

Chapter 2

Post-Nairobi: Perspectives on Potential New Issues in the World Trade Organization

*Rashid S. Kaukab**

2.1 Background and context

The 10th World Trade Organization (WTO) Ministerial Conference, held in Nairobi, Kenya, on 15–19 December 2015, adopted a far-reaching ministerial declaration to guide the work of the organisation in the coming years. The last paragraph of this declaration created the possibility of bringing so-called ‘new issues’ to the WTO. This paragraph states, ‘[w]hile we concur that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation; others do not. Any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members’ (WTO, 2015, para. 34).

This is clearly not a mandate to negotiate, which can be granted only through an agreement/consensus among all members. Moreover, there is no mention or details of the ‘other issues’, or of how and when these can be identified and discussed. Nevertheless, and keeping in mind the rather long history of efforts to bring new issues to the WTO, there is an urgent need to objectively examine some of the potential ‘new issues’, with a view to developing a better understanding of them among the Commonwealth developing countries, particularly least developed countries (LDCs), small states and Sub-Saharan African countries. This will assist them in identifying their own interests and concerns regarding these issues and, hence, enable their better-informed and more active participation in various informal discussions. This chapter is geared towards meeting this need.

After briefly discussing some general contextual and background points about the new issues here, in the remainder of this introduction, Section 2.2 provides a brief but comprehensive analysis of several new issues. Finally, Section 2.3 offers some reflections and recommendations for the consideration of Commonwealth developing countries, in particular LDCs, small states and Sub-Saharan African countries.

Several important contextual points must be borne in mind when discussing potential new issues in the WTO. First, and perhaps the most important and interesting point, there is no clear and agreed definition of a ‘new issue’. A working understanding implies that a new issue is one without any existing WTO disciplines. However, this can be inadequate because there are provisions in many existing WTO agreements regarding most of the so-called new issues, for example provisions related to investment in the Agreement on Trade-Related Investment Measures (the TRIMs Agreement) and the General Agreement on Trade in Services (GATS), and those related to competition in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS

Agreement) and GATS. Therefore, the intention of the proponents of the new issues may be either (i) to supplement the existing WTO provisions on that issue; or (ii) to negotiate a dedicated, separate WTO agreement on that issue. Taken in this broad sense, a 'new issue' can be any issue that is not completely and/or distinctly covered under the existing WTO agreements. This broad understanding certainly enlarges the set of potential new issues, which leads us to the second contextual point below.

The broad understanding as described above would mean—at least theoretically—that any issue that is not fully and/or distinctly covered under the existing WTO agreements could be brought in as a 'new issue'. This will be problematic for at least two reasons. First, if the issue is already covered, but only partially, a better approach would be to build on this through the existing mandates for reviews and negotiations. Second, and more importantly, not every issue—no matter how new—can and should be addressed by the WTO. This condition has led to the general understanding that a new issue must be trade-related to be eligible to be proposed at the WTO. Although necessary and useful, this condition is not sufficiently robust, particularly in view of the growing flow of goods and services within and across borders, the emergence and expansion of regional and global value chains and links between various public policies and public policy instruments. In an increasingly interconnected and globalised world, any issue, whether economic, social or environmental, can have trade implications. However, this does not necessarily mean it should be addressed by the WTO, and competence to deal with it may lie with another international organisation or forum.¹ As a result, it has been extremely difficult to reach a consensus among all members on the 'trade-relatedness' of a 'new issue' and to bring it to the WTO. Third, the WTO debate around new issues has often been predicated on North–South (or the developing vs. developed country) lines.²

Although developed countries have generally proposed the new issues (based on the needs and demands of their businesses) to be discussed by the WTO, developing countries have generally opposed such efforts. There are several reasons for this general opposition of developing countries to the introduction of new issues in the WTO. First, their primary interest and emphasis has been on the full and faithful implementation of the Uruguay Round Agreements, and then on the conclusion of the Doha Round negotiations.

Second, they often lack the human, technical and institutional capacities to fully understand and effectively engage on a large number of issues. In many cases, their knowledge and understanding of the new issues may be limited.

Third, given the mercantile nature of the WTO and the fact that the proponents of new issues often happen to be developed countries, developing countries seem to fear that developed countries will accrue the main benefits emerging from agreements on new issues, while they will be left with less policy space, as well as the implementation burden of new commitments that can be enforced against them through the binding dispute settlement system.

Fourth, a look at the history of efforts to bring new issues to the WTO shows that these started as early as 1996, when the first WTO Ministerial Conference, held

in Singapore, established working groups on the four so-called Singapore Issues.³ E-commerce was brought into the work programme at the second WTO Ministerial Conference, held in Geneva in 1998. The fourth WTO Ministerial Conference in 2001, while launching the Doha Round, established Working Groups on Trade and Transfer of Technology (WGTTT), and Trade, Debt and Finance.⁴ None of these efforts led to the actual negotiation and conclusion of agreements, despite the attempts of their respective proponents, except for one, mentioned below. In fact, given strong opposition by developing countries, three of the four Singapore Issues (Relationship between Trade and Investment, Inter-Relationship between Trade and Competition Policy, and Transparency in Government Procurement) were dropped from the WTO agenda after the fifth WTO Ministerial Conference, held in Cancún in 2003.⁵

Fifth, and finally, although efforts to bring the new issues to the WTO have generally failed, at least one new issue has been successfully brought in and concluded at the WTO—namely, the WTO Trade Facilitation Agreement (TFA), which was concluded at the ninth WTO Ministerial Conference in 2013 and which entered into force on 22 February 2017. It is beyond the scope of this paper to discuss in full the reasons for this success. However, some key insights that can be offered in this regard include the clear relationship of the issue with trade; the perception of benefits to all; and the structure of the agreement, including the nature of special and differential treatment (S&DT) provisions in it, which link the assumption and implementation of obligations to national capacities and the provision of required assistance by developed countries. The lessons from this success, as well as from the failure in respect of many other new issues, should be kept in mind while dealing with potential new issues in the post-Nairobi scenario.

2.2 Potential new issues: Evolution and analysis

In the context of the points made in Section 2.1, this section provides a brief analysis of five ‘new issues’. These have been, or are, part of the WTO work programme, although they have not undergone any actual negotiations. These issues are trade and competition; trade and investment; transparency in government procurement; e-commerce; and trade and the transfer of technology. The ensuing sections give a brief account of their introduction and history in the WTO and identify key points of discussion among members, as well as points of particular interest to Commonwealth developing countries, especially LDCs, small states and Sub-Saharan African countries. Where relevant, they also include the latest developments on these issues outside the WTO, for example under the Trans-Pacific Partnership (TPP).

2.2.1 Trade and competition

History and key discussion points in the World Trade Organization

Competition has been discussed repeatedly in the context of trade. Non-discrimination and market access form the bedrock of the General Agreement on Tariffs and Trade (GATT), which aims to ensure a free and competitive market. A similar commitment

is seen in the GATS. The TRIPS Agreement allows Member States to take appropriate actions to prevent the abuse of intellectual property rights (IPR) that unreasonably restrain trade (e.g. anticompetitive licensing).

As a result of the WTO Ministerial Conference in Singapore (1996), the Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established to study various aspects of this issue, with the participation of all WTO members. The WGTCP studied and discussed issues concerning trade and competition from 1996 to 2004, including:

- i. The relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy, and their relationship with development and economic growth;
- ii. Stock-taking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their application:
 - National competition policies, laws and instruments as they relate to trade;
 - Existing WTO provisions, bilateral/regional, plurilateral and multilateral agreements and initiatives;
- iii. Interaction between trade and competition policy:
 - The impact of anticompetitive practices of enterprises and associations on international trade;
 - The impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
 - The relationship between the trade-related aspects of IPR and competition policy;
 - The relationship between investment and competition policy;
 - The impact of trade policy on competition.

There were in-depth discussions in the WGTCP on many themes, and the following may be particularly relevant to Commonwealth developing countries:

Special needs and circumstances of developing countries

The view was expressed that an important feature of any multilateral framework in the area of competition law and policy would be its adaptation to the differing levels of development among members. It was important to take into consideration their different economic realities and degrees of economic development; their different cultural and social dynamics; the differences in resource endowments (i.e. taking note that certain applications of competition policy required more human and material resources); and the different degrees of institutional development present in Member States. In particular, any discussion pertaining to multilateral rules on competition

must take into consideration the different capacities and levels of sophistication of the developing countries.

Possible elements for a World Trade Organization framework on competition policy

It was suggested that the focus of this reform be to link WTO rules to the broad competition principles of open markets, non-discriminatory conditions of competition and consumer welfare. Along with the implementation of this approach, due attention needed to be given to governmental restraints, such as trade measures that restrict import and export competition, and exemptions from competition rules such as those concerning export cartels.

A number of further suggestions were made regarding implementation of a WTO framework on competition policy. First, it was suggested that transitional arrangements be an integral element of a multilateral framework. A second suggestion was to prioritise the anti-competitive practices that should be banned. A third was to examine the appropriateness of exemptions systems, particularly in terms of any adverse effects on economic development. A fourth was to study further whether or not competition law was a necessity, in particular whether or not there were ways in which to render markets competitive without resorting to a competition law. Fifth, it was desirable to conduct regular reviews of competition policy, including the handling of individual cases by members. Sixth, it was suggested that a technical co-operation and competition advocacy support system be created within the WTO.

Important recent developments outside the World Trade Organization

The TPP contains a specific chapter on competition policy,⁶ under which TPP members agree to adopt or maintain national competition laws that proscribe anticompetitive business conduct. To ensure such laws are effectively implemented, TPP parties will establish or maintain authorities responsible for the enforcement of national competition laws. The agreement limits the scope of competition policy to consumer protection, procedural fairness (with respect to laws of host countries), private rights of action, cooperation among competition authorities of Member States and transparency obligations.

The Transatlantic Trade and Investment Partnership (TTIP) between the USA and the EU is still under negotiation, and the final draft of the chapter on competition is not yet publicly available. However, the USA has indicated its interest in ensuring a sound and effective enforcement of competition for the efficient operation of markets and trade between the two trading blocs (Office of the US Trade Representative, 2014). Both parties also want disciplines on state-owned enterprises. The EU has released a draft of its textual proposal that indicates the level of coverage that it desires. It calls for a domestic competition law framework that addresses horizontal and vertical arrangements, the abuse of dominant positions and economic concentration. Furthermore, it calls for the effective implementation of laws, disciplines on state-owned enterprises and mutual cooperation between the competition authorities of both parties.

2.2.2 Trade and investment

History and key discussion points in the World Trade Organization

The Havana Charter for an International Trade Organization (Interim Commission for the International Trade Organization, 1948), which was never ratified, contained provisions on the treatment of foreign investment as part of a chapter on economic development. Article 12 acknowledged that investment was valuable in promoting economic development and reconstruction and that members shall strive to 'provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments, and to give due regard to the desirability of avoiding discrimination as between foreign investments'. It also recognised a member's right to regulate investment in line with its domestic policies.

Two existing WTO agreements contain important provisions related to investment. The TRIMs Agreement recognises that certain investment measures can restrict and distort trade. It states that WTO members may not apply any measure that discriminates against foreign products or that leads to quantitative restriction, and provides an illustrative list of prohibited TRIMs, such as local content requirements. Owing to strong disagreement among Member States during the Uruguay Round, the TRIMs Agreement does not impose any new disciplines or commitments relating to investments. The GATS governs rules relating to trade in services and describes four modes by means of which services may be rendered. One of these modes (commercial presence) deals with investment by foreign service suppliers and covers rules on general obligations, disciplines and individual commitments on market access.

As a result of the WTO Ministerial Conference in Singapore (1996), the Working Group on the Relationship between Trade and Investment (WGTI) was established to study various aspects of this issue, with the participation of all WTO members.

Under the Doha Ministerial Declaration (2001), the WGTI was mandated to clarify the scope and definition of the following issues: transparency; non-discrimination; means of preparing negotiated commitments; development provisions, exceptions and balance-of-payments safeguards; consultation; and dispute settlement (WTO, 2001: paras 20–22). A summary of some important points discussed from the perspective of Commonwealth developing countries is provided below.

Definitions of investment and investors

The definition of investment and investors was debated and discussed in great detail within the WGTI, and different approaches were highlighted. There was considerable difference of opinion among Member States on whether the Doha mandate⁷ prescribed a 'narrow' or 'broad' approach to defining investment. The narrow view supported limiting the definition to foreign direct investment (FDI) alone (sometimes also referred to as an 'enterprise-based' definition). The supporters of the 'broad' definition argued that the Doha ministerial mandate, while emphasising FDI, did not exclude the possibility of including other categories of investment. It was felt that a broad, asset-based definition of investment, covering both FDI and portfolio investment, would provide comprehensive, rules-based protection and guarantee high standards

of treatment for all categories of foreign investment. Supporters of a hybrid approach advocated the use of a narrow definition covering FDI in the pre-establishment phase only, and a broad, all-encompassing definition in the post-establishment phase.

Foreign direct investment and competition

The WGTI recognised that a liberal FDI regime could increase competition in the market and that a well-functioning competition policy could help remove obstacles to inward FDI resulting from the behaviour of incumbents. Therefore, a well-functioning competition policy could contribute towards providing an attractive legal framework for foreign investors and could enhance the benefits of inward FDI.

Transparency

Many Member States underlined in their submissions to the WGTI the importance of transparency for creating a predictable, stable and secure climate for foreign investment. The focus of discussion was not primarily on the benefits of transparency, but rather on the nature and depth of transparency provisions and the scope of their application. Member States recognised that transparency within the context of international commercial treaties involved two core requirements: (i) to make information on relevant laws, regulations and other policies publicly available; and (ii) to notify interested parties of relevant laws and regulations and any changes made to such laws. However, there was a difference of opinion on whether or not transparency also involved obligations to ensure laws and regulations were administered in a uniform, impartial and reasonable manner.

Some possible transparency obligations may include publication and notification requirements; enquiry points; prior notification; administrative and judicial procedures; investor and home country obligations; and confidentiality.

Non-discrimination

A distinction was drawn between the application of non-discrimination and national treatment, in particular at the pre- and post-establishment phases of investment. Many Member States agreed that the standards of non-discrimination should apply to investors and investments in the post-establishment period only, whereas the host country should have the right to regulate incoming investments, and that, therefore, pre-establishment commitments should be part of a multilateral agreement.

Balancing the benefits and costs

Developing countries acknowledged the importance of foreign investment for their sustainable development, including through the transfer of capital, technology and managerial know-how. Most developing countries were interested in attracting foreign investment through FDI and had undertaken many actions nationally to promote and protect foreign investment. However, they were not convinced that an investment agreement in the WTO would increase the flow of investment to them. They feared such an agreement would give more rights and privileges to foreign investors, including through dispute settlement.

Important recent developments outside the World Trade Organization⁸

In view of the importance of the definitions of investment and investors, as they effectively determine the coverage of obligations, it is useful to look at the definitions being adopted more recently in agreements/negotiations outside the WTO.

The TPP defines investment as⁹:

Every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- a. an enterprise;
- b. shares, stock and other forms of equity participation in an enterprise;
- c. bonds, debentures, other debt instruments and loans;
- d. futures, options and other derivatives;
- e. turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- f. intellectual property rights;
- g. licences, authorisations, permits and similar rights conferred pursuant to the Party's law; and
- h. other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges,

but investment does not mean an order or judgment entered in a judicial or administrative action.

Under TTIP negotiations, the EU has released a draft of its textual proposal that indicates its desired coverage (EU, 2015):

Investment means every kind of asset which has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- a. an enterprise;
- b. shares, stocks and other forms of equity participation in an enterprise;
- c. bonds, debentures and other debt instruments of an enterprise;
- d. a loan to an enterprise;
- e. any other kinds of interest in an enterprise;
- f. an interest arising from:
 - i. a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources,

- ii. a turnkey, construction, production, or revenue-sharing contract, or
- iii. other similar contracts;
- g. intellectual property rights;
- h. any other moveable property, tangible or intangible, or immovable property and related rights;
- i. claims to money or claims to performance under a contract. (For greater certainty, 'claims to money' does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, domestic financing of such contracts, or any related order, judgment, or arbitral award.)

Returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments.

However, in January 2016, India released its model Bilateral Investment Treaty (BIT), which adopts a narrower enterprise-based definition:¹⁰

Investment means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made. An enterprise may possess the following assets:

- a. shares, stocks and other forms of equity instruments of the enterprise or in another enterprise;
- b. a debt instrument or security of another enterprise;
- c. a loan to another enterprise
 - i. where the enterprise is an affiliate of the investor, or
 - ii. where the original maturity of the loan is at least three years;
- d. licenses, permits, authorisations or similar rights conferred in accordance with the law of a Party;
- e. rights conferred by contracts of a long-term nature such as those to cultivate, extract or exploit natural resources in accordance with the law of a Party, or
- f. Copyrights, know-how and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of a Party; and
- g. moveable or immovable property and related rights;

- h. any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value.

For greater clarity, investment does not include the following assets of an enterprise:

- i. portfolio investments of the enterprise or in another enterprise;
- ii. debt securities issued by a government or government-owned or controlled enterprise, or loans to a government or government-owned or controlled enterprise;
- iii. any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the enterprise incurred before the commencement of substantial business operations of the enterprise in the territory of the Party where the investment is made;
- iv. claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party;
- v. goodwill, brand value, market share or similar intangible rights;
- vi. claims to money that arise solely from the extension of credit in connection with any commercial transaction;
- vii. an order or judgment sought or entered in any judicial, administrative or arbitral proceeding;
- viii. any other claims to money that do not involve the kind of interests or operations set out in the definition of investment in this Treaty.

2.2.3 Transparency in government procurement

History and key discussion points in the World Trade Organization

The GATT's Article III:8(a) excludes government procurement from national treatment commitments (GATT, 1994: Annex 1a). However, it defines the scope of exclusion. Government procurement is described as 'procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale'. The GATS gives an identical description while excluding the procurement of services from commitments under the agreement as 'procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale' (GATT, 1994: Annex 1b).

Government procurement has been an important area of work within the WTO, and Member States have worked on it on three fronts, as outlined below.

Plurilateral agreement on government procurement

The WTO Agreement on Government Procurement (GPA) was negotiated to ensure open, fair and transparent conditions of competition in government procurement.

Given that it is a plurilateral agreement, not all WTO members are parties to it. The first agreement (called the Tokyo Round Code on Government Procurement) and its amendment were negotiated as part of the Tokyo Round, and extended discussions under the Uruguay Round led to the GPA of 1994. Continued discussions for improving the government procurement regime led to the adoption of the Revised Agreement on Government Procurement 2012.

The GPA establishes rules that require open, fair and transparent conditions of competition in government procurement. However, these rules do not automatically apply to all the procurement activities of each party. Rather, disciplines apply according only to the commitments made by each member in its commitment schedule.¹¹

GPA 1994 and 2012 extend to both goods and services. They require Member States to extend most-favoured nation and national treatment benefits and to contain disciplines on transparency.

General Agreement on Trade in Services Negotiations on Government Procurement¹²

The GATS excludes government procurement in services from market access commitments. However, it does establish a multilateral mandate for negotiating the procurement of services. Negotiations have been ongoing under the Council for Trade in Services. There remains a significant difference of opinion among Member States on the scope and mandate for the negotiations.

Some members take the view that negotiations under this mandate can involve market access and non-discrimination as well as transparency and other procedural issues. Other members believe the mandate excludes most-favoured nation treatment, market access and national treatment from the scope of the mandated negotiations.

Working Group on Transparency in Government Procurement

The Singapore Ministerial Conference of 1996 set up the multilateral Working Group on Transparency in Government Procurement (WGTGP) to conduct a study on transparency in government procurement practices, taking into account national policies and, on that basis, to develop elements suitable for inclusion in an appropriate agreement.¹³ The Doha Ministerial Conference recognised the need for a multilateral agreement on transparency in government procurement and for enhanced capacity-building/technical assistance to developing countries and LDCs (WTO, 2001: para. 26). Like the working groups on Trade and Competition and Trade and Investment, the WGTGP carried out its work from 1997 to 2004.

The WGTGP discussed many issues, broadly covering the following themes:

- The definition of government procurement and the scope and coverage of a potential agreement;
- The substantive elements of a potential agreement on transparency in government procurement, including various aspects of access to general and specific procurement-related information and procedural matters;

- Compliance mechanisms of a potential agreement; and
- Issues relating to developing countries, including the role of S&DT, as well as technical assistance and capacity-building.

A summary of the discussion of some important points from the perspective of Commonwealth developing countries is as follows (WTO, 2002: 3–5):

Definitions

One view was that existing definitions under Article III:8 of the GATT and Article XIII:2 of the GATS could be used for a potential future multilateral agreement. Another view propounded that such a definition may not be sufficient or clear, particularly since ‘governmental purposes’ was itself a vague term.

Treatment of contractual arrangements by government entities

The main issue that arose with regard to this matter was the extent to which concessions and build–operate–transfer (BOT) contracts should be covered and, if covered, how they should be defined. Member States had a difference of opinion on this issue. Some felt that BOT contracts and concessions should not be covered, while others expressed the view that BOT contracts and at least some types of ‘concessions’ should be considered government procurement, especially given that in many countries the private sector has been increasingly involved in rendering goods and services that were traditionally handled exclusively by governments.

Application to levels of government entities

Three different approaches were offered. First, entities at all levels of government, including at sub-central levels, should be covered. Second, central government entities and entities at the highest level of sub-central government should be covered. Third, only central/federal government entities should be covered. Another important area of discussion under this theme pertained to procurement by state enterprises and whether or not such procurements should be covered under ‘government procurement’.

Application to procurement of services

Some Member States suggested that the issue of procurement of services should be discussed and decided under the GATS framework. Others expressed the view that there was little or no difference in the procurement of goods and services and that, therefore, both should be covered.

Application thresholds

The main issue related to whether or not the use of threshold values might avoid an unnecessary burden resulting from a transparency agreement. Many members opined that there should be a minimum threshold below which transparency obligations would not apply, and that there should be different limits for developing countries.

Application to procurement not open to foreign competition

It was the view of some that information on contracts that are not open to foreign entities was not a legitimate concern for an international agreement and, therefore,

should not be covered. Another view advocated the need to also cover such contracts, since foreign suppliers have an interest in clear information indicating that certain contracts are not open to them.

Provisions for exceptions

There was a discussion on including a general exceptions list, as contained in the GATT and GATS, which would be exempt from transparency obligations. Some Member States believed that, given the limited scope of such an agreement, general exceptions were not required. Furthermore, some suggested that exceptions should be envisaged to respond to social and developmental objectives, including procurement for public distribution systems and stabilisation programmes for essential commodities. Others argued that such goals did not conflict with the aim of achieving transparency.

Important recent developments outside the World Trade Organization

The TPP¹⁴ subjects government procurement to core commitments on national treatment and most-favoured nations. The chapter on government procurement applies to all measures concerning ‘covered procurement’, which is defined as a good or service or their combination specified in each member’s schedule by ‘any contractual means, including purchase; rental or lease, with or without an option to buy; BOT contracts; and public works concessions contracts’ above a specified threshold value by a procuring entity.¹⁵

The EU has not yet published the proposal that it submitted to the USA on government procurement under TTIP negotiations. The summary factsheet on government procurement highlights the importance of market access commitments on procurement; however, it does not detail the scope of the chapter.¹⁶

However, the recently completed text of the Comprehensive Economic and Trade Agreement between the EU and Canada is a good reference point from which to understand the EU’s comfort level. It extends the obligations on procurement to all covered procurements. In article 19.2, ‘[c]overed procurement’ covers both goods and services that are ‘not procured with a view to commercial sale or resale, or for use in the contractual means, including: purchase; lease; and rental or hire purchase, with or without an option to buy’ above a specified threshold limit by a procuring entity.

2.2.4 E-commerce and digital trade

History and key discussion points in the World Trade Organization

At the WTO’s Second Ministerial Conference in Geneva in 1998, a Declaration on Global Electronic Commerce was adopted. The Declaration called for the establishment of a work programme ‘to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members.’ Member States also affirmed that they would continue not to impose customs duties on electronic transmissions.

In September 1998, the General Council adopted the Work Programme on Electronic Commerce with a mandate to examine all trade-related issues relating to

global e-commerce and to propose any recommendations for action. Furthermore, four WTO bodies were mandated to continue the task of the work programme by exploring existing links between WTO agreements and e-commerce. The Council for Trade in Services was instructed to examine the treatment of e-commerce within the GATS; the Council for Trade in Goods was instructed to study the treatment of e-commerce in the GATT; the Council for TRIPS was mandated to examine IPR issues pertaining to e-commerce; and the Committee on Trade and Development was required to report on the development implications of e-commerce. The WTO General Council was mandated to, and continues to, keep the work programme under continuous review.

For the purposes of the work programme, e-commerce was understood to mean 'the production, distribution, marketing, sale or delivery of goods and services by electronic means'. The work programme covers all issues related to trade arising from global e-commerce, including enhancing internet connectivity and access to information and telecommunications technologies and public internet sites, the growth of mobile commerce, electronically delivered software, cloud computing, the protection of confidential data, privacy and consumer protection. The work programme also explores the economic development opportunities afforded by e-commerce for developing countries, particularly LDCs.

Over the years a number of topics have been discussed, some of which are highlighted below:

- Protection of personal information, privacy and development of e-commerce;
- Rules supporting innovative advances in computer application and platforms;
- Enhancing internet connectivity and mobile telephones;
- Electronically delivered software;
- Cloud computing;
- Consumer protection;
- Access to e-commerce by micro, small and medium-sized enterprises;
- Trade treatment of electronically delivered software;
- Jurisdiction and rules for applicable law to govern e-commerce;
- Classification of the content of certain electronic transmission.

Below is a summary of some important points addressed in the discussion.

Classification of digitised products

There was a considerable amount of discussion on the classification of digitised products and how this would fit within the WTO rules. The Harmonised System, upon which GATT concessions are negotiated, covers only goods that have physical characteristics, and it is not possible to fit electronic transmissions within the existing nomenclature. Furthermore, the need for a concrete definition of 'digitised product'

was mooted. Members were not sure if the coverage would include such different things as architectural designs, health check reports and fashion design, etc., which may be vague. Members also discussed the fact that there was likely to be overlap and confusion between application of the GATT and GATS to digitised products.

For example, such confusion could have related to software that could be either downloaded or delivered on a disk by means of cross-border post after an order was placed. The two transactions might be exactly the same, and it is simply the customer's choice as to how the software is supplied. Here, there may be inconsistencies between the commitments under the GATS and those under the GATT if the software were to be delivered physically. In this case, it would be not only the GATT that applied, but both the GATT and the GATS, because the GATS would apply to the distribution transaction and the GATT to the physical product. Many members thus believed that analysis of the scope called for its classification as a cross-cutting issue and should be further explored.

Fiscal implications

Some members were interested in finding out more about the application of internal taxes or other charges to e-commerce by different countries. Diverging views were expressed on the actual impact of e-commerce with regard to revenue losses for developing countries.

Imposition of customs duties on electronic transmissions

It is worth noting that the moratorium on the imposition of customs duties on electronic transmissions continues. At the WTO's 10th Ministerial Conference in Nairobi in December 2015, a decision was taken that Member States would not impose any customs duties on electronic transmissions until the next meeting in 2017.

Development-related issues

Many members voiced a concern that the benefits of e-commerce may not automatically flow to developing countries, despite this being an important tool of growth for them. As such, technical assistance alone may not be sufficient. Measures would have to be taken regarding access to basic infrastructure and technology, investment, market access, human resources and education.

Major recent developments outside the World Trade Organization

TPP's e-commerce chapter includes commitments ensuring that companies and consumers can access and move data freely (subject to safeguards), which will help ensure the free flow of global information and data. It also includes commitments on market access and national treatment and other measures to help prevent unreasonable restrictions, such as the arbitrary blocking of websites.

According to the definitions in the TPP, a digital product means a computer programme, text, video, image, sound recording or other product that is digitally

encoded, produced for commercial sale or distribution, and can be transmitted electronically. Electronic transmission or transmitted electronically means a transmission made using any electromagnetic means, including photonic means.

The EU has made available a draft proposal that it has submitted to the USA under the TTIP negotiations. The chapter on e-commerce applies to telecommunications and other information and communication technologies. It does not apply to gambling services, broadcasting services, audio-visual services, services of notaries or equivalent professions and legal representation services. The chapter on cross-border services deals with such issues (except audio-visual services).

Electronic transmission shall not be subject to any customs duties, and the chapter highlights the need for cooperation, the conclusion of contracts electronically and marketing communications. The chapter on the cross-border supply of services deals with market access, national treatment and most-favoured nation obligations. However, none of the provisions in the draft defines the items covered under e-commerce.

2.2.5 Trade and transfer of technology

There are a number of provisions in the WTO agreements that call for the transfer of technology between developed and developing countries.

The GATS recognises that increasing the participation of developing countries in world trade in services needs to be facilitated. This requires strengthening the capacity and competitiveness of their services sectors, *inter alia*, through access to technology on a commercial basis. The GATS also contains an obligation in Article IV paragraph 2, which encourages ‘developed countries to establish contact points to facilitate the access of developing country members’ service suppliers to information related to their respective markets concerning the availability of services technology’.

The TRIPS Agreement contains standards that affect the transfer of technology, and a number of provisions relate directly to the transfer of technology. The stated objectives of the agreement include that the ‘protection and enforcement of IPR should contribute to the promotion of technological innovation and to the transfer and dissemination of technology’. Similarly, Article 8 states that members may adopt measures to promote technological development provided that these are consistent with the provisions of the TRIPS Agreement. The TRIPS Agreement also stipulates that ‘developed-country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base’.

Under Article 9 of the WTO Agreement on Sanitary and Phytosanitary Measures, Member States agree to help developing countries with technical assistance, including in the areas of ‘processing technologies, research, and infrastructure’. In a similar vein, the Agreement on Technical Barriers to Trade recognises ‘the contribution which international standardization can make to the transfer of technology from developed to developing countries’.

However, many countries raised the issue that there were no guidelines to facilitate the transfer of technology and questioned how the transfer should take place and what specific measures could be taken within the WTO. As a result, in 2001 the Doha Ministerial Declaration called for the establishment of a working group to examine the relationship between trade and the transfer of technology and to prescribe any recommendations that may be taken within the mandate of the WTO to increase the flow of technology to developing countries.

The WGT'TT's work programme has largely comprised the following issues:

- An analysis of the relationship between trade and the transfer of technology;
- Work by other international intergovernmental organisations and academia;
- Sharing of country experiences;
- The identification of provisions related to the transfer of technology in the WTO agreements;
- Any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries.

Some important points discussed in the WGT'TT include the following:

Definitional issues

Members expressed two different views on the definitional aspect of technology and its transfer. One group of countries (including the EU, Japan and Canada) argued in favour of a broad and inclusive definition of technology transfer. They felt a narrow definition of technology transfer would risk excluding relevant factors and processes that hinder developing countries in their efforts to make use of the opportunities that access to and use of technology offer. They felt that a definition should be inclusive and, *inter alia*, comprise the processes and factors relating to access to and use of technology.

The other group, comprising countries including India, Pakistan, Brazil, Cuba and Egypt, argued that the WGT'TT should avoid duplication and extract the benefits from a large body of available literature on this aspect. In their view, getting caught up in the definitional aspect would only shift its focus from the core issues.

Enabling environment

An important issue has been the vital role of domestic policies and frameworks in the generation, transfer and diffusion of technology. There is general recognition that the development of human capital, infrastructure, legal frameworks, macroeconomic conditions, levels of indigenous skills of workers and the domestic education system are key elements in creating a suitable enabling environment for the flow and diffusion of technology. Some members also emphasised the importance of a country's absorptive capacity in this regard, which depends on, among other things, the level and nature of the domestic education system in attracting technology from abroad.

Roles of home and host countries

Members considered the roles of both home and host countries to be important factors in facilitating the transfer of technology. Some believed the role policies could have in promoting greater flows of technology transfer could be established by considering both international technology transfer and the diffusion of technology within a country, once it had been transferred. Others emphasised the importance of examining the reasons why developing countries faced structural problems in acquiring technology from abroad and considering ways in which the international community could change that situation.

Furthermore, many developed countries argued that the regulatory framework and other supportive measures in the host country to attract technology were of crucial significance in creating an enabling environment. However, many developing countries believed that home country measures, including financing for the transfer of technology, incentives to stimulate FDIs with a technology of transfer component, incentives for small and medium-sized enterprises seeking partners in developing countries, simplification of rules of origin and the establishment of a database to ensure the flow of all relevant information on technology, were much more important in facilitating technology transfer.

Role of intellectual property rights

The discussions suggest that, although the empirical evidence on the subject is mixed, an appropriate IPR regime could have a role in technology transfer as an inducement to direct investment, as a stimulus to innovation and as a source of inexpensive technological know-how. However, views have also been expressed that one cannot be the precondition for the other. A number of members have stated that it is only after a developing country has acquired sufficient national scientific and technological capacity that the protection of intellectual property becomes an important element in the transfer of technology.

Role of foreign direct investment

There has been a difference of opinion among members on the role of FDI and the transfer of technology. Some members observed that technology transfer was often most successful when accomplished by means of FDI. They believed that the pre-establishment assessment and long-term commitment of foreign direct investors increased the likelihood that transferred technology would be adapted to local needs and made suitable for the local production environment. However, other members (particularly the developing countries) felt that, although FDI could result in the transfer of technology, its importance in that regard had been overstated. They have been sceptical about FDI providing a solution to the problem of technology transfer in much of the developing world, especially given that FDI in many cases has resulted in the transfer of only low levels of technology.

Transfer of technology and World Trade Organization agreements

The Working Group engaged in preliminary discussions on some of the existing WTO agreements that contain technology-related clauses that might have an impact

on facilitating the flow of technology to developing countries. Members recognised that most of the WTO provisions related to technology transfer were of a ‘best endeavour’ nature, rather than binding obligations, and believed they should be made operational so they could actually facilitate the transfer of technology to developing countries. Others argued that the provisions were underpinned by several priorities, such as integrating countries into world trade, protecting IPR, increasing the flow of investment and promoting sustainable development. They noted that some of these provisions identified technical assistance, training, the provision of information and other forms of developmental cooperation as the principal means of promoting the transfer of technology. These members were also not willing to introduce any element of negotiation into the Working Group and believed it was not the appropriate forum in which to review implementation of the WTO agreements.

Role of technical assistance

Members acknowledged that technological capacity-building in developing countries could have an important role in the transfer of technology. Some believed that, as production became increasingly knowledge and technology-intensive, issues of technology transfer and technological capacity-building in developing countries would become even more important for achieving sustained growth and development. They felt enhancing the effectiveness of the relevant WTO instruments for the transfer of technology and capacity-building in developing countries would be important. At the same time, they argued the WTO was not geared to support initiatives that would help developing countries attract foreign technology.

2.3 Ways forward: Some reflections and recommendations

The information and points presented in the previous two sections of this paper highlight several insights relevant to the discussion of potential new issues in the post-Nairobi period. First, many of the new issues are not really ‘new’ to the WTO. There are provisions in several existing WTO agreements that deal with some aspects of these. Moreover, wide-ranging discussions have taken place among members on many of these issues, and a body of relevant information and analysis exists in WTO Reports and WTO Secretariat Notes.

Second, and as a very important caveat to the first point, the views and perspectives of members continue to diverge. This divergence is related not only to whether or not to negotiate on the issue but also, perhaps even more importantly, to definitions, possible coverage, extent of possible obligations, special treatment for developing countries and application of WTO dispute settlement, among other things. Third, and unsurprisingly, these differences and divergences are often predicated on developed vs. developing country lines.

Fourth, definitional challenges abound for all the issues. There may be many reasons for this. Technical clarity and legal specifications are always difficult when dealing with emerging and complex phenomena. The definitions also determine the scope, and hence shape the extent, of ultimate obligations. In this sense, definitions have a big impact on ultimate outcomes and members are thus understandably very

careful. The definitional challenge may also be attributable to the current and future commercial interests of the members. Members have a tendency to argue for the definitions that best serve their own interests.

Fifth, the debates on special treatment for developing countries with respect to the new issues generally reflect the very similar views and deadlock as in the other WTO discussions and negotiations under the Doha Round on S&DT for developing countries. Hence, while the needs of developing countries for technical assistance, capacity-building and transitional periods are recognised, there is generally much stronger resistance to allowing them substantively differentiated obligations, particularly as a group.

Sixth, the world outside the WTO is moving on. The same new issues have been/are being negotiated in regional and plurilateral agreements outside the WTO. These often take place among developed countries, although some developing countries are also part of these. These agreements are adopting definitions, clarifying concepts, determining obligations and setting the standards that may very well become the templates for future negotiations and agreements on these issues. Rather worryingly, the inputs by developing countries to these developments have so far been very limited.

Seventh, the international economic and trade scene has been evolving at a pace not witnessed before. Technological, economic and political changes require that the trade rule books also be updated. This may be done by addressing the new issues and, hence, it is important to find appropriate ways in which to do this.

Finally, amid all this, a large number of developing countries, particularly LDCs, small states and Sub-Saharan African countries, continue to face the extreme challenges of under-development and abject poverty. Their resources remain limited and they are still marginalised in the international trade and economic systems. Their engagement in discussions on potential new issues is urgently warranted but is predicated on building their capacity as well as clearly demonstrating the tangible benefits they will reap from participation. This should be the role and responsibility of their developed country partners.

For their part, these developing countries need to break the vicious cycle of their limited participation in the WTO discussions/negotiations, which leads to lopsided agreements that do not benefit them equally, which in turn leads to chronic under-capacity and resentment, reflected again in their limited participation in the subsequent discussions/negotiations.

Accordingly, some suggestions are hereby offered to assist the Commonwealth developing countries, in particular LDCs, small states and Sub-Saharan African countries:

- **Substantive and technical preparations:** There is an urgent need to undertake a reasonably thorough assessment of the potential new issues with a view to improving technical knowledge and understanding, identifying national interests and concerns and outlining possible substantive ways and means by which to

articulate and advance these interests and concerns. This will be challenging but not impossible. In many cases, there is no need to reinvent the wheel: a great deal of information and analysis already exists. This can be built upon and refined with the help of organisations such as the Commonwealth Secretariat. An important component of this work will be country- and region-specific.

- **Models for S&DT:** As part of these substantive preparations, it will be crucial to develop concrete, robust, realistic and practical models for the S&DT of developing countries with respect to the new issues. This work should not be postponed. Developing countries cannot abandon the quest for S&DT, but this quest should not remain grounded in the past. There is the opportunity for innovation in crafting S&DT that is suitable to each issue and in line with countries' development needs. The experience of TFA negotiations can be useful in this regard.
- **Initiative and engagement:** Developing countries should not remain passive bystanders and wait for developed countries to set the agenda. They can be proactive in many ways without giving up their principled positions on new issues. For example, they can propose new issues relating to their own interests; request other proponents of new issues to provide further details and clarifications particularly related to the development dimension of the issues; ask relevant international and non-governmental organisations to assist by preparing focused studies and option menus; discuss/take up the issues within their own fora and regional arrangements; and engage in informal discussions with developed countries, etc.
- **Strategic approach:** Finally, developing countries need to develop a holistic and strategic approach to new issues. These—and even 'newer'—issues will keep emerging in a fast-evolving world. A knee-jerk reaction of either an immediate 'no' or an enthusiastic 'yes' to each issue will not be appropriate. Instead, there is a need for a strategic approach that carefully examines each issue and then decides whether, where and how to deal with it.

Notes

* Rashid S Kaukab is Executive Director, CUTS International, Geneva. This paper has been contributed in his personal capacity with substantial research inputs by Smriti Bahety, Policy Analyst, CUTS International, Jaipur, and hence does not necessarily reflect the views of CUTS International. An earlier draft of this paper was presented at a meeting of the African Commonwealth countries held in Lusaka, Zambia, on 14–15 April 2016.

- 1 It can be argued that one reason for the proponents of the new issues bringing these to the WTO is the incomplete and uncoordinated system of global governance, where effective, well-resourced and competent international organisations do not always exist and/or have the mandate to deal with the issue comprehensively and effectively. Moreover, systematic and organised mechanisms to bring together several international organisations to deal collectively with issues that clearly have multiple dimensions do not exist. Finally, the binding and efficient dispute-settlement system of the WTO can be a reason for bringing the issues to the WTO even when other organisations may be dealing with it.
- 2 This seems to be changing, as now some developing countries do not seem to oppose the new issues so stringently.

- 3 Relationship between Trade and Investment, Inter-Relationship between Trade and Competition Policy, Transparency in Government Procurement, and Trade Facilitation.
- 4 This was at the demand of developing countries.
- 5 Although developing countries advanced many reasons for their opposition, their limited technical and negotiating capacities, their priority for the implementation of Uruguay Round Agreements and the conclusion of Doha Round, and their perception of these issues as being of primary benefit to developed countries, can be regarded as the main ones. It will be imperative to understand and effectively address these in order to overcome the opposition of many developing countries to the bringing of 'new issues' to the WTO in the future.
- 6 Chapter 16 of the TPP, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf>
- 7 The Doha mandate gave guidance in this area, through its reference to 'long term cross border investment, particularly foreign direct investment that will contribute to the expansion of trade'.
- 8 Investment has also been covered through a very large number of bilateral agreements among countries, known as Bilateral Investment Treaties (BITs). A cursory look at the BITs' evolution in the past decade shows a movement towards balancing the rights of foreign investors and host governments, including through reform of the mechanisms for dispute settlement between them.
- 9 Chapter 9 of TPP, available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>
- 10 See https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf
- 11 See https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm
- 12 Ibid.
- 13 See https://www.wto.org/english/tratop_e/gproc_e/gptran_e.htm
- 14 See <https://ustr.gov/sites/default/files/TPP-Final-Text-Government-Procurement.pdf>
- 15 Please note that 'procuring entity' is described (by way of listing specific government entities or departments) by each party in its own schedule of commitments.
- 16 See http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153000.3%20Public%20Procurement.pdf

References

- Canadian Government and EC (European Commission) (2014) 'Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and Its Member States'. Ottawa and Brussels: Canadian Government and EC. Available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf
- EU (European Union) (2015) 'Transatlantic Trade and Investment Partnership: Trade in Services, Investment and e-Commerce. Chapter II: Investment'. Draft Internal Document. Brussels: EU. Available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf
- GATT (General Agreement on Tariffs and Trade) (1994) 'Marrakesh Agreement Establishing the World Trade Organization'. 15 April. Geneva: GATT.
- Interim Commission for the International Trade Organization (1948) 'Final act and related documents'. United Nations Conference on Trade and Employment, Havana, 21 November 1947–24 March 1948. Available at https://www.wto.org/english/docs_e/legal_e/havana_e.pdf
- Office of the US Trade Representative (2014) 'U.S. objectives, U.S. benefits in the Transatlantic Trade and Investment Partnership: A detailed view'. Washington, DC: US Government. Available at <https://ustr.gov>

gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View

WTO (World Trade Organization) (2001) 'Doha Ministerial Declaration'. WT/MIN(01)/DEC/1, adopted 14 November 2001. Available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

WTO (2002) 'Work of the Working Group on the Matters Related to Items VI-XII of the list of the issues raised and points made'. Note by the Secretariat, WT/WGTGP/W/32, 3 October. Available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=48826,29873,451,9295,42530,105953,70728,25839,60661,40028&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

WTO (2015) 'Nairobi Ministerial Declaration'. WT/MIN(15)/DEC, adopted 19 December 2015. Available at https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm

WTO (1996) 'Singapore Ministerial Declaration'. WT/MIN(96)/DEC, adopted 13 December. Available at https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm