification is essential. Again, the WTO's Joint Initiative on Services Domestic Regulation is an appropriate starting point.

Chapter 11

Temporary Entry for Business-Persons

Free movement of people is an essential element of the Commonwealth FTA, and likely one which will be essential to gain concessions from countries such as India. Enabling workers to move freely across the Commonwealth should boost competition and productivity. The CANZUK project[33] demonstrates that there is already broad support for free movement across the larger developed country members of the Commonwealth. The free movement of people will be in part facilitated by provisions recognizing professional qualifications, discussed earlier. This will enable workers to maximize their productivity by working in the sectors for which they have already qualified and have experience.

If full free movement of people is not possible across all parties, the Commonwealth FTA could create entrepreneur visas for highly qualified individuals to promote innovation, as many have advocated.[34] Procedures for granting visas should be as fast and low cost as possible. The Commonwealth Scholarship and Fellowship Plan, which exists currently as a series of bilateral arrangements to support the movement of students and professionals, could be expanded and managed centrally (see below regarding institutions) to augment participation.

33 *See* CANZUK International <https://www.canzukinternational.com/> (accessed 4 July 2022).

34 I Khan, "A Cure for the Brexit Blues" Foreign Policy Insider (22 December 2022) <https://foreignpolicy.com/2020/12/22/brexit-trade-commonwealth-eu-innovation-investment/> (accessed 4 July 2022).

Chapter 12

Telecommunications

This chapter commits parties to ensure that service suppliers have access to public telecommunications networks on a timely, reasonable and non-discriminatory basis. It also commits Commonwealth parties to cooperate on security and diversification in the telecommunications sector, including on infrastructure and technologies. These commitments are essential to ensuring that Commonwealth countries can fully participate in the modern digital economy.

Some Commonwealth countries, notably Canada, maintain highly restrictive telecommunications markets.[35] Achieving gains in this area may require concessions in other areas, such as the free movement of professionals.

35 UK-Canada Free Trade Agreement: The UK's Strategic Approach" UK Department of Trade, March 2022.

Chapter 13

Investment

Global value chains in the manufacturing and assembly sector, coupled with the services industries, create the need for a robust regulatory framework that underpins trade-investment-service-intellectual property nexus. As a result, it is essential that trade and investment are addressed jointly.

The free movement of capital across borders is one of the essential ingredients of economic prosperity. The ability of firms to internationalize is key to their capacity to expand profits, lower prices for consumers and spur economic development. This chapter accordingly establishes the basic guarantees and protections for foreign investment (both foreign direct investment and portfolio investment), including national treatment, most-favoured-nation, fair and equitable treatment, full protection and security and guarantees against expropriation without compensation. Free transfer of capital and returns must also be protected in order to ensure that profits can be repatriated to shareholders. These rights will be accorded to the pre-establishment stage of investment, helping fully liberalize market access for foreign companies.

Some of the UK's new FTAs (e.g., Australia, NZ) do not contain all of these protections. However, given that the political environment is not entirely stable in some of the Commonwealth countries, raising the risk of expropriations due to civil unrest, the full suite of investment protections should be included in the Commonwealth FTA. This will help provide security to enhance investment among the parties.

Going beyond the WTO Trade Related Investment Measures (TRIMS) Agreement, investment provisions is FTAs cover *investment protection, liberalization, promotion and facilitation*. Of the four, investment protection is the most important, and the rules should offer protection to investors against these risks (ranging from expropriation to discrimination, unfair treatment and limitations on a firm's operation, or its hiring decisions) which could potentially lower the cost of capital.

This chapter should also prohibit the use of performance requirements including local content requirements, minimum export requirements, technology transfer, and localization requirements as conditions of investment. Moreover, any investment incentives, such as tax breaks (which parties should be free to use), should not be tied to any of these performance requirements which are by their nature economically distortive. Some Commonwealth

countries, such as Singapore, may resist surrendering their ability to use performance requirements given that in some cases they have arguably been effective in achieving growth.[36] In this case it may be suitable to allow for phase-out periods of these programmes, enabling gradual adaptation to their removal.

The investment chapter will enshrine the 'right to regulate' in pursuit of environment, health and other objectives as well as 'best efforts' commitments to endeavour to uphold environmental, social, and corporate governance (ESG) standards. But this right should be narrowly framed and avoid any reference to amorphous concepts such as climate change as justifications for anti-investment protectionism.

The investment chapter should contain provisions preventing states from relaxing labour or environmental standards to attract investment inflows.[37] These are now common features of FTAs, ensuring that there is no backsliding in terms of these norms.[38]

In the event that full liberalization for foreign investment is not achievable by all of the parties to the FTA, this chapter should use a negative list style for each economic sector – investment protections apply to all sectors except those which are expressly excluded.

Investor-state dispute settlement (ISDS) should be included in this chapter as a means for aggrieved investors to be compensated in the event of a breach of this chapter by a party-governments. The drawbacks of ISDS, typically framed in terms an encroachment on national sovereignty, are over-stated. ISDS enables foreign investors to bring claims for breach of treaty obligations directly against host states in neutral international arbitration, a useful tool where local courts lack independence or competence. While this format of disputes settlement remains highly controversial (and has been omitted from some of the UK's new FTAs, such as that with Australia and New Zealand, and probably also with Canada) it is needed in the Commonwealth FTA because of the uneven commitment to rule of law and independent judicial systems across the Commonwealth.

As it is plausible that: i) local courts in smaller Commonwealth countries can be biased, or inexperienced in the application of investment protection obligations, and ii) and Commonwealth country governments are often not inclined to allow ordinary commercial disputes into inter-state dispute, it is highly desirable to have a clear provision on ISDS before international arbitral tribunals as the preferred choice to settle any disputes.

Should some Commonwealth members be reluctant to accept ISDS across the board, it is possible to include in a multi-party Commonwealth FTA as 'non-conforming measures' matters that will not be subject to the main commitments in the investment chapter or to the procedural protection of ISDS.

The definition of investment which is used should be a broad asset-based definition which will include both foreign direct investment (FDI) and portfolio investment. This had been widely used by the ASEAN and China, and China and New Zealand[39] in their preferential trade agreements. An example is as follows:

"every kind of asset invested, directly or indirectly, by the investors of a Party in the territory of the other Party including, but not limited to, the following: (a) movable and immovable property and other property rights such as mortgages and pledges; (b) shares, debentures, stock and any other kind of participation in companies…."

36 Suzy H. Nikièma, 'Performance Requirements in Investment Treaties,' *International Institute for Sustainable Development* (December 2014), at 3.

37 Some FTAs place these obligations in Labour and/or Environment specific chapters, e.g., the UK-EU TCA.

38 *See* D Collins, 'Standing the Test of Time: The Level Playing Field and Rebalancing Mechanism in the UK-EU Trade and Cooperation Agreement (TCA)' *Journal of International Dispute Settlement* Volume 12 Issue 4 (2021) 617.

39 New Zealand opposed the use of ISDS during the TPP negotiations, which almost led to the collapse of the negotiations to revive the TPP. *See* Pattrick Smellie and D Nang, 'Jacinda Arden Lays Ground for Defeat on TPP Investment Dispute Clauses,' *New Zealand Herald* (9 November 2017) <https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11942488> (accessed 1 July 2022).

Chapter 14

Digital Trade

The free flow of electronic commerce is a key component of the modern global economy and must be preserved and enhanced through the Commonwealth FTA. The UK-Singapore Digital Economy Agreement (DEA) is a good model for the type of material that should be included in a digital trade chapter of the Commonwealth FTA.[40]

The ability to move data freely across borders underpins international trade and economic growth. Global data flows were more valuable than trade in goods in 2014.[41] For instance, in the same year, the United States (US), raised an estimated US GDP by up to 4.8% in digital trade.[42] Interestingly, most of these gains were realised in non-IT sectors, which underscores that it is the use, rather than the production of digital technologies that matters most. It is forecast that by 2030, AI could raise global GDP by 14%, which is the equivalent of an additional $15.7 trillion.[43]

According to the UNCTAD, the value of e-commerce sales was worth US $26 trillion in 2018, which was up by 8% from previous years. Of this, i) US$21 trillion was in B2B e-commerce, ii) B2C value increased by 16% compared to 2017, and iii) cross-border B2C sales reached $404 billion. As per the WTO report from 2018, using digital technologies to reduce trade costs could increase world trade by up to 34% by 2030.[44] According to the same report, since 1996, trade in physical IT goods, which is heavily relied on by digital economy, has tripled to $1.6 trillion in 2016. Although difficult to ascertain precise economic impact, data flows on their own have been estimated to have increased global GDP by $2.8 trillion in 2014. As a result, the biggest sectoral gains will be witnessed in retail, financial services and healthcare.

Computer-integrated manufacturing, additive manufacturing, automation and advanced analytics of Big Data and the flow of information over the Internet of Things (IoT), are characteristics of the fourth industrial revolution. The IoT[45] is built on global data flows. The IoT, coupled with computing power has revolutionised the manufacturing process, besides other spheres of human activity. For the manufacturing industry/businesses IoT improves operational efficiency, and for the consumer IoT improves quality of lives in all aspects. Blockchain technology[46] also comes into the picture, which uses cryptographic means for authentication. In the modern globalized world, the digitalization of the economy (which includes IoT and blockchain) has redefined the structure of the global value chain (GVC).

AI has significantly increased productivity, product quality, and consumption. Data flows enable international trade by supporting global communication, access to information, tracking and tracing along supply chains and opportunities for collaboration and innovation. Data flows themselves can be a services trade, *e.g.*, cloud computing or professional services. Yet data flows are restricted by regulation, for reasons such as, protection of privacy and addressing cybersecurity risks.

Digital technology is increasingly used for public service provisions in both developed and developing countries. The majority of the initiatives to introduce digital technology in the developing countries had focused on agriculture, education, health sector, and civic education spheres. The digital economy, as it stands, offers opportunities beyond national borders without relocation. This space, *i.e.*, online platforms, augment the demand and supply of goods, and labour, besides also creating new services. While the positives are there, it could also mean the potential weakening of labour rights[47] in developing countries and emerging economies, where most of the Commonwealth countries are located.

In the digital trade landscape, the UK is both a pioneer and a beneficiary, as it has forged growth in digital trade. It has the third largest B2C market with sales worth US$266 billion, ranking only behind China and Canada. The UK's capabilities include deliverance of trade in services digitally. The UK in 2018 exported and estimated £190.3 billion in digitally delivered services, amounting to 67.1% of its total services export. The above figures capture the economic importance of the digital trade policy. It will not be an exaggeration to state that trade policy must be digital by default.

The FTAs to be forged among the Commonwealth countries should consider prioritising data flows which seek to combine production, information technology, and the IoT. It is to be noted that the global economy – which is increasingly focused on developing countries and

40 The DEA also includes provisions on digital customs, fintech and digital identities, which would feature in other parts of the Commonwealth FTA.

41 James Manyika, and Michael Chui, 'By 2025, Internet of Things Applications Could Have US$11 Trillion Impact,' *Mackinsey Global Institute* (22 July 2015) <https://www.mckinsey.com/mgi/overview/in-the-news/by-2025-internet-of-things-applications-could-have-11-trillion-impact> (accessed 2 July 2022).

42 United States International Trade Commission, 'Digital Trade in the US and Global Economies,' Part 2, Investigation, Pub. No 4485 (August 2014) 332-540.

43 Price Waterhouse Coopers, 'Sizing the Price: What is the Real Value of AI for your Business and how Can you Capitalise?' (2017) <https://www.pwc.com/gx/en/issues/analytics/assets/pwc-ai-analysis-sizing-the-prize-report.pdf> (accessed 2 July 2022). Forecast also points out that the greatest gains from AI are likely to be in China and North America.

44 WTO Secretariat, 'World Trade Report 2018 on Future of World Trade: How Digital Economies Are Transforming Global Commerce' (3 October 2018).

45 IoT is defined as 'global infrastructure for the information society, enabling advanced services by interconnecting (physical and virtual) things based on existing and evolving interoperable information and communication technologies'. *See* International Telecommunications Union (ITU, 2018).

46 Blockchain offers the possibility to use smart contracts, where computer programmes self-execute when specific conditions are met, and automate certain processes such as payments of duties, *etc.* Also, unlike normal databases, blockchains are highly resilient to cyber-attacks.

47 Weakening of contractual rights leads to 'gig economy', *i.e.*, where workers are hired on the spot, potentially eroding into basic rights.

emerging economies where the manufacturing process is concentrated[48] – has become a strong competitor for the industries in Europe. On the other hand, 'data localization' requirements prevalent in some jurisdictions can seriously restrict cross-border data flows putting the GVC at risk.

Economic benefits from data flow and digital technologies: digitalization offers news opportunities for developing countries to engage in digital trade – particularly for micro, SMEs, and women entrepreneurs. Economic benefits also include overcoming existing trade cost disadvantages in delivery of products to the global markets.

Information, which is part of the digital economy, is intangible and highly tradeable, and as a result trade in information differs significantly from trade in goods and services. Unfortunately, WTO trade agreements do not delineate a clear set of laws about the IoT or censorship. It is, hence, incumbent on UK negotiators to incorporate suitable provisions to both safeguard the home industries, and at the same time such primary intellectual property rights relating to data flows and censorship.

The world is currently witnessing a rise in digital protectionism amongst developing and emerging economies, through the introduction of measures that seek to shelter their domestic markets from outside competition through restrictive trade or by discriminating foreign firms. The Digital Services Trade Restrictiveness Index from OECD shows that seven G20 nations have in place more restrictiveness measures in 2018 compared to 2014.[49] Protectionist policies on the digital front take different shapes, *i*ncluding web censorship, conditions for market access, restriction of data flow (including data localisation), tariffs on goods and intangible products, and forced transfer of intellectual property.[50]

Protectionist policies with rising restrictions on the movement of date has a negative impact on global digital economy and result in increased costs for goods and services. It has been pointed out by the European Centre for International Political Economy (ECIPE) that a restrictive regulatory environment for digital trade will have a knock-on effect and weigh down many non-digital sectors.[51] Such a protectionist agenda can also undermine internet stability and inter-operability, with the risk of creating isolated country specific webs.[52] Protectionist policies leading to reduction to internet openness results in reduced technology diffusions, affect GVCs and weaken growth.[53] Where protectionism takes the shape of cyberwarfare, it could disrupt information flows, impeding online access. These protectionist policies rely on behind-the-border regulations, rather than tariffs to protect local firms.

The Information Technology and Innovation Foundation (ITIF) calls such measures as 'innovation mercantilist practices'. In many cases beyond being policies, such measures are passed into law. For instance, i) China passed law requiring firms to store date only in China if it related to privately funded, commercially focused research, *i.e.*, data localisation laws, and ii) China enacted standardisation laws which favour local technological firms and products over foreign firms (which violates non-discrimination principles of the WTO).[54] These laws, or standards, make it more difficult (and costlier) for foreign firms to enter China's market.

This necessitates the UK, and other Commonwealth countries, to develop an effective digital trade policy through their FTAs. It is also strongly suggested that 'censorship' of the IoT/ data flow is identified as tantamount to protectionism, or a 'trade barrier' in the FTAs.

This chapter will establish that parties are prohibited from imposing data localization requirements. There should be zero tariffs on cross-border electronic transactions. The chapter will promote interoperability between different regimes and facilitate paperless trade.

While there should be room to preserve privacy rights of citizens, no particular framework for privacy should be introduced as these can be cumbersome and anti-competitive. Privacy protections should involve minimal compliance costs. As in the CPTPP, there should be exceptions to the non-discriminatory treatment of cross-border data for "achieving a legitimate public policy objective" as long as the measure is not arbitrary or unjustifiable, a disguised restriction on trade or disproportionate to the objective pursued. Strict language could be used here, such as a "clearly defined public policy objective."

See chapter 19 on the importance of digital trade for SMEs that rely on online platforms.

48 Several developing countries have become active participants in the digital trade in the past decade, with some of them present in the Commonwealth. Nevertheless, the industries in the developing countries and emerging economies are not well-regulated.

49 Janos Ferencz and Frédéric Gonzales, 'Barriers to trade in digitally enabled services in the G20', OECD Trade Policy Papers, (October 2019).

50 *See* Martina Francesca Ferracane, Hosuk Lee-Mkiyama, and Erik van der Marel, 'Digital Trade Restrictiveness Index,' *European Centre for International Political* Economy (April 2018).

51 *Ibid.*

52 *See* Keith Wright, "The 'Splinternet' is Already Here", TechCrunch, March 2019, <https://techcrunch.com/2019/03/13/thesplinternet-is-already-here/> (accessed 3 July 2022).

53 Susan Ariel Aaronson, 'What Are We Talking about When We Talk about Digital Protectionism?' *World Trade Review* (December 2018).

54 Nigel Cory, 'The Ten Worst Digital Protectionism and Innovation Mercantilist Policies of 2018', Information Technology & Innovation Foundation (January 2019) <https://itif.org/publications/2019/01/28/ten-worst-digitalprotectionism-and-innovation-mercantilist-policies-2018> (accessed 3 July 2022).

Chapter 15

Intellectual Property

As suggested earlier, global value chains in the manufacturing and assembly sector, coupled with the services industries, create the need for a robust regulatory framework that underlies the intersection of trade-investment-service-intellectual property.

Commonwealth FTAs should establish high standards of protection for all forms of IP. Of course, some Commonwealth members may be less willing to embrace protections which exceed those of the WTO TRIPS Agreement.

India and South Africa have advocated states' ability override IP in the case of vaccines. There is growing consensus to allow governments to issue compulsory licences to make pharmaceutical products domestically, with some compensation for rights holders, although a full waiver of WTO Trade-Related Intellectual Property (TRIPS) rights was not achieved at the WTO 2022 Ministerial Conference. The Commonwealth FTA should accordingly contain a provision facilitating compulsory licensing for essential medicines, with strict conditions.

Concerns about inadequate intellectual property protection are likely to vary across the Commonwealth and may change over time. This could make it difficult to negotiate such rules as part of an FTA. As a result, one approach to intellectual property protection may be to limit it to a requirement to enforce domestic laws and address greater protections at a later re-negotiation stage.

A substantial amount of EU laws contained in Directives and Regulations relating to IP rights are incorporated in the FTAs entered by UK post-Brexit. The current UK IP laws to a greater degree still retains EU law, which position will make it difficult for the UK to change its domestic IP laws without causing friction with its current FTA partners. The trade agreement with the EU, which covers trade worth £294 billion (as of 2019) includes far fewer IP rights obligations that the FTA with Ukraine, which covers trade worth £1.63 billion (as of 2019). Similarly, the UK's FTA with Moldova has provisions which are prescriptive and sets out terms of supplementary protection certificates. On the other hand, the UK-CARIFORUM FTA in article 148 provides detailed rules on utility models.[55] The UK-CARIFORUM FTA also contains a wide range of IP provisions. Some of the UK FTAs forged by UK have no IP provisions,[56] and some have limited IP provisions. The rules relating to generic resources are found in only five FTAs concluded by the UK.[57] In some of the FTAs, UK has negotiated a wide range of IP provisions.[58]

In terms of IP rights obligation under the Commonwealth FTAs with developing and emerging economies, it is urged that a case-by-case analysis be carried out of the Commonwealth country/negotiating partner in question before firming up a suitable IP chapter.

The protection and enforcement of IP rights is key for UK Small and Medium-Sized Enterprises (SMEs), and any future FTA that the UK concludes should contain rules on strengthening the protection of IPRs in countries with less developed IPR systems. Also of importance is the existence of an accessible enforcement mechanism to protect IP rights in the trade-partners jurisdiction, as in the absence of a robust legal framework, digital products and services that rely heavily on IP could be hindered.

55 Utility models, also referred to as utility innovations; short-term patents, *etc.*, are intended to protect new minor/technical inventions through the grant of a limited exclusive right to prevent others from commercially exploiting the protected inventions without consents of the rights holder. *See* World Intellectual Property Organization <https://www.wipo.int/patents/en/topics/utility_models.html> (accessed 10 July 2022)

56 FTAs forged with *Cameroon*; *Côte d' Ivoire*; *Eastern and Southern Africa (ESA) trade bloc* (comprising *Mauritius, Seychelles,* and *Zimbabwe*); *Faroe Islands*; *Kenya*; *Kosovo*; *Liechtenstein*; and *Pacific States* (comprising *Fiji*, *Papua New Guinea*, *Samoa*, and *Solomon Islands*).

57 FTAs forged with Andean Communities – Art. 201; CARIFORUM – Art. 150; Central America – Art. 229(4) and (5); Korea – Art. 10.39; and Ukraine – Art. 219(1).

58 FTAs forged with the Andean Communities; Australia; Canada; CARIFORUM trade bloc; Central America trade bloc; EFTA; EU; Georgia; Japan; Moldova; Singapore; South Korea; Ukraine; and Vietnam.

Chapter 16

Government Procurement

This chapter would commit Commonwealth parties to accept bids for as central and sub-central government level public procurement projects from producers and service providers of the other parties, and to consider those bids on a non-discriminatory basis. The chapter would also harmonize the procedures associated with announcing public procurement projects and considering the offered proposals. It would also provide rules to ensure transparency in the decision-making process. These obligations would essentially embody commitments contained in the WTO plurilateral Government Procurement Agreement (GPA). Several Commonwealth countries are already signatories of the GPA: the UK, Canada, Australia, New Zealand, and Singapore. Few developing countries have signed the GPA. The procedural requirements associated with these commitments may be too onerous from some Commonwealth members.

It should be noted, however, that a number of Commonwealth countries use government procurement at the national as well as regional level as a mechanism for various policy goals, including inclusivity and sustainable development, e.g., South Africa, India, Australia, Canada and Malaysia. In other words, they have retained the capacity to discriminate in favour of local providers in certain circumstances. It has been suggested that developing countries should be encouraged to are able to retain this important development tool.[59] If this capacity is kept, strict language should be used to ensure that it is not abused for protectionist reasons.

The size of the global procurement market is estimated at US$13 trillion per annum, making it an essential economic activity.[60] OECD figures show that an estimated 9 to 20 % GDP accounts for government procurement markets in developing countries.[61] Public procurement expenditure as a percentage of GDP increased slightly across OECD countries, from 11.8% of GDP in 2008 to 12.6% of GDP in 2019.[62] The COVID-19 pandemic witnessed a spike in public procurement relative to GDP in 2020.

59 Olayinka Bandele, 'Emerging Disciplines on Government Procurement in Trade Agreements,' *The Commonwealth, Emerging Issues Briefing Note (6)* March 2016.

60 Spend Network, 'How Governments Spend: Opening up the Value of Global Public Procurement,' (2021).

61 OECD, 'The Size of Government Procurement Markets,' *Journal of Budgeting Vol 1 Issue 4* (2002).

62 OECD, *Government at a Glance 2021* (OECD Publication, 2021).

Public procurement spending is concentrated in the areas of health to environmental protection, public order and economic affairs (infrastructure, transport, communication, energy, and research and development). Across OECD countries in 2019, health expenditure represented the largest share of public procurement spending, averaging 29.3%. Other than health, the next largest areas of public procurement spending were economic affairs (16.7%), education (11.6%), defence (10.5%) and social protection (10.0%) with relatively little variability among countries.[63]

All government spending is not to be considered as public procurement. For instance, spending on wages, salaries, and pensions is part of state spending, and not part of spending on goods and services. Needless to say, the state has considerable influence over the allocation of resources and there is a home bias. Most procurement systems strive to achieve "value for taxpayer money". This means, for such public procurements domestic providers are preferred over foreign firms in the award of public contracts. Home bias can distort trade flows and influence international specialisation and can be considered as equivalent of trade barriers.

The GPA, mentioned above, is plurilateral in nature and not multilateral. As a result, FTAs are the only means through which procurement rules could be extended to countries that are not parties to the GPA.[64] Studies carried out in the last decade reveal that over 40 FTAs have introduced commitments with trade partners to open access to public procurement contracts on a bilateral or regional basis, with provisions explicitly prohibiting public procurement practices that discriminate against foreign providers/producers.[65]

Hence, it is desirous to have suitable public procurement provisions prohibiting discrimination against foreign providers in the FTAs to be formed with the Commonwealth countries.

63 *Ibid.*

64 *See* Bernard Hoekman, 'International Cooperation on Public Procurement Regulation,' *Robert Schuman Centre for Advanced Studies* (2015).

65 *See* Robert D. Anderson, Anna Caroline Müller, Kodjo Osei-Lah, Josefita Pardo de Leon, and Philippe Pelletier, 'Government Procurement Provisions in Regional Trade Agreements: A Steppingstone to GPA Accession?' in Sue Arrowsmith and Robert D. Anderson (eds.) *The WTO Regime on Government Procurement: Challenge and Reform*, (Cambridge University Press, 2011) 561-656; Asako Ueno, 'Multilateralising Regionalism on Government Procurement' *OECD Trade Policy Paper 151* (2013); Stephanie J. Rickard, Daniel Y. Kono, 'Think globally, Buy Locally: International Agreements and Government Procurement,' *Review of International Organizations* Vol 9 No 3 (2014) 333-352.

Chapter 17

Competition Policy and Consumer Protection

This chapter requires parties to promote open and fair competition. It forbids anticompetitive practices by entities that have substantial market power and addresses mergers that may have significant anticompetitive effects. The chapter further establishes procedural rights for both people and businesses under investigation by competition authorities in party countries, such as ensuring they have the right to be legally represented. The chapter promotes cooperation between Commonwealth competition and consumer protection authorities.

On consumer protection, this chapter ensures that consumers across the Commonwealth are protected from misleading, fraudulent, and deceptive practices. It ensures goods provided are of satisfactory quality and services are performed with reasonable skill and care. These concepts are in keeping with principles well enshrined in the Common Law and should be amenable to most Commonwealth parties which for the most part have embraced market economies.

Chapter 18

State Owned Enterprises and Designated Monopolies

In this chapter the parties make commitments related to how State-Owned Enterprises (SOEs) engage in commercial activities, preventing governments from discriminating in their favour in a manner which would violate the FTA or cause injury to another FTA party. SOEs must not be entitled to any subsidies which have trade-distorting effects. SOEs must also be subject to the jurisdiction of the courts of each FTA party and must be regulated impartially and transparently. The chapter also encourages co-operation in improving rules on SOEs internationally, such as at the WTO. It might be sensible to require each party to list its SOEs for the purposes of transparency.

State ownership of commercial enterprises are prevalent in various parts of the world for reasons, including a mixture of social, economic, and strategic interests.[66] Since being created by the State, the SOEs carry specific characteristics and possess inherent competitive advantages over privately owned enterprises (POEs). The SOEs continue to play an important role in international economic law, and carry worrying features, such as their ability to distort competition and investment in international trade. These features come into sharp focus with the SOEs' participation and involvement in the services trade and GVCs, *etc*. In contrast to POEs, SOEs have different guiding objectives.

The objectives of SOEs are not profit making and they are viewed more as a state mechanism to augment/ remedy market failures. A classic example is where SOEs are created as agents for developmental policies. For instance, SOEs are created to maintain public service obligations, such as, postal services, telecommunications services, public transport services, and for providing essential utilities.[67] SOEs' strategic competitive advantage over POEs arise due to the government's financial participation and departing from the principle of competitive neutrality with the objective of remedying market failures. SOEs are also different from the POEs in the decision-making process, with very little accountability on top management.

SOEs also provide a major source of employment, in most instances with generous social benefits attached to them.[68] Being SOEs state owned allows SOEs for cross-subsidisation,

66 OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publication, 2005).

67 *See* Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-owned Enterprises: Challenges and Policy Options', *OECD Corporate Governance Working Paper No. 1* (2011).

68 *Ibid*.

enabling one state business to pay for public services in another sector.[69] Where the SOEs' objective is to succeed in a competitive market, as opposed to a justifiable policy objective, it severely distorts competition leading to an uneven playing field.[70]

It is the absence of competitive neutrality in the operation of SOEs that distorts the playing field and puts POEs at a great disadvantage. This obviously necessitates the drafting of a specific chapter with detailed set of rules in UK's FTAs.

Article XVII of GATT 1994 defines 'state trading enterprise' as 'a state enterprise, wherever located, and any enterprise that has been granted, formally or in effect, exclusive or special privileges', including marketing boards and import monopolies. Pursuant to Article XVII, where a WTO member establishes or maintains a state enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, then such an enterprise shall, for its exports or imports, act in accordance with two principles (1) non-discriminatory treatment and (2) commercial considerations. One would note that the phrase 'state enterprise' is misleading, as the obligations apply to both state enterprise and to any enterprise (whether private or public) that has been granted a special privilege by the state.[71]

One of the first instances where an FTA comprehensively dealt with the threat of SOEs was the TPP (which was to later morph into the CPTPP). Chapter 17 of the TPP Agreement was devoted to the regulation of SOEs and aimed at reducing the unfair advantages that SOEs enjoy. Of all WTO Member States, China has the largest state-owned sector in the world – an estimated 100,000 at the time of negotiating the TPP.

Chapter 17 of the CPTPP in essence prohibits SOEs from discriminating against other CPTPP firms when buying or selling goods or services; seeks to ensure that SOE purchases and sales are made only on the basis of commercial considerations; and prohibits the use of non-commercial assistance, namely subsidies, to support SOEs in many cases. The provisions of Chapter 17 also requires countries to provide other CPTPP members a list of all SOEs or otherwise list them on a public website.

It is well-documented that developing and emerging economies of the Commonwealth have several state-owned sectors, to cover public service obligations, such as, postal services, telecommunications services, public transport services, *etc*. It is, hence, essential that the UK has a robust provision dedicated to SOEs (similar to the provisions of the CPTPP) in the FTAs under proposal with the Commonwealth nations to ensure a level playing field.

69 *Ibid*.

70 Daniel Sokol, 'Competition Policy and Comparative Corporate Governance of State-owned Enterprises', *Brigham Young University Law Review Vol 6* (2009) 1713.

71 *See* Kirk Haywood, 'The Treatment of State Enterprises in the WTO & Plurilateral Trade Agreements,' *Emerging Issues Briefing Note (3) The Commonwealth* (2016).

Chapter 19

Small and Medium-Sized Enterprises

This chapter will contain commitments aimed at helping Small and Medium-Sized Enterprises (SMEs) expand their trade with Commonwealth countries. This will consist of trade and investment promotion initiatives, such as websites promoting partnerships, as well as online tariff databases along with dedicated points of contact in each party country to improve access to information. Parties also commit to reducing the regulatory burden on SMEs, notably in relation to data / privacy and taxation. SMEs in developing countries are particularly vulnerable to excessive regulation and needful of assistance in adapting to digital marketplaces.[72] As mentioned in the Digital Trade section above, SMEs stand the most to gain from liberalization of rules governing the digital economy across the Commonwealth.

As noted in the WTO's report from 2016, SMEs form the backbone of practically every domestic economy.[73] Until recently, the role of the SMEs in facilitating international trade was largely overlooked by international economic law,[74] as it was considered the domain of larger multinational enterprises (MNCs) or transnational corporations (TNCs).[75] What is clear is the SMEs in the past two decades have increasingly reached out beyond their traditional domestic habitat to play a crucial role in the delivery of services trade, and as part of the GVCs to become key actors. Importantly, they are directly engaged in international trade, investment,[76] and digital trade.[77] In sum, the active participation of SMEs in the GVCs and digitisation of the economy has paved the way for the internationalisation of SMEs.

According to OECD statistics from 2017, SMEs account for an estimated 99% of businesses and about 70% of private-sector jobs in OECD countries.[78] As regards the UK is concerned, there is a strong upward trend since from the early 2010s, with the SMEs accounting for 99.9% of

72 David Collins, 'Digital Trade and the WTO: Opportunities and Challenges for SMEs' in Julien Chaisse ed. *Elgar Companion to WTO* [forthcoming, Elgar, 2022]

73 *See* WTO, *World Trade Report 2016: Levelling the Trading Field for SMEs* (WTO Publications 2016).

74 *See* Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press, 2016).

75 See Joachim Karl, 'The Treatment of Small and Medium-Sized Enterprises in International Investment Law,' in Thilo Rensmann (ed.) *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press, 2017).

76 *See* WTO, *World Trade Report 2016: Levelling the Trading Field for SMEs* (WTO Publications 2016).

77 International Trade Centre, *Connect, Compete and Change for Inclusive Growth: SME Competitiveness Outlook 2015* (2015); International Trade Centre, *Business Ecosystems for the Digital Age: SME Competitiveness Outlook 2018* (2018).

78 OECD, *Entrepreneurship at a Global* (OECD, 2017).

businesses in 2018. In UK, SMEs account for about 60% of all private-sector employment, and produce a turnover of £1,994 billion, which is the equivalent of 52% of the UK economy.[79]

The need to access for SMEs to international trade and investment has been identified in the 2015 UN Sustainable Development Goals. As FSB research indicates, amongst small business exporters, more than a third (36%) stated they would find formal FTAs beneficial to supporting their exporting ambitions.[80]

It is essential that the UK establish a dedicated SME Committee, comprising of representatives from both the Government and the private sector. This process should facilitate meaningful discussions in the areas where SMEs are involved in delivering trade, namely, e-commerce, IP rights, rules of origin, GVCs, *etc*.

Similar to the Economic Partnership Agreement (EPA) drawn up between EU and Japan, a dedicated SME Contact Point can be created to provide information on customs regulations and procedures, rules of origin (RoO), IP rights and regulation in partner-countries, TBT and SPS measures, business registration procedures, employment regulations, taxation, trade barriers, *etc*. to the UK based SMEs. The CPTPP Agreement, for instance, has a dedicated helpdesk for SMEs to provide all necessary information.

Digital trade is an important vehicle for SMEs that rely on online platforms, as they help them connect with other traders, business, and customers abroad. It is highly desirable that there should be a prohibition on customs duties on electronic transmission, as it confers certainty for digital trade, e-commerce, and data flows. Both India and South Africa have expressed concerns about the WTO Moratorium on customs duties on electronic submissions,[81] as opposed to Indonesia which is keen on levying customs duties.

The CPTPP, for instance, places more emphasis on facilitating e-commerce directly, which includes data flows. On the other hand, the EU-Japan EPA gives more attention to consumer privacy and security considerations, but at the expense of some increase in business costs. Any FTAs struck by the UK should consider SME business constraints when striking the balance between supporting free flows of data and customer privacy and security.[82]

The CPTPP contains a cooperation clause for parties to support SMEs in relation to e-commerce.[83] Similarly, under the USMCA, e-commerce issues are under the (non-exclusive) purview of the SME Committee.[84] Hence, it is imperative that, in any FTAs forged by the UK, a separate Committee on e-commerce is established to consider SME interests and/ or require e-commerce to be included on the agendas of the Committee on SMEs.

See Chapter 15 for SMEs and IP rights protection.

79 BEIS, Business Population Estimates.

80 FSB Customs Survey (2018) <https://www.fsb.org.uk/media-centre/press-releases/finally-a-brexit-blueprint-but-much-more-work-to-do> (accessed 25 July 2022).

81 WTO General Council, Document #WT/GC/W/747, 26-27 July 2018.

82 *See* generally, Minako Morita-Jaeger, and Ingo Borchert, 'The Representation of SME Interests in Free Trade Agreements: Recommendations for Best Practice,' UK Trade Policy Observatory (2020).

83 *Ibid.* But nevertheless, e-commerce is not included in the agendas of the Committee on SMEs, which renders the e-commerce cooperation mechanism weak.

84 *Ibid.*

Chapter 20

Innovation

This chapter will contain provisions to enable Commonwealth parties to explore the benefits of innovation on trade and investment. This includes discussion on regulatory approaches, commercialization of new technologies, such as Artificial Intelligence and Digital Identities as well as fintech and e-payments. This could use provisions found in the DEA concluded between the UK and Singapore. These chapters remain uncommon in FTAs, but the model Commonwealth FTA is a good opportunity to establish benchmarks for cooperation in this field with a view to developing global norms.

Chapter 21

Labour

The main objective of this chapter is to prevent the undercutting by producers in Commonwealth countries with relatively weaker labour standards leading to unfair competition. This can be achieved by requiring that parties do not lower their labour standards to attract trade or investment, known as a "non-regression" clause, common to many FTAs, and mentioned earlier. Parties are otherwise free to regulate labour as they see fit, subject to adhering to relevant international treaties.

More innovative labour provisions, such as the USMCA's requirement that certain percentages of goods be produced by workers earning above a certain wage threshold, should not be included in the model FTA as it is not clear that such practices will not unfairly disadvantage some Commonwealth countries where lower cost labour is a legitimate comparative advantage.

Chapter 22

Environment

As with the previous chapter, this chapter should reflect the parties' commitment to protect the environment, for example by not lowering environmental standards to attract trade or investment (non-regression or 'level playing field' clauses).

This chapter will regulate the capacity of parties to emit pollutants and toxic chemicals and will seek to protect endangered species. However, there should be no references to climate change whatsoever as this concept is un-definable and can lead to policies which are economically harmful as well as distortive to global markets. Furthermore, carbon border taxes, essentially tariffs on goods based on the levels of carbon emitted in their production, should be prohibited as these will raise the price of products, contributing to the rising cost of living throughout the world.

Chapter 23

Development

This chapter, found in some of the UK's new FTAs, acknowledges the importance of trade as a tool for economic growth and poverty reduction. It will contain provisions on Commonwealth-wide development activities, facilitating cooperation, sharing of best practice on technical assistance for developing countries and capacity building, along with impact monitoring. As noted earlier, there will be some variable commitments contained within the respective Commonwealth FTAs corresponding to the respective stages of development of the Commonwealth members.

Chapter 24

Trade and Gender Equality

Gender equality has been shown as one of the most efficient policy tools to promote economic development.[85] This chapter will enable the Commonwealth countries to work together to support women as business owners, innovators, and workers. It complements provisions advancing gender equality in the chapters on Labour, SMEs, Digital and Financial Services. The focus of this chapter must be maintaining equality of opportunities rather than setting targets or outcomes.

85 *See* Sonali Jain-Chandra, Kalpana Kochhar, Monique Newiak, Yang Yang, and Edda Zol, 'Gender Equality: Which Policies have the Biggest Bang for the Buck' *IMF Working Paper* (WP/18/105) (2018).

Chapter 25

Animal Welfare and Antimicrobial Resistance

This chapter commits parties to maintaining high levels of animal welfare protection. It also ensures that parties cooperate in combating antimicrobial resistance.

Chapter 26

Good Regulatory Practice

Many FTAs promote the use of good regulatory practices, but only a few mandate their use.[86] The model Commonwealth FTA should use 'best efforts' language to streamline and harmonize regulations while retaining flexibility. Divergence of regulations and regulatory practices between countries can increase costs and frustrate market integration. When the objectives of the regulation are similar, there should be scope to permit businesses to comply with only one set of standards.

Since a number of Commonwealth countries require governments to carry out impact assessments in conjunction with enacting regulations, this chapter could be problematic. Commonwealth FTAs must accordingly incentivize parties to use good regulatory practices such as impact assessments only when the costs of running them and waiting for the results are worthwhile.[87] As noted earlier, a stricter approach to the use of science in policymaking has been advocated by the OECD and is now featuring in FTAs.

The chapter should discourage promulgation of regulations that were developed in a non-transparent way, without sufficient input from stakeholders. It should establish a regulatory cooperation mechanism to promote mutual recognition of effectively equivalent regulations.

86 E.g., UK-Japan.

87 Margherita Melillo.

Chapter 27

Cooperation

This chapter establishes a committee overseeing areas of cooperation among the Commonwealth on matters such as environment, development, labour, and anti-corruption. It is noteworthy that the Commonwealth countries already cooperate on many of these areas for example through the biennial Commonwealth Heads of Government meeting and through organizations like the Commonwealth Secretariat. Should the Commonwealth Secretariat take over responsibility for monitoring the FTAs, it may be sensible to move it to India as some have suggested, to encourage greater involvement in this country in improving the economic development opportunities of Commonwealth members.[88]

88 Centre for Brexit Policy at 57.

Chapter 28

Transparency and Anti-Corruption

Many Commonwealth countries score low on corruption indices, particularly those in Africa.[89] This chapter requires all parties to the Commonwealth FTAs to promote transparency in government decision-making. It also encourages the participation of the private sector and civil society in this objective. The chapter further reaffirms parties' commitment to the international obligations to combat bribery and corruption.

This chapter could also include material on "Responsible Business Conduct" (formerly known as Corporate Social Responsibility). This would include provisions to encourage enterprises to uptake and implement RBC in their business practices informed by and existing global RBC standards such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.[90]

89 As measured by the Corruption Perception Index: https://www.transparency.org/en/cpi/2021 (only Singapore and New Zealand are in the top 10 least corrupt countries, with Mozambique, Nigeria, Cameroon and Uganda all in the bottom 40 out of 180 countries evaluated).

90 This forms part of the negotiating objectives of Canada in the currently negotiated Canada-UK FTA: "Canada's Objectives for Negotiations for a Canada-United Kingdom Free Trade Agreement" December, 2021.

Chapter 29

Administrative and Institutional Provisions

The effectiveness of the FTAs in liberalizing trade and investment among the Commonwealth will depend on how they are implemented by the parties. This chapter establishes additional bodies that can assist in resolving disputes before they escalate into formal legal claims, and by clarifying, adding or removing provisions. A Committee should therefore be set up for each FTA, comprised of Commonwealth party government officials and with a regular schedule for meetings and which monitors all of the FTAs.

The Commonwealth Secretariat could offer administrative support for this institution for each FTA. A new body within the Commonwealth Secretariat could be set up to promote trade and investment facilitation coupled with gradual liberalization, in the event that full liberalization commitments are not feasible for all members.[91] Training initiatives could feature as part of the FTA, for example in relation to improving the civil service.[92]

As Commonwealth-only agreements, the FTAs would not be open to accession by non-Commonwealth members. In that sense they would differ from other mega-regional agreements such as the CPTPP. It may be conceivable to grant other countries observer status, engaging in discussions with Commonwealth parties. This could facilitate other bilateral FTAs between Commonwealth members and third (non-Commonwealth) countries. Malta and Cyprus would be entitled special status as non-signatories of any FTA to which they had an interest, enabling them to participate in discussions on matters that fall outside EU-level competence, such as recognition of professional qualifications.

91 Centre for Brexit Policy at 57.

92 Centre for Brexit Policy at 57.

Chapter 30

Dispute Settlement

In order for the obligations contained in the Commonwealth FTAs to have a beneficial impact on trade liberalization, they must be binding and enforceable. The agreements must therefore include robust dispute settlement provisions. This chapter will establish that all of the obligations undertaken by the parties in the agreement are subject to dispute settlement. Dispute settlement will consist of neutral, expeditious, state-to-state arbitration along with a process for consultations, rules on tribunal composition and adjudication. It would apply to all chapters of the agreements. WTO dispute settlement would be expressly permitted in matters where there is jurisdictional overlap.

Chapter 31

General Provisions and Exceptions

General exceptions for non-trade concerns justifying departure from the FTAs' various obligations will be included using the language of GATT Article XX, as is common in most FTAs and for which there is a large body of caselaw (primarily WTO) providing a degree of clarity.

A narrow exception for essential security will also be included in this chapter. This will help avoid the risk that national security will be used as an excuse for trade protectionism, as has become commonplace in recent years. Importantly, the essential security exception will not be framed using 'self-judging' language, meaning that an objective case (redacted as needed for security purposes) must be made by any party seeking to use essential security as a justification for a trade barrier. This requires a high degree of mutual trust among Commonwealth parties – but given the shared cultural and historic ties this should be feasible.

Chapter 32

Final Provisions

This chapter contains provisions related to the application, amendment, and termination of the FTAs as well as their entry into force. In the event that a party to the FTA fails to make full commitments, for example in relation to zero tariffs or non-discrimination for services, a renegotiation clause should be inserted in the treaty. Renegotiation clauses are common for FTA parties which need more time to fully liberalize their markets.[93] A partial renegotiation clause could be used in the event that complete liberalization in the near future is unlikely. Such a clause does not have a specific agenda or schedule for renegotiation, imposing 'best efforts' obligations to return to negotiations to address any gaps at some point in the future. Alternatively, if the parties are more willing, a full renegotiation clause, specifying a schedule along with an all-party committee and an agenda could be used. If so, a five-year period to complete the renegotiation is advised.

93 Tae Jung Park, *Incomplete Investment Contracts* (Elgar, 2021) at 124.

Conclusion

Enhancing trade among the Commonwealth is a worthwhile goal that could engender significant economic gains and prosperity for the UK and the other 53 members of the Commonwealth family, founded on a shared history and culture as well as commitment to rule of law and conviction in the benefits of free enterprise and competition in international markets.

This report has presented, at a general level, the key features of a model Commonwealth FTA which can be used as a baseline to build upon specific FTAs pursued bilaterally between Commonwealth members or to form the basis of an agreement to which a larger number of Commonwealth countries could accede. The report drew attention to common areas of trade/investment policy which should be duplicated, as far as possible, across the breadth of the Commonwealth. It also briefly highlighted some of the areas which may prove to be contentious, necessitating a network of FTAs with variable commitments, either adding to, or pulling back from, the model agreement discussed herein.

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