

出國報告（出國類別：開會）

出席「APEC 亞太自由貿易區(FTAAP)區域貿易協定-電子商務能力建構工作坊」
出國報告書

服務機關：經濟部國際貿易局

姓名職稱：黃建凱二等經濟秘書、廖思婷科員

派赴國家：韓國首爾

出國期間：108年9月17日至18日

報告日期：108年10月3日

摘要

APEC 致力推動 APEC 亞太自由貿易區(FTAAP)，其中電商為會員在多邊貿易體系下關注焦點之一，並刻正在 WTO 進行廣泛討論，為加強 APEC 會員官員瞭解電商議題，韓國在 108 年 9 月 17 日至 18 日在首爾舉辦「APEC 亞太自由貿易區(FTAAP)區域貿易協定-電子商務能力建構工作坊(FTAAP Capacity Building Workshop on E-commerce Elements in FTAs/RTAs)」。

本次韓國所辦的研討會，邀請韓國學者、智庫、業者及 WTO 前任官員進行能力建構，旨在協助 APEC 開發中會員進行能力建構，共有 13 個會員派員參與，針對電商定義、資料傳輸、資料在地化、關稅等議題進行討論。

過程除探討目前全球三大電商體系美、歐、中之立場外，亦研析 CPTPP 及 USMCA 相關電商條文，如個資保護、資料跨境流通、資料在地化、網路安全、原始碼、免徵關稅門檻與隱私保護等。

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壹、會議時間

108 年 9 月 17 日至 18 日。

貳、會議地點

韓國首爾樂天飯店 3 樓會議室。

參、會議目的

數位化時代來臨，已大幅度改變我們的生活，電子商務的崛起亦為已開發及開發中經濟體/服務提供者及消費者帶來許多利益和新契機，如各式新產品新服務等。越來越多經濟體致力於應用新科技及改善法規，藉由電子方式促進貿易及投資便捷化。

APEC 致力推動 APEC 亞太自由貿易區(FTAAP)，其中電商為會員在多邊貿易體系下關注焦點之一，並刻正在 WTO 進行廣泛討論，為加強 APEC 會員官員瞭解電商議題，韓國在 108 年 9 月 17 日至 18 日在首爾舉辦「APEC 亞太自由貿易區(FTAAP)區域貿易協定-電子商務能力建構工作坊(FTAAP Capacity Building Workshop on E-commerce Elements in FTAs/RTAs)」。

本次韓方安排講師以韓國學者、智庫、業者為主，另邀 WTO 前任官員進行經驗分享，主題分為亞太地區電商發展現況及展望、WTO 電商談判關鍵議題、企業觀點探討電商之機會及挑戰、自由貿易協定之電商議題、經濟體電商國內法制分享及 WTO 電商談判關鍵議題等，旨在協助 APEC 開發中會員進行能力建構，以 WTO 相關規範及業者實務經驗進行探討，促進 APEC 會員瞭解未來可推動議題。

肆、會議議程

APEC 亞太自由貿易區(FTAAP)區域貿易協定-電子商務能力建構工作坊議程：

第 1 日	108 年 9 月 17 日(星期二)
09:00-09:30	報到
09:30-10:00	開場致詞：韓國外交部國際經貿司司長 Mr. Young Jae KIM
10:00-11:00	第 1 場次： 亞太地區電商發展現況及展望 講者：韓國國際經濟政策研究中心印度及南亞組長 Mr. Jeong Gon KIM
11:00-11:20	中場休息
11:20-12:30	第 2 場次： WTO 電商談判關鍵議題 講者：WTO 服務貿易及投資處前處長 Mr. Hamid MAMDOUH
12:30-14:30	午餐
14:30-15:30	第 3 場次： 企業觀點探討電商之機會及挑戰 講者：Interpark 公司未來商務實驗室主任 Mr. Jun-Seon YUN
15:30-15:50	中場休息
15:50-17:30	第 4 場次： 自由貿易協定之電商議題 講者 1：韓國國立外交院教授 Ms. Hyo-young LEE 講者 2：韓國國際經濟政策研究院(KIEP) Mr. Kyu Yub LEE 研究員
18:00-20:00	晚餐
第 2 日	108 年 9 月 18 日(星期三)
09:30-11:20	第 5 場次：

	<p>經濟體電商國內法制分享</p> <p>講者 1：韓國國際經濟政策研究中心印度及南亞組長 Mr. Jeong Gon KIM 博士</p> <p>講者 2：White & Case 律師事務所 Mr. Charles JULIEN</p>
11:20-11:40	中場休息
11:40-12:40	<p>第 6 場次：</p> <p>WTO 電商談判關鍵議題</p> <p>與談人 1：韓國國立大學教授 Mr. Jaemin LEE</p> <p>與談人 2：WTO 服務貿易及投資處前處長 Mr. Hamid MAMDOUH</p> <p>與談人 3：White & Case 律師事務所合夥人 Mr. Charles JULIEN</p>
12:40-13:00	總結
13:00-14:30	午餐

伍、過程

一、亞太電商發展現況

(一) 韓國國際經濟政策研究中心印度及南亞組長 Mr. Jeong Gon KIM 博士介紹電子商務：

1. 電商發展迅速，尤其在亞太地區，其可提供出口機會、降低企業營運成本、提供企業創新機會、擴大市場規模、對中小企業之發展有助益。
2. 電商發展有賴：
 - (1) 強化數位創新的基礎，包括實體基礎建設、ICT 的近用和使用、數位技巧、強化銷售者與消費者間的信任、電子支付系統、協助中小企業參與跨境電商（如協助中小企業近用的電商平台或物流商）；
 - (2) 進行法規調適：因應電商進行法規的調適，如促進互通性 (interoperable) 規範、資料保護 (APEC's CBPR)、線上消費者保護、關稅、線上智財權相關產品等。

(二) Interpark 公司主任 Mr. Jun-Seon YUN 自企業觀點看電商的機會及挑戰：

1. Interpark 是韓國發展最早也最大的電商平台之一，以企業的觀點，Y 主任亦認為亞太地區的電商仍會繼續蓬勃發展。根據其經驗，電商平台的成功，須善用使用者的使用行為數據 (data) 進行最有效的廣告觸擊。
2. 大型電商平台如 Amazon、阿里巴巴的競爭下，其他電商平台或相關業者 (尤其是中小企業) 該如何生存？其建議可以建立另一個電商生態系，並提出 APEC 雲端服務系統的概念，希望未來各會員或企業可以思考。惟其對於政府措施的部分較無陳述。

二、WTO 電商談判發展進展及重要議題

(一) WTO 服務貿易及投資處前處長 Mr. Hamid MAMDOUH :

1. 簡介 WTO 電商談判由來，指出數位科技逐漸影響跨境服務貿易，傳統商品流通及服務業型態不變，但新興科技已創造出新型交易模式，如 UBER 定位為資訊服務業，而非交通運輸業，凸顯電商刻正重新改變國際貿易規則，並使服務與貨品貿易間的分界變得模糊難分，但服務業才是電商發展之骨幹，此一發展趨勢將加重服務業與網路連結的程度。
2. 探討 WTO 現有制度導致談判亦不易取得進展，電商議題在 MC12 前完成談判之可能性低。即便外界曾討論將電商談判獨立於 WTO 體制外，但該作法毫無任何共同基礎，討論過程必定曠日廢時，因此難以實現。

(二) 韓國國立外交院教授 Ms. Hyo-young LEE :

1. 簡介 WTO 現行電商法規及相關限制，講述數位產品及服務之定義、數位產品的分類、跨境傳輸資料議題、消費者保護法規措施、國家安全保護及國內法規執行。
2. 探討電商實務運作在現在的多邊貿易體系不足之處，包含在 GATS 架構下，服務業自由化承諾表難以驅動數位貿易，涉及 GATT 包含的議題如貿易便捷化、智財權保護、標準安全認證等亦須檢視並強化。
3. 除討論目前全球三大電商體系美、歐、中之立場外，亦探討 CPTPP 及 USMCA 相關電商條文，如個資保護、資料跨境流通、資料在地化、網路安全、原始碼、免徵關稅門檻、與隱私保護等。

(三) 韓國國際經濟政策研究院(KIEP)研究員 Mr. Kyu Yub LEE :

1. 介紹資料在地化議題，指出 AI、IoT 及大數據已明顯提升民眾生活水準，其中關鍵議題在於資料是否允許跨境流通，除使用者對其隱私權及網路

安全問題產生擔憂，部分國家視為國安問題，禁止傳輸到境外，並採取相關措施限制資料，包含中國、印度、印尼、俄羅斯等

2. L 研究員以渠研究之量化模型說明資料在地化產生之額外成本對整體社會福利產生負向影響，對廠商而言亦視為貿易障礙。另討論歐盟一般資料保護規定(GDPR)納入資料保護政策之影響。

三、國際貿易電商規則

(一) 首爾國際大學教授 Mr. Jaemin LEE

1. 目前 WTO 相關規則為 1986 至 1994 年所制訂，近 20 年來電商發展迅速，雖自 1998 年起即討論電商議題，迄今未形成可充分反映電商現實的協定，規則並無改變。電商不僅是下單、付款、送貨，現有的電商服務涵蓋很廣，電商議題是全新概念，貿易過程會使用各種資訊來進行，涉及議題除貨品規章外，亦包含服務、投資、智財權、資料傳輸、隱私保護、監管措施等等議題。
2. 早期(2001 年)主要討論議題為跨領域議題(最惠國待遇、S&D 待遇、關稅、競爭、智慧財產權等)，時至今日，重要討論議題如資料傳輸、隱私保護、監管措施等，未來的議題包含工業 4.0 革新、人工智慧、數位經濟。但 WTO 現有規範仍相當膚淺，會員盼在多邊下尋求電商共識，美、歐、陸、俄、日、韓等各國皆有不同立場，很難形成共識。
3. 電商待解決議題包含隱私權、網路安全、國家安全，但各國家有不同看法，國家利益及主權常與貿易自由化有所衝突，其中資料保護是重要關鍵，包含個人隱私、國家機敏資訊、監管工具，各國對於要如何在資料利用及保護間取得平衡持有不同看法。
4. 目前各會員所簽署 FTA 內的電商章節內容僅為片面性規範，且不同的雙邊 FTA 難以整合，但近年區域性之大型 FTA，如 CPTPP 及 USMCA 為

高標準的 FTA，其電商章節涵蓋較為全面，其中 CPTPP 已生效，WTO 會員可觀察其執行成效，截長補短，增進共識。

(二) White & Case 律師事務所合夥人 Mr. Charles JULIEN

1. 部分 FTA 雖填補 WTO 協定的空隙(gap)，但其影響範圍有限，無法全面反映現實。期許未來在雙邊場域，可協助探索新的電商規則，協助市場自由化與便捷化。
2. 在多邊場域，則需要會員的共識和意志，建議可導入 FTA 談判之結果(如 CPTPP、USMCA、RCEP 等)或 APEC 場域經驗，最重要的是讓既有規則與時俱進。

四、綜合座談

(一) 與談人包含韓國國立大學教授 Mr. Jaemin LEE、WTO 服務貿易及投資處前處長 Mr. Hamid MAMDOUH、White & Case 律師事務所合夥人 Mr. Charles JULIEN，就電商之定義及範圍、網路安全、原始碼移轉、應與 WTO 現有規範連結之議題等節意見交流。

(二) L 教授表示

1. 2019 年 1 月 29 日的電商啟動談判的聯合聲明未有明確目標，渠認為電商談判前各國應先明訂出電商的定義，並界定出涵蓋的範圍，並盤點現在體制下已有規範，及未有規範部分，以便加速談判進度。
2. 在多邊體系進行談判本有其複雜度，哪些規範要放在文本或附件，目前沒有合適的選項，但重點是各國應先釐清對電商的定義及擬達成目標，意見分歧處再另討論，或許電商談判會更有彈性。
3. 電商範疇除包含傳統貨品及服務外，亦包含 ICT 服務及數位服務，「資料」為核心元素，因此資料流通及資料間連結扮演關鍵角色，倘無法有效利

用，則無法發揮最大效果。

4. 電商議題範圍可很大，倘無先界定出範圍，議題不斷擴張，則達成共識之機會更遙遠，因此會員應先考慮「資料」是否要放在貿易議題，另開放原始碼及強制技術轉移雖然是貿易議題，但其涉及投資條款，似可考慮在投資範疇討論。

(三) M 前處長

1. 回顧過去 WTO 的談判經驗，很難有一套規範適用很長的時間，現在所討論的架構在 2025 年、2030 年可能已無法完全適用，所以運作上不可過度理論，會員可先就當下問題解決，並再逐一審視檢討。
2. 電商係以服務業為基礎之議題，旨在提供貨品及服務，以網路購物為例，其貨品的提供亦屬服務業，如同現在的貿易，其三項元素即買方、賣方、產品/服務，WTO 的服務業係依照 CPC 及 W/120 進行談判，但目前的爭議點在於無形的貨品該如何分類，如影音串流、軟體、電子書等，有待未來電商談判定義分類方式。
3. WTO 於 1998 年設立電子商務工作計畫，將電子商務定義為以電子方式製作、配銷、行銷、販售或交付的貨品及服務，20 年前以該電商定義之相關議題包含最惠國待遇(MFN)、國民待遇、透明、市場進入、原產地、智財權保護，20 年後的今天，新的領域包含電子簽章、電子合約及使用者保護，現在各國仍在摸索如何去規範，即便是歐盟對外洽簽的 FTA，僅先已以「合作」等方式進行，未有明確規範。
4. 相關延伸議題包含資料保護，資料流通、國家安全，兩者雖是不同議題，但資料流通是電商談判發展關鍵，可視為貿易的一部份。資料該如何有效被使用，則待各國討論折衷方案，並先訂出具體目標及適用範圍，以平衡發展。

(四) J 合夥人

1. 重點應放在貿易相關議題，渠個人認為「資料」不應納入電商範疇，因為並非所有國家之國內法或 FTA 對資料之處理有明確規範。從 WTO 之角色來看，兩者應脫鉤討論。
2. 有關原始碼提供方面，部分國家尤其是開發中國家視之為國家安全，導致電商議題不易產生共識，綜上，渠建議資料流通、保護及國家安全不應放在最上位，建議放在次級題目，不應放在貿易規則裡。
3. CPTPP 為近年推出高標準規範的 FTA，其電商議題包含資料流動、資料在地化，不得要求開放原始碼或技術移轉作為市場進入條件等，CPTPP 是第 1 個有相關規範且已生效的 FTA，其執行情形可作為 WTO 電商談判之參考。

陸、心得與建議

- 一、本次研討會主題雖為「APEC 亞太自由貿易區(FTAAP)區域貿易定-電子商務能力建構工作坊」，惟講者及與會人員多關注目前在 WTO 進行之電商談判及其重要議題。
- 二、本次研討會重點之一係討論資料跨境傳輸及在地化問題，部分禁止資料跨境傳輸國家如中國、印尼、俄羅斯表達國家安全與自由貿易難以兩全其美之立場，另印尼洽詢韓方學者是否有解決之道供該國政策參考，惟韓方學者以不表示意見回應，顯見資料跨境傳輸議題仍是當下電商談判難以達成共識之議題。
- 三、目前參與 WTO 電商談判的國家占全球貿易額 90%，占比前三大為美國、歐盟、中國等，其他國家包含開發中國家及低度開發國家，但由於南非、印度等部分 WTO 會員質疑數位產品免徵關稅對其毫無效益，相關立場受到部分國家重視，後續發展值得關注。
- 四、WTO 電商談判的成果將成為獨立協定，抑或是附屬在 GATT 或 GATS 下，後續發展值得探討及關注。
- 五、目前服務業主要使用 CPC 及 W/120 分類表做為會員列舉行業別之依據，在電商的部分，部分新型態產業難以歸類 (如 Uber)，定義及分類方式未來在相關場域應仍持續討論。
- 六、過去各會員所簽署 FTA 的電商章節內容多為片面性規範，但近年區域性之大型 FTA，如 CPTPP 及 USMCA 等，為高標準的 FTA，電商章節涵蓋較全面。後續可多觀察其執行成效，導入 FTA 談判之結果或 APEC 場域經驗，以作為促進 WTO 會員共識之參考。

E-Commerce: A Driver of Digital Innovation



Jeong-Gon KIM

Head of India and South Asia Team
(Korea Institute for International Economic Policy)





APEC FTAAP Capacity Building Workshop on E-commerce
Elements in FTAs/RTAs (Seoul, Korea)

E-COMMERCE: A DRIVER OF DIGITAL INNOVATION

September 17, 2019

Dr. Kim, Jeong Gon



KIEP Korea Institute for International
Economic Policy

Content

- 1. Concept of E-commerce**
- 2. E-commerce in Asia and the Pacific**
- 3. Benefits of E-commerce**
- 4. Challenges**

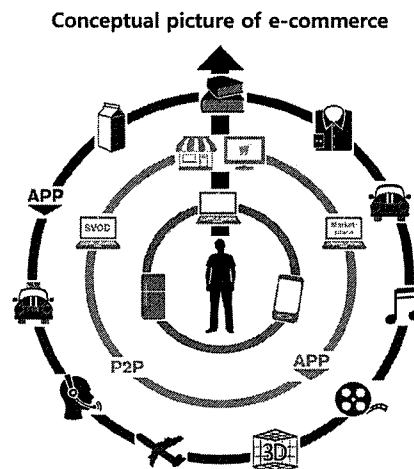
1. Concept of E-commerce

General definition of e-commerce

- **OECD(2009)**
 - “The sale or purchase of goods or services conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders... the payment and the ultimate delivery... do not have to be conducted online.”
 - Who is involved?: enterprises, households or individuals, governments, and other public or private organisations

- **How is e-commerce conducted?**

- **Electronic devices:** desktops, tablets, smartphones and things
- **Wide range of platforms:** online market places, mobile apps, P2P platforms, etc.
- **Wide range of goods and services:** from traditional consumer goods to music, films, games, flight tickets, maps, car rental, car sharing, etc.
- **Enablers:** connectivity through internet

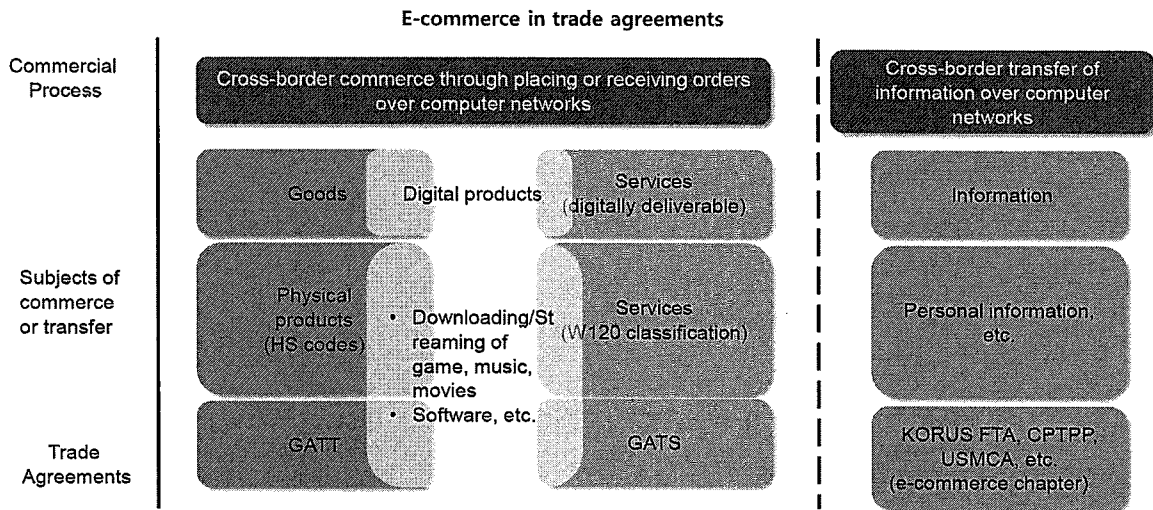


Source: Kimmerscollegium(2015)

E-commerce in the context of FTAs/RTAs

- **Scope of e-commerce chapters in trade agreements**

- Fill loopholes(grey areas) in GATT and GATS: concept of 'digital products'
- Regulations on data/consumer protection and cross border flows of data
- Trade facilitation elements: regulations on e-trade, etc.



Source: Author

E-commerce as a driver of digital innovation

- **E-commerce is about...**

- Innovation in international commerce of all kinds of goods and services traded based on online networks.
- Innovation in entire sectors or fields based upon hyper-connectivity, platforms and data.

Examples of U.S. Platform Companies

UBER

Connecting drivers and passengers

amazon

Connecting buyers and sellers

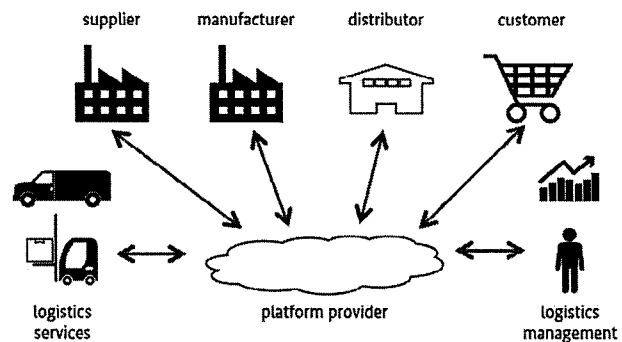
airbnb

Connecting homestays and tourists

Google play

Connecting app developers and mobile users

A Scenario of Industrie 4.0: Self-organizing Adaptive Network



Source: BMWi(2016).

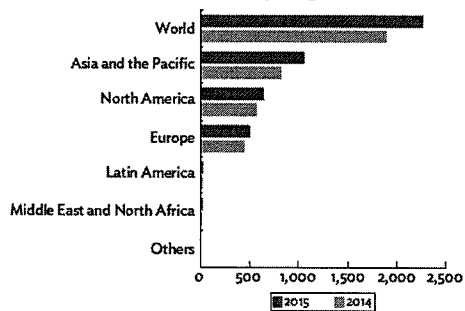
2. E-commerce in Asia and the Pacific

E-commerce market in Asia and the Pacific

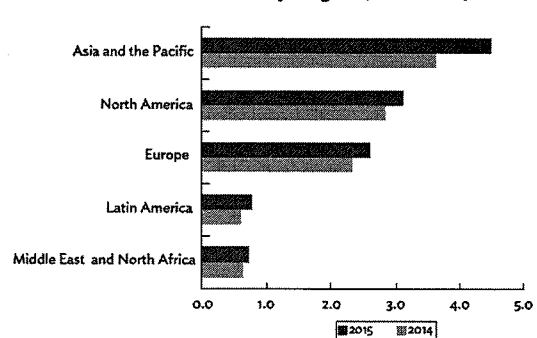
- **Total B2C market**

- The Asia-Pacific region holds the largest share.
 - over \$1 trillion of the \$2.3 trillion global e-commerce total in 2015
- It also had the fastest e-commerce growth rate 28%, compared with the global growth rate of 20%
- By the end of 2015, the size of e-commerce relative to GDP was 4.5% in Asia and the Pacific.

Size of B2C E-commerce by Region(US\$ billion)



Size of B2C E-commerce by Region(% of GDP)



Notes: Business-to-Consumer (B2C) e-commerce covers any contract for the sale of goods and/or services, fully or partially concluded by a technique for distance communication. Values refer to the total of goods and services sold through B2C transactions.

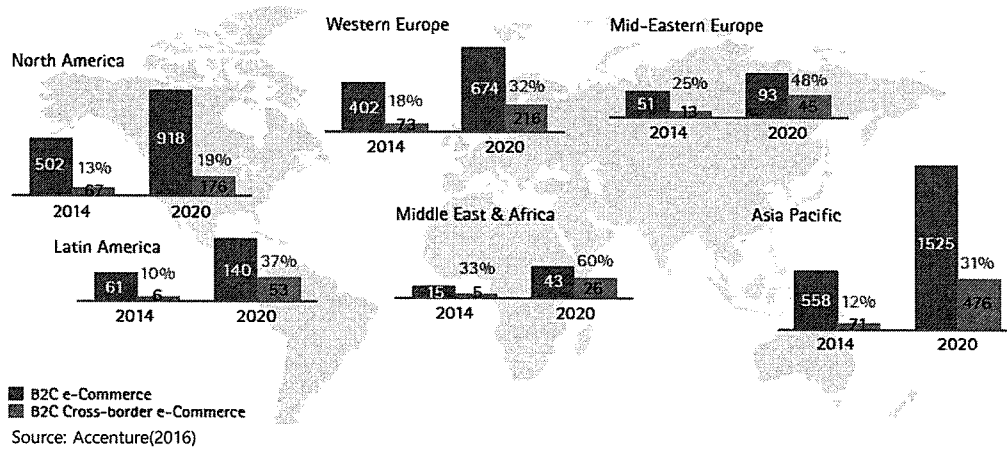
Source: Ecommerce Foundation(2016); UNESCAP and ADB(2018)

E-commerce market in Asia and the Pacific

- **Cross-border B2C market**

- Asia-Pacific region leads the growth of global cross-border e-commerce.
- (e.g.) Cross-border transactions comprise about 40% of all Southeast Asia's e-commerce.
- Cross-border e-commerce in Asia-Pacific is expected to grow faster than domestic e-commerce.

Cross-border B2C E-commerce Transaction Value(US\$ billion)

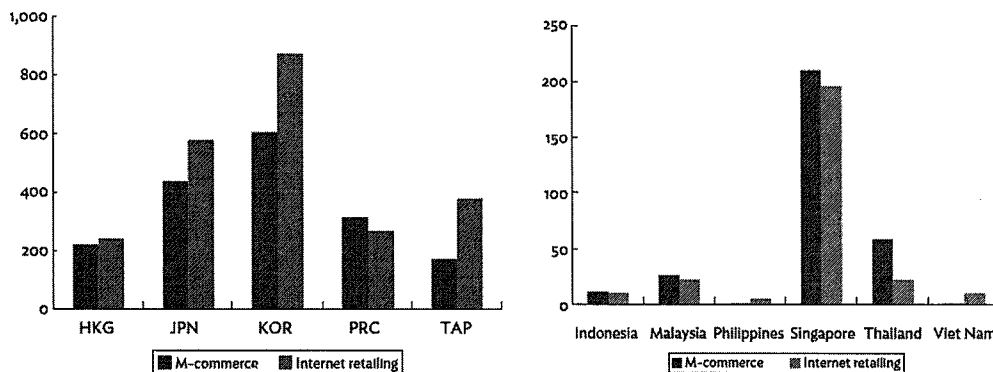


E-commerce market in Asia and the Pacific

- **B2C market by sub-region and country**

- East Asia: The PRC is the largest e-commerce market globally.
 - Korea is Asia's third-largest retail e-commerce market, and seventh worldwide(eMarketer)
- Southeast Asia: As of 2017, 3% of the 560 million people had shopped online(Wenyu 2017).

Internet Retail and M-commerce Spending Per Capita: East Asia(left) and Southeast Asia(right), 2016[\$]

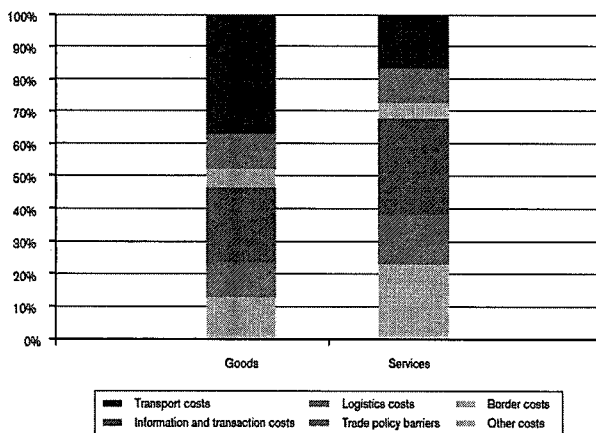


3. Benefits of E-commerce

Benefits of E-commerce: Exports

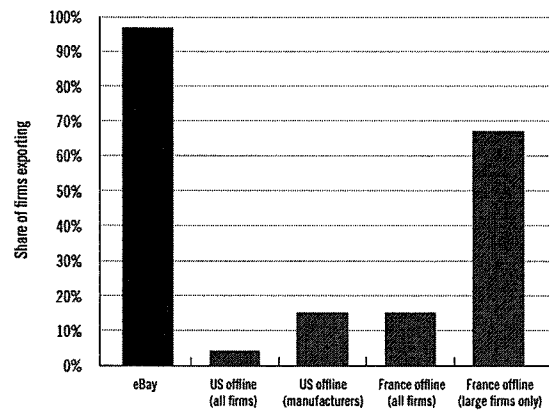
- **E-commerce can provide substantial export opportunities.**
 - Reduction of firms' operational costs
 - Opportunities for innovation and new forms of businesses
 - Wider market scope due to reduction in transaction costs
 - Small and medium enterprises(SMEs) could be big beneficiaries.

Trade costs breakdown (percent)



Source: WTO(2018)

Share of sellers exporting: ebay vs. offline, %

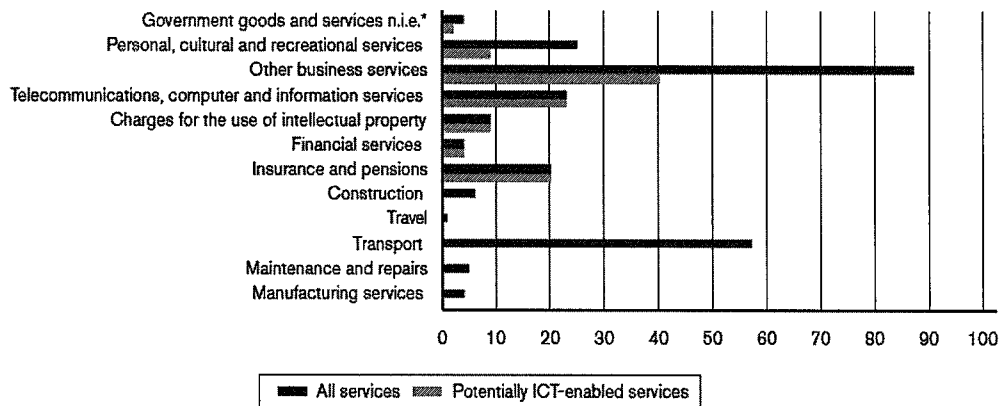


Source: ebay inc.

Benefits of E-commerce: Exports

- **E-commerce can promote some services exports.**
 - Some services are now tradable across borders through innovative business models that leverage digital technology.
 - The share of trade in digitally deliverable services is growing from 46% to 52% during 2005-2016(WTO 2018).

Approximation of potentially ICT-enabled services by sector (percent)



Source: WTO(2018)

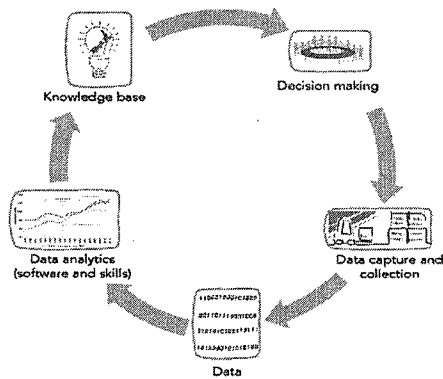
Benefits of E-commerce: Exports, A Case of Korea

- **Korea is world's 7th largest retail e-commerce market.**
 - Market size is around \$ 44 bil. in 2017, 11% of total domestic retail sales.
 - E-commerce market grows fast around 10% per annum (eMarketer).
- **Cross-border e-commerce export increases dramatically.**
 - (2015) \$154 mil. → (2016) \$262 mil. (Korea Customs)
- **Positive relationship between e-commerce and productivity**
 - Productivity of Korean firms operating e-commerce is higher than those who do not (both in manufacturing and services. Lee 2017).
- **SMEs' participation in cross-border e-commerce increases very fast.**
 - Korean SMEs' e-commerce export volume increases 47% between 2015 and 2016. (Korea Customs)
- **Export prices of consumer goods decrease.**
 - Average export price of consumer goods per unit decreases from \$ 311 to \$181 during 2014-16.

Benefits of E-commerce: Data-driven Innovation

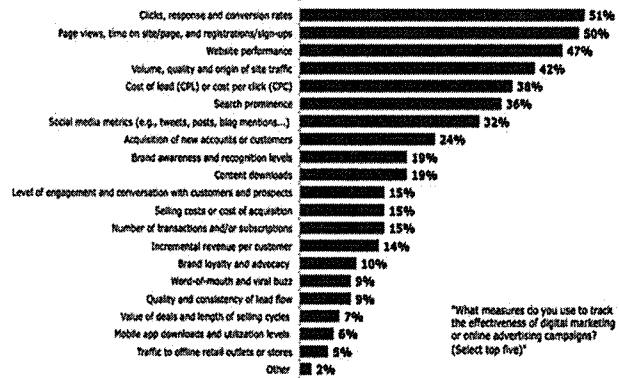
- **Data collection and analyses are the source of unpredictable innovation.**
 - Platform is a main driver of data-driven innovation.
- Data as firms' and national **“infrastructural resource”**(OECD)
 - Platform → data accumulation → analysis → decision making → innovation
 - Customized and personalized services is the ultimate goal of e-commerce.

The Data Value Cycle



Source: OECD(2014)

Data Use: Example of Marketing



Source: CMO Council

4. Challenges

Challenges: Promoting E-commerce

Building Grounds of digital innovation

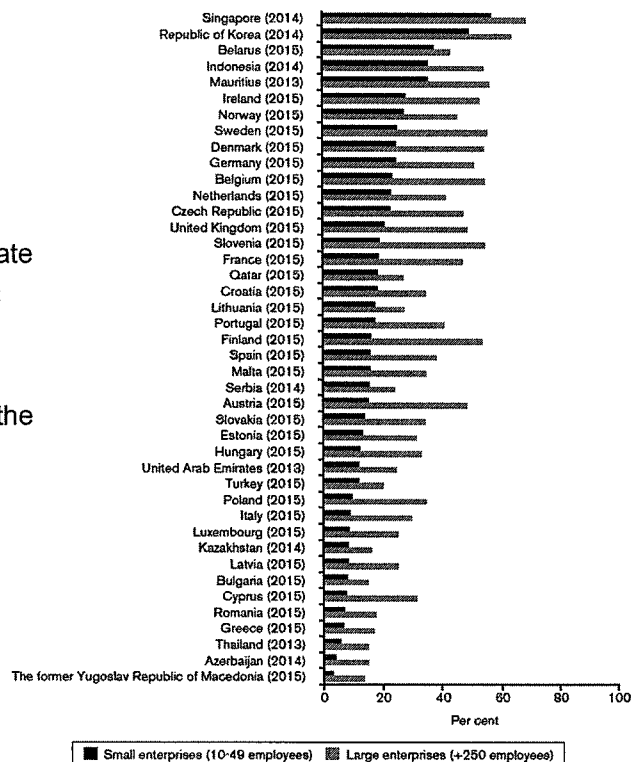
- Solid ICT infrastructure, ICT access and use
- Physical infrastructure such as logistics
- Digital skills
- Digital security → trust between buyers and sellers
- Use of financial and e-payment systems
- SMEs' participation in cross-border e-commerce: e.g. helping access to qualified e-commerce platform and logistics providers
- Innovation ecosystem focusing on startups, etc.

Challenges: Promoting E-commerce

Proportion of small and big firms selling online, 2013-15 (percent)

Source: UNCTAD(2017)

- The likelihood that a firm will participate in the digital economy increases with firm size.
- Big firms seem to be adequately prepared to participate effectively in the digital economy.



Challenges: Improving regulatory condition

Adapting regulatory frameworks to innovation in e-commerce

- Balancing freer cross-border flows and protection of data
 - Cross-border flows of data are becoming essential condition of businesses.
 - Adequate system of data protection is also a necessary for business activities as well as consumers.
- There are plenty of issues where int'l cooperation is effective.
 - Internationally compatible(interoperable) regulations
 - Data Protection over the Internet(ex. APEC's CBPR)
 - Online consumer protection
 - Customs regulations
 - Online IPRs, etc.

// Thank you

Key Issues related to E-Commerce at the WTO



Hamid MAMDOUH

Senior Counsel and former Director of
Trade in Services and Investment Division
of the WTO (King & Spalding LLP)





E-commerce in The WTO

Hamid Mamdouh
September 2019

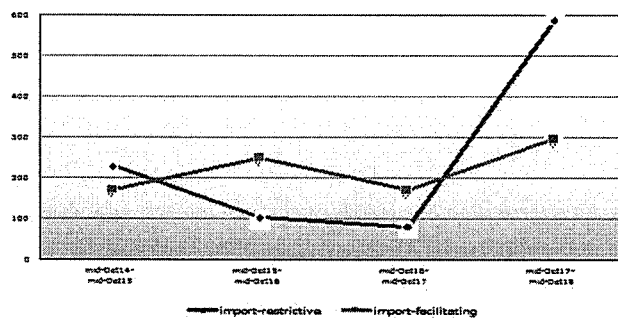
WTO functions

- Administer and implement the WTO agreements
- Forum for negotiations
- Administer the settlement of disputes
- Administer the trade policy review mechanism
- Technical assistance and capacity building
- Co-operation with other IOs

The WTO Structure



Chart KF6 Trade coverage, current and previous reports (USD billion)



- A recent sharp rise in protectionist measures.
- The unilateral character of restrictive measures.
- Questionable legality.
- A relative slowdown in import facilitation measures.

The WTO's Existential Challenges

- The PHENOMENA, a “triangular challenge”:
 - Leadership deficit
 - Increasing complexity of trade policy issues
 - The “common purpose” is no longer “common”

- Failure of vital functions:
 - Negotiations
 - Dispute settlement
 - Administering compliance with WTO Agreements (regular bodies)

Specific Challenges

- Reforming the Negotiating function
- Updating the Rule Book
- The Trade and Development Debate(S&D)
- Reforming the Dispute Settlement System
- Revitalizing the Monitoring Machinery
- Reactivating the Deliberative Function

“WHY” E-commerce in the WTO?

- The WTO redefined international trade
- Trade through digital means
- Technology-driven innovative business models
- Trade-inhibiting regulatory responses
- The need to keep markets open as a means of growth and development (the “purpose”)
- Balance “liberalization” with the “right to regulate”
- Update the rule book

The Work Programme

- The need to understand trade implications
- Launched by Geneva Ministerial Session 1998
- Called for “deliberations” on trade-related aspects of global e-commerce (not negotiations)
- Specific topics assigned to Goods, Services and TRIPS Councils, and to Trade and Development committee
- **Moratorium:** Members agreed to continue the current practice of not imposing customs duties on electronic transmissions
- Work Programme still ongoing

What is the scope of the Work Programme?

- For purposes of the programme, the activity 'electronic commerce' is understood to mean
 - 'the production, distribution, marketing, sale or delivery of goods and services by electronic means'
 - Reuses the terminology of the GATS in defining the scope of the services *activities* covered
- E-commerce also touches on a wide range of individual service sectors and subsectors (e.g. telecom, financial, transportation, logistics, express delivery, distribution services ...)

Services Progress Report (1999) on 12 mandated issues

The Services Council was mandated to examine and make a progress report on these and other relevant issues:

1. Scope of the GATS: (Art I) GATS apply to measures affecting electronic supply of services, through any of 4 modes of supply, GATS is technologically neutral
2. MFN (Art II) applies to the supply of services through electronic means.
3. Transparency (Art III) applies to all laws and regulations affecting the supply of a service through electronic means.
4. Developing countries: (Art IV) participation of developing countries in electronic commerce should be enhanced inter alia by the implementation of Article, through the liberalization of market access in areas of export interest to them and through better access to technology

... Progress Report

5. Domestic Regulation: Crucial to maintain a balance between right to regulate and need to ensure that domestic regulatory measures do not constitute unnecessary barriers
6. Competition (monopolies and restrictive business practices) (Art VII and IX): The expansion of electronic commerce could help reduce the extent of restrictive business practices (Art. IX), inter alia, by facilitating market entry for smaller service suppliers.
7. Protection of privacy, public morals and prevention of fraud (Art XIV) Applicable, but measures not to be more trade restrictive than necessary to fulfil such objectives, and must not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services.

... Progress Report

8. Market access commitments: (Art XVI) The means of delivery does not alter specific commitments; they permit the electronic supply of the scheduled service unless otherwise specified in schedule.
9. National treatment: (Art XVII) Commitments cover the supply of services through electronic means unless otherwise specified.
10. Access and use of telecom public telecom networks (Annex on Telecommunications): applies to access to and use of the Internet when it is defined in a Member's regulatory system as a public telecommunications transport service and/or network in terms of that Annex.
11. Customs duties on electronic transmissions: No common view on desirability or feasibility (but now moratorium)
12. Classification issues: No clarity on how to classify novel ICT services

Relevance of GATS case law

- Some dispute settlement cases in services have involved on-line or networked services.
 - *Mexico Telecom (2004)* Case brought by the US, telecom services
 - *US Gambling (2005)* Case brought by Antigua, on-line gambling services
 - *China Publications (2010)* brought by US, audiovisual downloads
 - *China Electronic Payments (2012)* brought by US, on electronic card payment services
- Overall, these Panels (and the Appellate Body when appealed) confirm that GATS obligations and commitments apply to on-line services

Specific findings by Panels

- In *US Gambling (2005)*, the panel said "we conclude that mode 1 includes all means of delivery. We are of the view that when a Member inscribes the word "None" in the market access column of its schedule for mode 1, it commits itself not to maintain measures which prohibit the use of one, several or all means of delivery under mode 1 in a committed sector or sub-sector.
- In *China Publications (2010)*, the Panel found that the scope of China's commitment in its GATS Schedule on "Sound recording distribution services" extends to sound recordings distributed in *non-physical form*, through technologies such as the Internet.

The Bali Ministerial Declaration (2013) Expanding mandate

- The Work Programme “should continue to examine the trade related aspects of, inter alia,”
 - enhancing internet connectivity, access to information & telecommunications technologies
 - growth of mobile telephony
 - electronically-delivered software
 - cloud computing
 - the protection of confidential data, privacy and consumer protection

Member submissions contain new issues

- Regulatory cooperation
- Network neutrality
- IPR protection
- Regulation of spam
- Data flows
- Open Internet/ networks
- Localization requirements
- Technology transfers
- Source code requirements
- Choice of technology
- E-signatures/ Authentication
- Network competition
- Encryption
- Infrastructure gaps
- Standards/ interoperability
- Electronic payments
- Trade Facilitation
- E-procurement
- Conformity assessment

WTO Work Gaining momentum

- Seminars and back room groups
 - Friends of E-commerce for Development
 - Rising interest among business community
- Ministerial Decision 2017 – Buenos Aires
 - Work Program / Moratorium continue
 - Questions about the Moratorium
- Launching of plurilateral “joint initiative”
 - Exploratory discussions on “trade related” aspects
 - Open to all Members

More issues

Cooperation with other IOs	Market access commitments/ negotiations
Legitimate policy objectives, DR & exceptions	Improve metrics and data
Privacy/ personal data	Trade monitoring
Consumer protection/ confidence	Classification
- cybersecurity	infrastructure gaps
- spam	Licensing/authorization
Regulatory cooperation	Customs duties
Network neutrality	Electronic payments
IPR protection	e-procurement
	Paperless trading

Resurgent Policy Concerns and regulatory responses

Cybercrime
Cyber security
Individual Privacy
Data protection
Consumer protection
IPR protection
National security

Recent developments

- Joint Statement Initiative (JSI) aiming at negotiations on:
 - TFA “plus”
 - ITA “plus”
 - GATS market access
 - Regulatory issues
 - “Horizontal” rules, i.e. across agreements
- JSI in Davos Starting the Negotiation- Jan 2019
 - Progress so far
 - Challenges

Main Challenges

- Complexity of balancing the “regulatory interface”
- The wide range of policy concerns
- The role of trade agreements on non-trade issues
- The multi disciplinary nature of “digital trade” across goods and services trade
- Distinguishing between WTO and RTAs outcomes
- Forms of regulatory cooperation
- The legal form of a negotiated outcome
- Capacity building

Complexity of balancing the “regulatory interface”

- The interface between trade liberalization and the right to regulate aims at:
 - Trade liberalization does not intrude on regulatory sovereignty
 - Trade rules ensure the “least trade restrictiveness” of regulatory interventions
- The concept is not new (e.g. TBT and SPS)
- Challenging in the case of digital trade because:
 - Intangible products
 - Absence of internationally agreed standards to establish a “rebuttable presumption” of least trade restrictiveness

The role of trade agreements on non-trade issues

- The WTO (and other trade agreements) is not a standard setting body (privacy, consumer protection, cybersecurity, etc..)
- The role of trade rules is to ensure least trade restrictiveness while not intruding on regulatory sovereignty
- Sound legal rules and disciplines to strike that balance and ensure it's continuity are critical

Distinguishing between WTO's and RTA's outcomes

- RTAs are, by definition, required to be more far reaching
- So often aim at deeper integration going beyond trade
- Some issues are critical for trade (e.g. recognition)
- Fertile grounds for innovative solutions among more "like minded" groups
- Different treaty architecture with different implications
- Complementarity of respective roles

Possible negotiated outcome

What are the working assumptions?

- The nature of the outcome- MFN or Non-MFN?
- A new standalone WTO agreement?
- Scheduling new commitments under the GATT and the GATS?
- Clarificatory interpretative statements on certain WTO provisions?
- Improved WTO provisions?

THANK YOU



Opportunities and Challenges of the E-Commerce Sector – From the Perspectives of Entrepreneurs

|

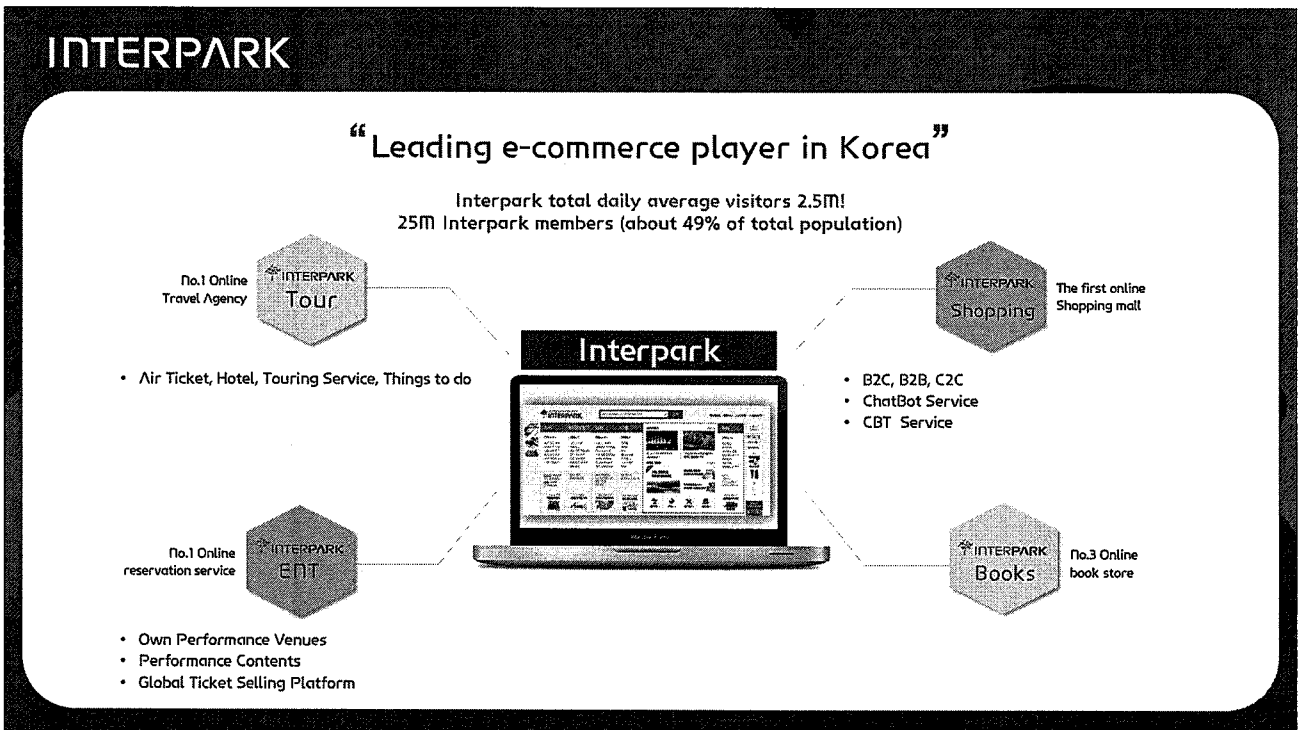
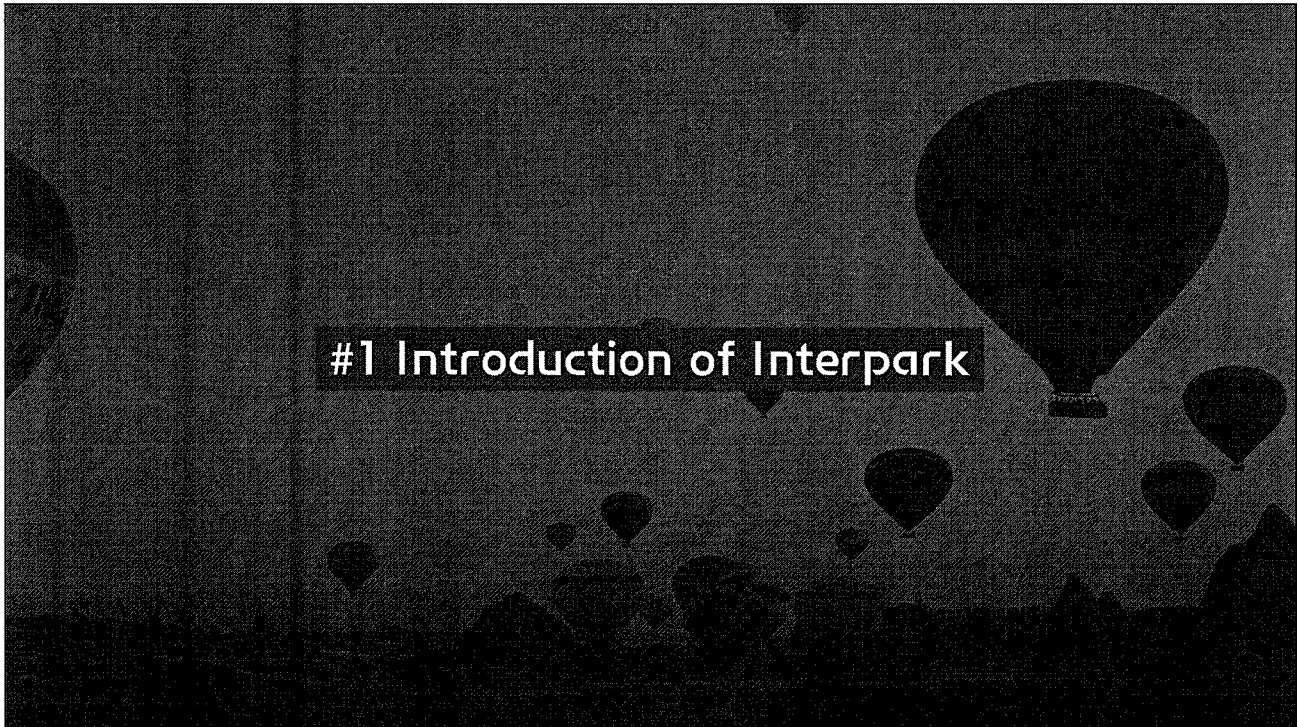
Jun-Seon YUN

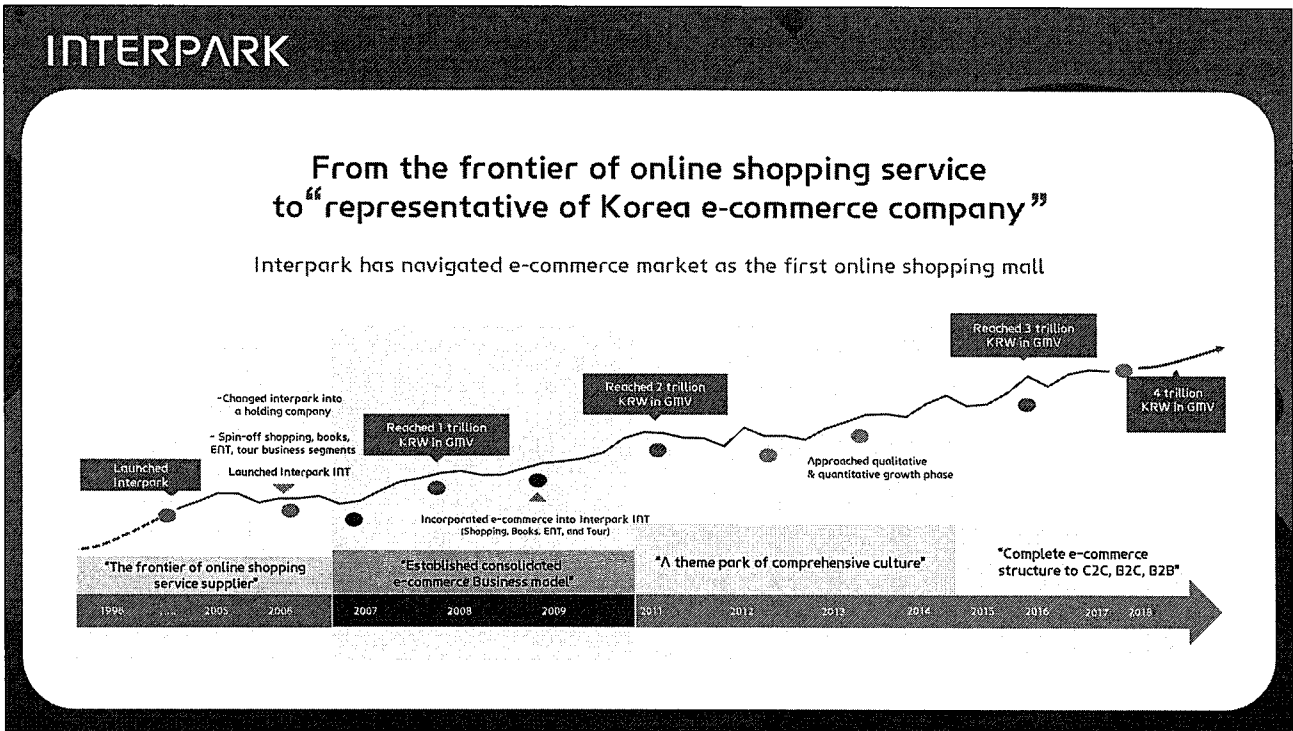
Head of Next Commerce Lab
(Interpark)









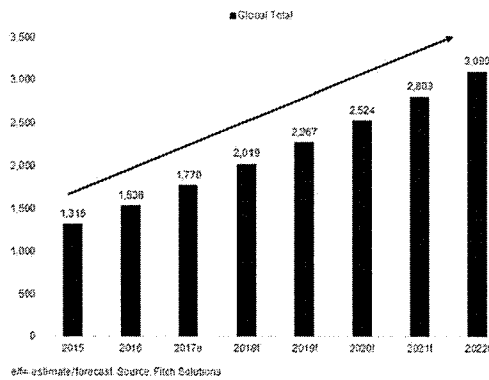


Global e-commerce growth

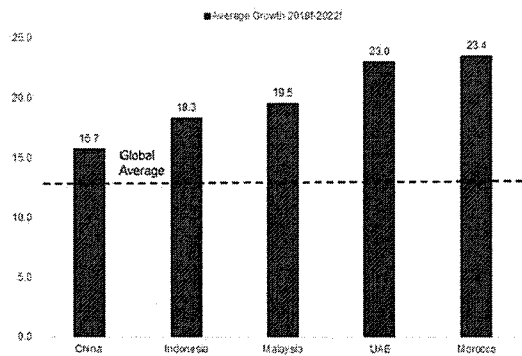
Global e-commerce sales will continue to grow.

E-Commerce Sales Forecast

Global e-Commerce Market To Hit USD3trn By 2022
Global e-Commerce Sales (USDbn)

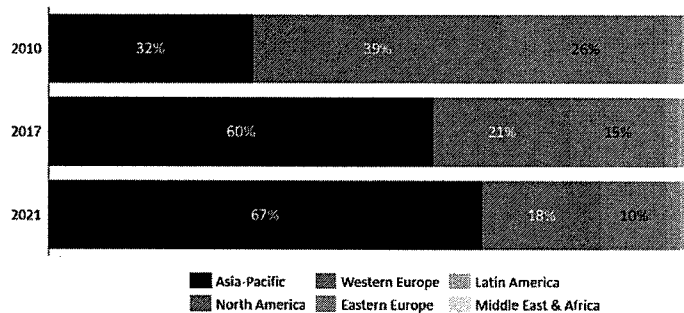


Fastest-Growing Markets Lie In Asia And MENA
e-Commerce Sales Growth, % y-o-y



Global e-commerce growth

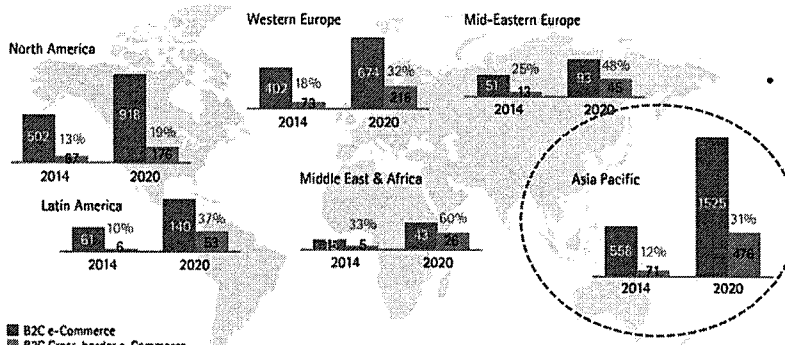
Asia-Pacific region will continue to grow.



Source: <https://www.metaforespress.gr>

Global e-commerce growth

Global cross-border B2C e-Commerce transaction value (US\$ billion)



- Over 2 billion e-shoppers would be transacting 13.5 percent of their overall retail consumptions online, equivalent to a market value of US\$3.4 trillion by 2020. (source: Accneture)

Region	2014-20 incremental B2C cross-border e-Commerce trade volume (billion dollars)	Contribution of global total incremental trade volume (%)
Asia Pacific	406	53.6%
Western Europe	143	18.9%
North America	109	14.4%
Latin America	47	6.2%
Mid-eastern Europe	32	4.2%
Middle-East and Africa	21	2.7%

#3 e-Commerce Platform

e-Commerce Platform

e-commerce platform?

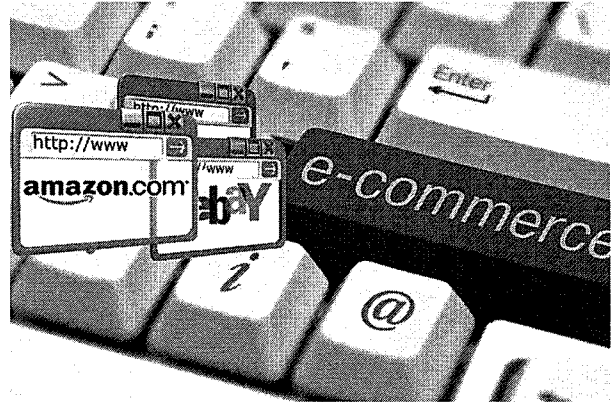
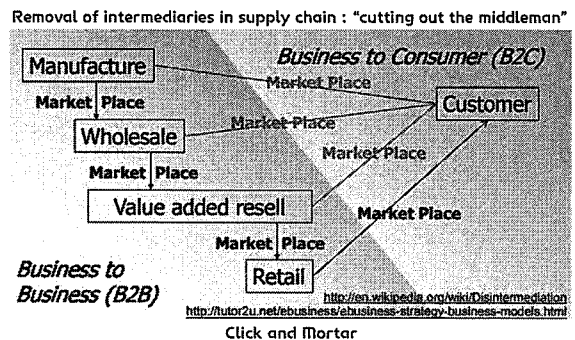
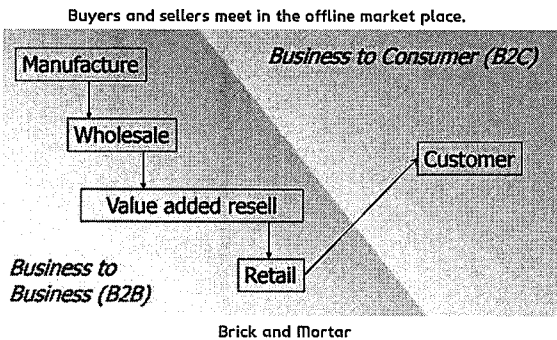


Image from quicktrade24.com, mlawebdesigns.co.uk

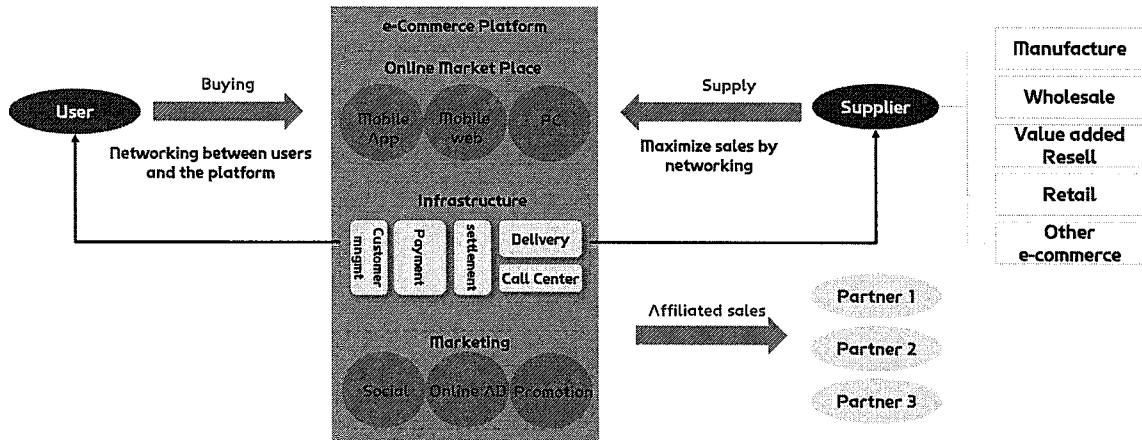
e-Commerce Platform

- E-commerce refers to a process of buying and selling products or services over the internet.
- E-commerce activities such as selling online can be directed at consumers or other businesses.



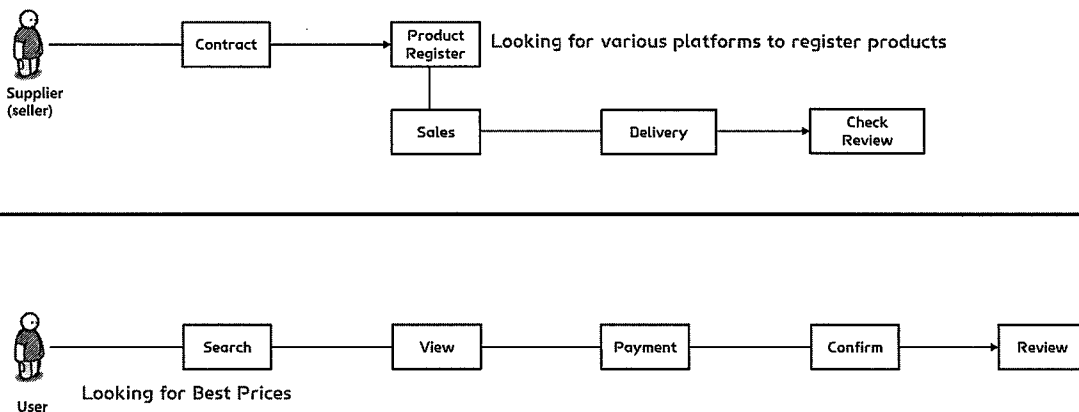
e-Commerce Platform

- Increased users and products will lead to increased in sales.



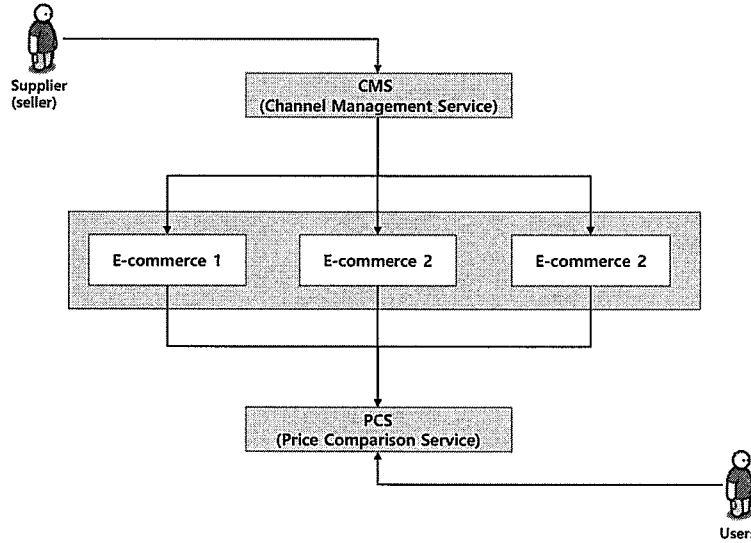
e-Commerce Platform

- Supply & Buying Process make other business on e-commerce.



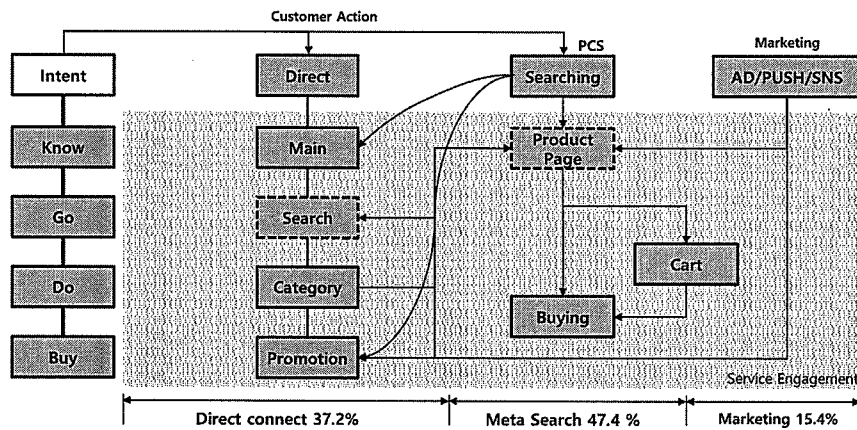
e-Commerce Platform

- Supply & Buying Process make other business model on e-commerce.



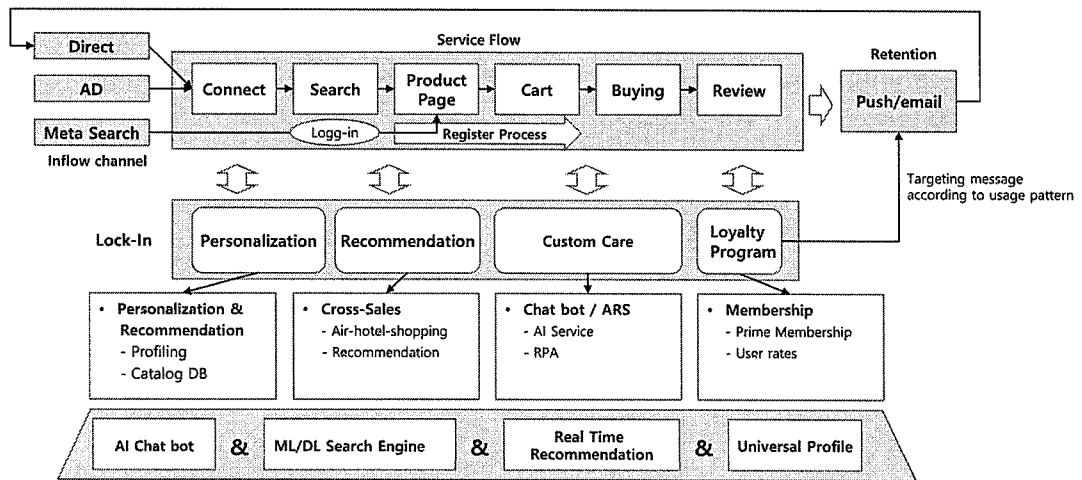
e-Commerce Platform

- Design a superior service model to attract and retain customer into ecosystem.



e-Commerce Platform

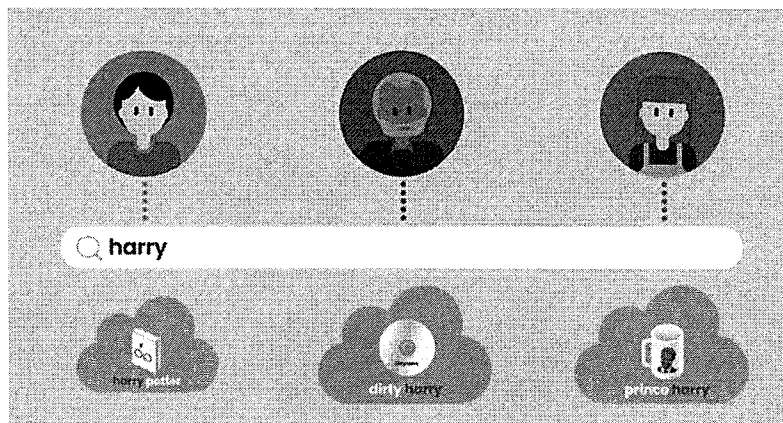
User Lock-In Framework



e-Commerce Platform

- Deliver a digital experience smart enough to know users interests and needs

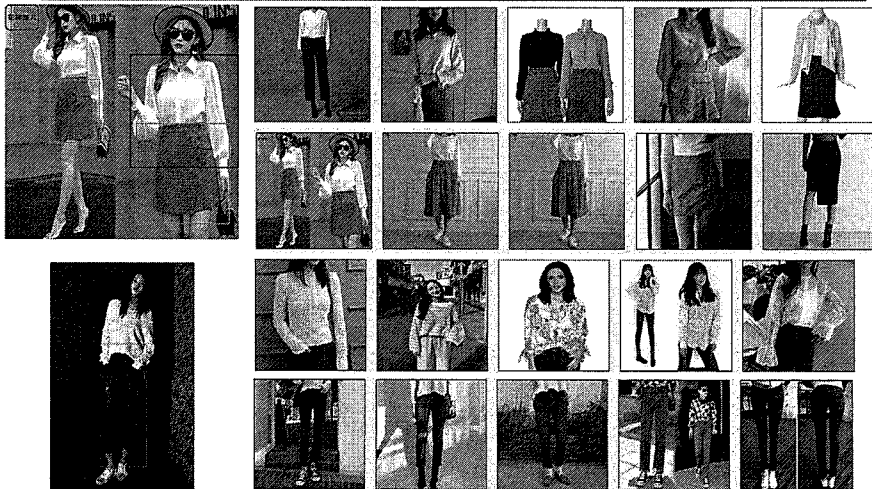
Personalization & Recommendation



e-Commerce Platform

- Selling products and providing contents

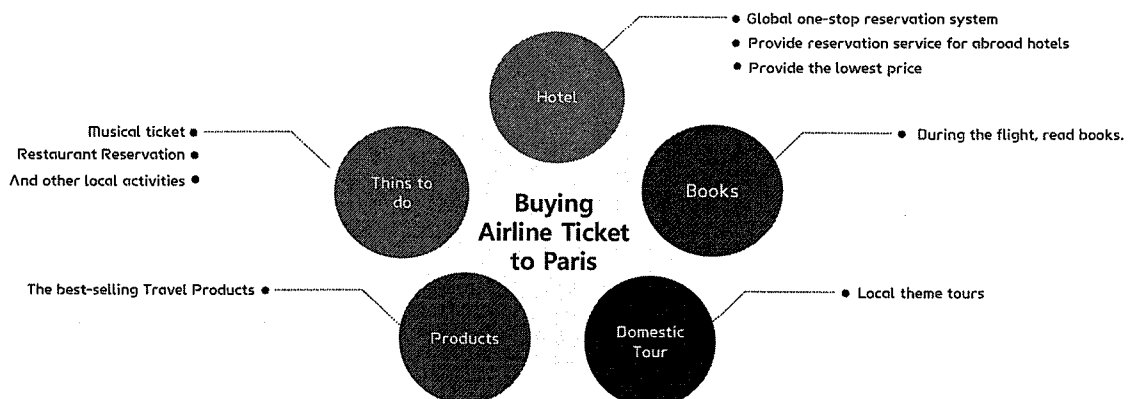
Experience



e-Commerce Platform

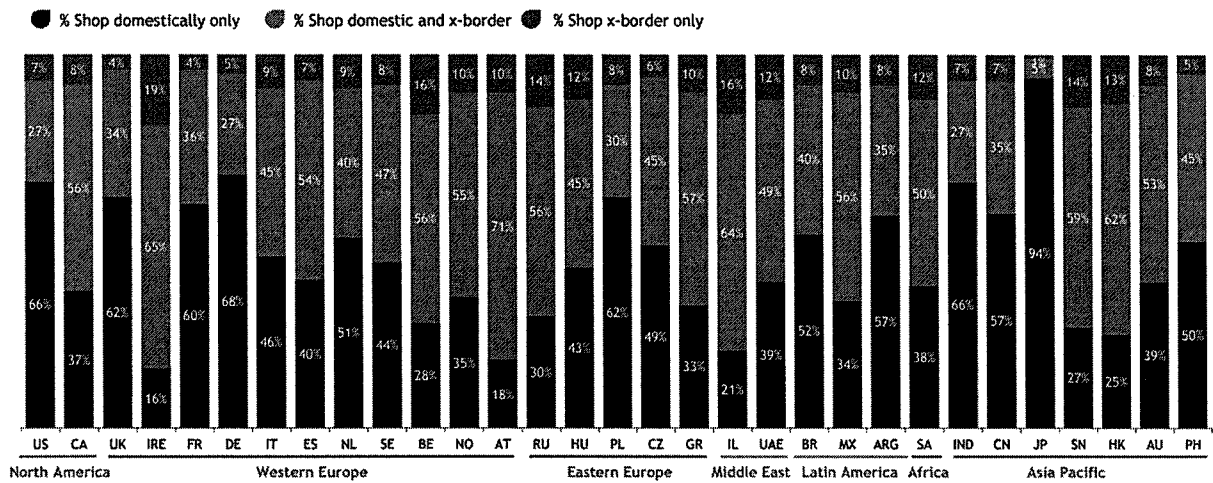
- Simple purchase of a product can lead to recommending related products and services.

Collaboration



#4 Opportunities and Challenges

Opportunities & Challenges

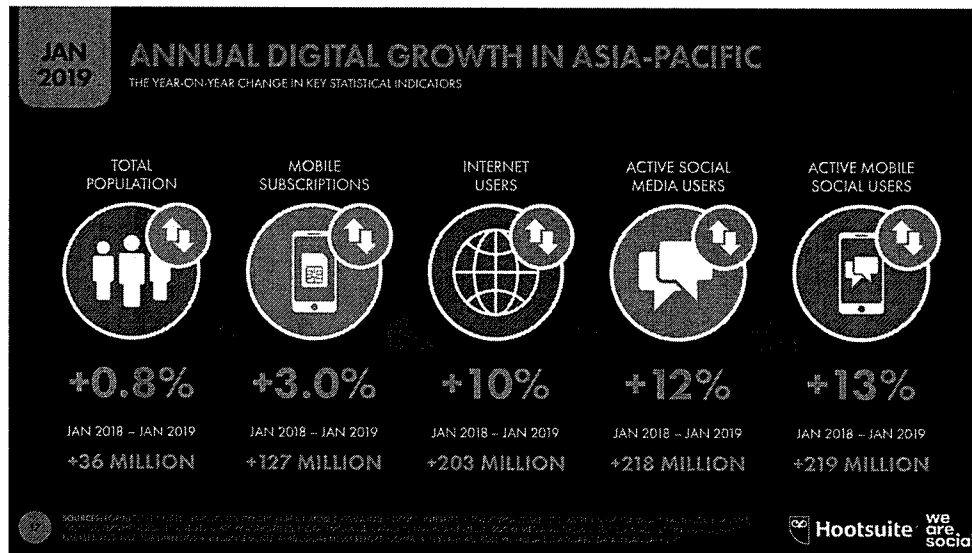


Paypal Cross-border consumer Research 2018

Opportunities & Challenges

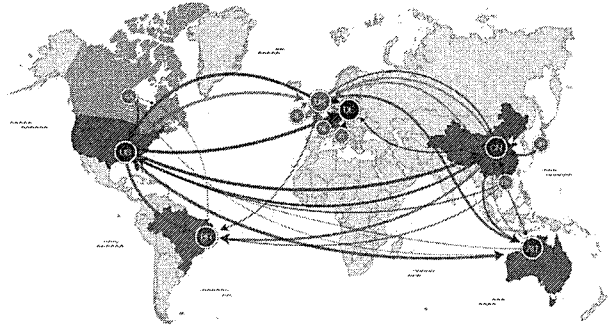


Opportunities & Challenges



Opportunities & Challenges

Yes, there are more customers in the world, But it is not easy to follow.



Advanced technology is helping to open up commerce opportunities for everyone – across borders, anywhere, anytime and via any device.

Opportunities & Challenges

- Online consumers in every corner of the world are shopping cross-border for physical goods.

#1 Better Price

#2 Access to items not available in my country

#3 I can discover new and interesting products

#4 Higher product quality

#5 Shipping is more affordable

Opportunities & Challenges

- Cross border trading in Korean market

KOREA 2018 CBT, GMV: Million

	Export		Import	
	Number	GMV	Number	GMV
2016	5,855	1,977	17,395	1,635
2017	8,093	2,611	23,592	2,110
2018	9,608	3,252	32,255	2,755

Export	Japan	China	Singapore	USA
	35%	31%	10%	5%
Import	USA	China	EU	Japan
	53%	23%	13%	8%

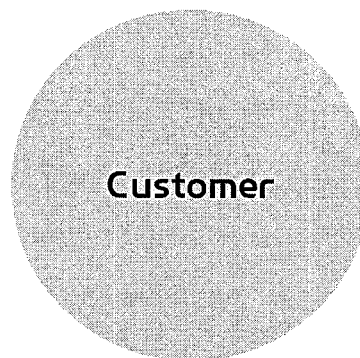
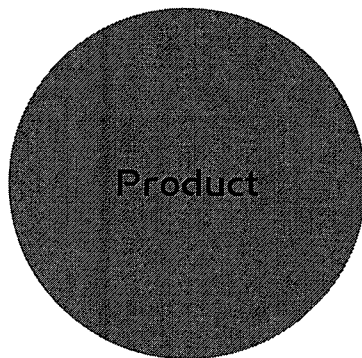
Export		Import	
Clothes	37%	Healthy Pro	25%
Cosmetic	19%	Clothes	15%
Shoes	3%	Cosmetic	13%
Bag	2%	Electric Pro	13%
Sports good	2%	Shoes	8%
Computer	1%	Toy	7%
Toy	1%	Bag	4%
Jewelry	1%	Book	1%
Glasses	1%	Watch	1%
Other	16%	Other food	13%

- Cross border trading (Interpark)

Export	China	USA	Japan	Singapore	ASEAN
	58%	12%	6%	1%	3%
Import	USA	China	EU	Others	
	55%	25%	15%	5%	

Opportunities & Challenges

- Intense Domestic Competition



- Import
- Strengthening product availability

- Export
- Boost gross merchandise volume

Opportunities & Challenges

• CBT (Import for local users)

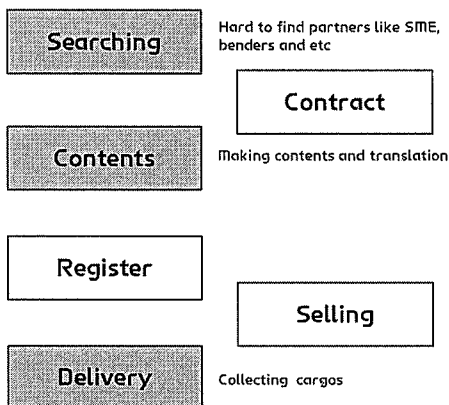


• CBT (Export for global users)

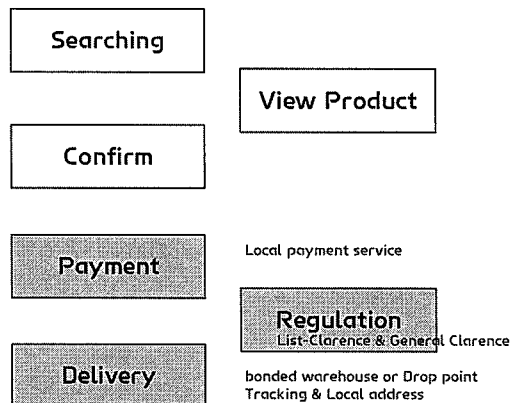


Opportunities & Challenges

• Import CBT

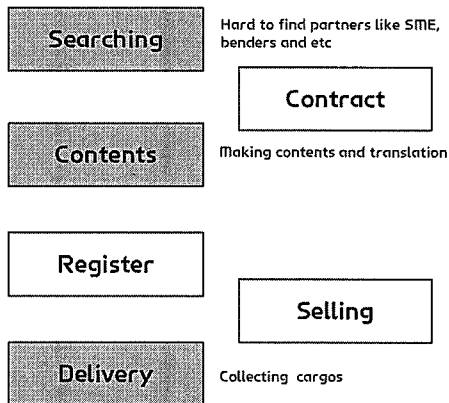


• Export CBT

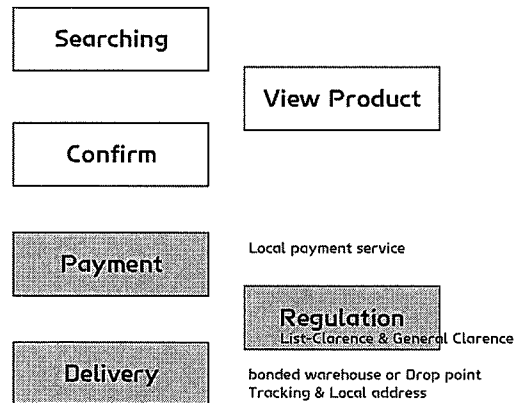


Opportunities & Challenges

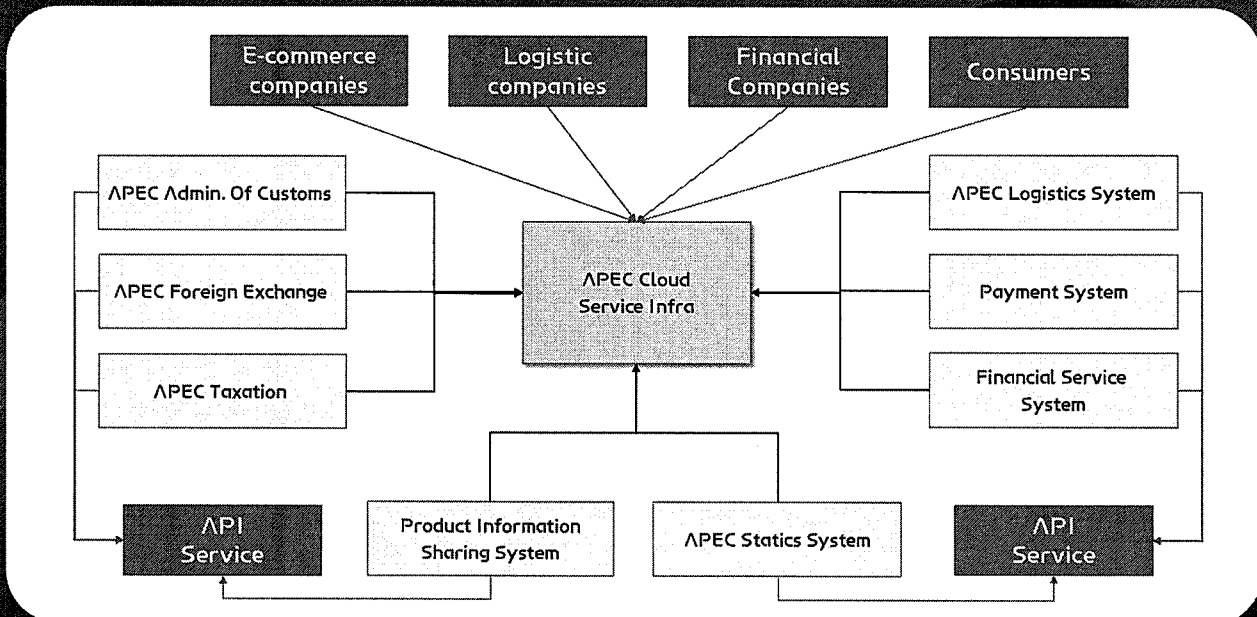
• Import CBT



• Export CBT



Opportunities & Challenges







Development of Rules on E-Commerce in WTO & RTAs

|

Hyo-Young LEE

Professor

(Korea National Diplomatic Academy)



DEVELOPMENT OF RULES ON E-COMMERCE IN WTO & RTAs

FTAAP Capacity Building Workshop on
E-Commerce Elements in FTA/RTAs
September 17, 2019

Hyo-young Lee
Korea National Diplomatic Academy (KNDA)

Contents

- Existing WTO Rules on E-Commerce and Limitations
- Efforts for Advancing Rules on E-Commerce
- Current State of E-Commerce Rules in RTAs
- Development and Prospects for Multilateral Rules on E-Commerce

Status of Multilateral Rules on E-Commerce

❖ Lack of Multilateral Rules on E-Commerce

- Fragmented application of WTO rules in GATT, GATS, TRIPs regarding e-commerce issues
- Efforts to introduce multilateral e-commerce rules since 1998
- Lack of progress on multilateral negotiations on e-commerce rules
- Rules on e-commerce introduced in bilateral FTAs or mega-regionals
- Current most advanced rules on e-commerce: CPTPP (and USMCA)

3

Existing GATS Rules on E-Commerce

❖ Existing GATS rules apply to online digital services

- Cross-border delivery of service via electronic means (Mode 1 "cross-border supply")
- Searching on the internet to purchase a service (Mode 2 "consumption abroad")
- GATS schedule of commitments on liberalization of service sectors critical for enabling digital trade
 - ✓ Computer and related services, telecommunications, banking and other financial services, etc.
 - ✓ Commitment to open up service sector to digital trade of that service subject to limitations listed in Member country's GATS schedule
- General principle: MFN treatment. Market access
 - ✓ Subject to limitations on number, value, type of legal entity, extent of foreign capital participation

4

Existing GATS Rules on E-Commerce

❖ Lack of applicable multilateral trade rules on 'new services'

- Not subject to market access commitments if e-commerce or other new type of services are not included in the Member's schedule of concessions
- Domestic regulations in services are allowed under the General Exceptions clause in GATS (Article XIV)
 - ✓ Measures deemed necessary to protect public morals or maintain public order, to protect human, animal, or plant life or health, to secure compliance with laws or regulations consistent with WTO law can be exempted from market access obligations
- **U.S.-Gambling dispute case (2005)**
 - ✓ Whether digitally transmitted services fall under GATS (market access and non-discrimination) obligations
 - ✓ 'Gambling Services' included in category of "other recreational services" in U.S. schedule of commitments
 - ✓ U.S. claim that the measures were necessary to protect public morals and maintain public order
 - ✓ GATS rules apply unless a Member specifically limits opening of 'digitally transmitted services' in its schedule of commitments

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Other Existing WTO Rules on E-Commerce

❖ Rules for Trade in Goods (GATT)

- Agreement on Technical Barriers to Trade (TBT): i.e. Standards governing telecommunications and broadband network, interoperability and portability standards
- Agreement on Trade-Related Intellectual Property Rights (TRIPS): i.e. use rights of music or audiovisual services traded via the internet
- Information Technology Agreement (ITA): i.e. trade in infrastructure equipment necessary for digital trade
- Trade Facilitation Agreement (TFA): i.e. procedures for electronic pre-arrival processing of documents, electronic payment of customs duties

6

Limitations of Existing WTO Rules on E-Commerce

- ❖ **Definition of digital goods and services**
 - Distinction between goods and services blurs with rise of 'Internet of Things (IoT)' and service-embedded goods.
- ❖ **Classification of digital services**
 - How services tied to new digital technologies are to be treated under existing GATS schedules.
- ❖ **Cross-border data flows**
 - Measures that impede free flow of data across borders i.e. data localization measures
- ❖ **Consumer-related regulatory measures**
 - Measures designed to protect consumer and personal data
- ❖ **Security-related regulatory measures**
 - Regulations to protect national security and domestic law enforcement to counteract criminal activities over the internet

7

Efforts for Multilateral Rules on E-Commerce

- ❖ **'Declaration on Global E-Commerce' at 2nd WTO Ministerial Conference**
 - Adoption of 'Work Program on E-Commerce' (1998)
 - Review of various issues related to e-commerce at Council for Trade in Goods, Council for Trade in Services, Council for Trade-Related Aspects of Intellectual Property Rights, Committee on Trade and Development
 - ✓ Discussion of various issues including non-discriminatory treatment, market access, competition, data privacy, development issues, customs, rules of origin, standards, copyright etc.
 - Progress only made in **temporary prohibition of customs duties on digitally transmitted goods**
 - ✓ Extension of the prohibition of customs duties as a temporary measure at every ministerial conference since adoption at the General Council in February 1998

8

Efforts for Plurilateral Rules on E-Commerce

❖ Trade in Services Agreement (TISA) Negotiations

- Plurilateral trade negotiations for TISA launched in 2013, with discussions on increased market access for 'new services'
- Negotiations to add Annexes on telecommunication services, e-commerce, data localization, and financial services, etc.
 - ✓ Issues on cross-border transfer of financial information by financial service providers
- 21 negotiation rounds until 2016; No progress in TISA negotiations since Trump Administration came into office in 2017
 - ✓ Key issues discussed in TISA negotiations formed basis for rule-making on e-commerce in multilateral services trade negotiations and mega-FTA negotiations

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More Recent Efforts for Multilateral Rules on E-Commerce

❖ Adoption of 'Work Plan on Electronic Commerce' at 11th WTO Ministerial Conference

- 71 WTO Members (including U.S.) announced '**Joint Statement on Electronic Commerce**' on December 2017
 - ✓ Reconfirmed WTO role in establishing regulatory environment which is open, transparent, non-discriminatory, and predictable for the facilitation of e-commerce
 - ✓ Showed willingness of WTO Members to engage in exploratory discussions among like-minded countries for starting WTO negotiations on e-commerce
- Numerous Joint Statement meetings held during 2018
 - ✓ Conflicting positions on most issues
 - ✓ Conflict of U.S. and EU positions on cross-border data flow
 - ✓ Opposition by developing country Members on permanent prohibition of customs duties on digitally transmitted goods

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More Recent Efforts for Multilateral Rules on E-Commerce

❖ 'Joint Declaration on Electronic Commerce' at Davos Forum 2019

- 76 countries (including U.S.) reconfirmed willingness to restart multilateral negotiations for rules on e-commerce at World Economic Forum (Jan. 2019)
 - ✓ Ambitious negotiation results
 - ✓ Open to all WTO Members
- U.S. position at 'WTO E-Commerce Joint Declaration' meeting on March 2019
 - ✓ Aim for ambitious level of results with binding regulations
 - ✓ Same level of obligations to all participants
 - ✓ Low level of results will be regarded as showing WTO is no longer able to reflect current economic reality

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Status of Rules on E-Commerce in RTAs

❖ CPTPP E-Commerce chapter vs. USMCA Digital Trade chapter

- **CPTPP E-Commerce Regulations**
 - ✓ Mandatory provisions on 'cross-border transfer of information by electronic means', 'location of computing facilities', and 'source code'
 - ✓ Recognize 'need for achieving legitimate public policy objectives' for measures related to cross-border data transfer, location of computing facilities, different legal approaches to protecting personal information
 - ✓ Right to achieve legitimate public policy objectives allowed unless they are means of arbitrary or unjustifiable discrimination or disguised restriction on trade
- **USMCA Digital Trade Regulations**
 - ✓ More comprehensive term 'digital trade' than 'e-commerce'
 - ✓ Higher level of trade liberalization due to clearer definitions and narrower exception clauses
 - ✓ No recognition of legitimate public policy objectives for 'location of computing facilities'; but allows measures to restrict cross-border transfer of information by electronic means when necessary to achieve public policy objectives

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Status of Rules on E-Commerce in RTAs

❖ CPTPP vs. USMCA : Personal Information Protection

	CPTPP	USMCA
Protection of Personal Information	<ul style="list-style-type: none"> • Obligation to adopt or maintain legal framework providing protection of personal information of users of e-commerce • Endeavour to adopt non-discriminatory practices in protecting users of e-commerce • Obligation to publish information on personal information protection methods • <u>Recognition of different legal approaches to protecting personal information</u>, while encouraging Parties to develop mechanisms to promote compatibility among different regimes 	<ul style="list-style-type: none"> • Obligation to adopt or maintain legal framework providing for protection of personal information of users of digital trade (<u>reference to APEC Privacy Framework and 2013 OECD Guidelines</u>) • Key principles for protection of personal information • Ensurance that restrictions on <u>cross-border flow of personal information</u> are necessary and proportional to the risks • Non-discriminatory practices in protecting users of digital trade • <u>Recognition of different legal approaches to protecting personal information</u> (<u>reference to APEC CBPR</u>)

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Status of Rules on E-Commerce in RTAs

❖ CPTPP vs. USMCA: Cross-border Transfer of Information

	CPTPP	USMCA
Cross-border Transfer of Information by Electronic Means	<ul style="list-style-type: none"> • <u>Recognition of respective regulatory requirements</u> • Obligation to allow cross-border transfer of information by electronic means • Allow regulatory measures to achieve <u>legitimate public policy objectives</u> (unless applied as means of arbitrary or unjustifiable discrimination, or disguised restriction on trade) 	<ul style="list-style-type: none"> • Obligation to allow cross-border transfer of information by electronic means when for conduct of business of covered person • Allow measures to achieve <u>legitimate public policy objectives</u> (unless applied as means of arbitrary or unjustifiable discrimination, or disguised restriction on trade)

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Status of Rules on E-Commerce in RTAs

❖ CPTPP vs. USMCA: Data Localization

	CPTPP	USMCA
Location of Computing Facilities	<ul style="list-style-type: none"> • Recognition of respective <u>regulatory requirements</u> • Obligation to prohibit requirement of locating computing facilities in that Party's territory as condition for conducting business • Allow regulatory measures to achieve <u>legitimate public policy objectives</u> (unless applied as means of arbitrary or unjustifiable discrimination, or disguised restriction on trade) 	<ul style="list-style-type: none"> • Obligation to prohibit requirement of locating computing facilities in that Party's territory as condition for conducting business • Prohibition of requirement for localization of data related to financial services (Financial Services chapter)

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Status of Rules on E-Commerce in RTAs

❖ CPTPP vs. USMCA: Cybersecurity

	CPTPP	USMCA
Cooperation on Cybersecurity Matters	<ul style="list-style-type: none"> • Recognition of importance of building capabilities of responsible national entities, and collaboration to identify and mitigate malicious intrusions or dissemination of malicious codes 	<ul style="list-style-type: none"> • Recognition of importance of building capabilities of responsible national entities, and collaboration to identify and mitigate malicious intrusions • Endeavour to employ <u>risk-based approaches that rely on consensus-based standards and risk management best practices</u>

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Status of Rules on E-Commerce in RTAs

❖ CPTPP vs. USMCA: Source Code

	CPTPP	USMCA
Source Code	<ul style="list-style-type: none"> Obligation to prohibit requiring the transfer of, or access to, source code (not include software used for critical infrastructure) Allow <u>provision of source code in commercially negotiated contracts</u>, and modification of source code in order to comply with CPTPP laws and regulations 	<ul style="list-style-type: none"> Obligation to prohibit requiring the transfer of, or access to, source code or source code algorithm (not include software used for critical infrastructure) Allow <u>regulatory body or judiciary authority to require preservation and make available the source code to regulatory body for specific investigation, inspection, examination, enforcement action, or judicial proceeding</u> (subject to safeguards against unauthorized disclosure)

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Proposals for Multilateral Rules on E-Commerce

❖ Protection of Personal Information

U.S. proposal	EU proposal	China's proposal
<ul style="list-style-type: none"> Obligation to adopt or maintain legal framework providing for protection of personal information of users of digital trade Obligation to publish information on personal information protections Recognition of different legal approaches to protecting personal information; develop mechanisms to promote compatibility among different regimes Ensure restrictions on cross-border transfer of personal information are necessary and proportional to the risks 	<ul style="list-style-type: none"> Protection of personal information is a basic human right; need for high level of protection Allow for adoption or maintenance of protection devices deemed necessary by each Member for protection of personal information 	<ul style="list-style-type: none"> Reference to international standards for measures for protection of personal information for users of digital trade Adoption or maintenance of legal framework for protection of personal information Non-discriminatory measures for protecting users of digital trade Obligation to publish information on personal information protections Recognition of different legal approaches to protecting personal information; develop mechanisms to promote compatibility among different regimes

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Proposals for Multilateral Rules on E-Commerce

❖ Cross-Border Data Transfer & Data Localization

U.S. proposal	EU proposal	China's proposal
<ul style="list-style-type: none"> Obligation to allow cross-border transfer of information by electronic means for conduct of business Allow measures to achieve legitimate public policy objectives (unless applied as means of arbitrary or unjustifiable discrimination or disguised restriction on trade) 	<ul style="list-style-type: none"> Ensure cross-border data flows to facilitate digital trade 	<p>(Domestic Regulations)</p> <ul style="list-style-type: none"> Application of GATS Article VI concerning domestic regulations Allow Member's right to conduct content review for purpose of achieving legitimate public policy objectives
<ul style="list-style-type: none"> Prohibit requirement of locating computing facilities in Party's territory as condition for conducting business Prohibition of requirement of locating financial computing facilities for covered financial service suppliers 	<ul style="list-style-type: none"> Prohibit requiring use of computing facilities in Member's territory; requiring localization of data for storage or processing; prohibiting storage or processing in other Members' territory; making cross-border data transfer contingent on use of computing facilities in Member's territory 	

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Proposals for Multilateral Rules on E-Commerce

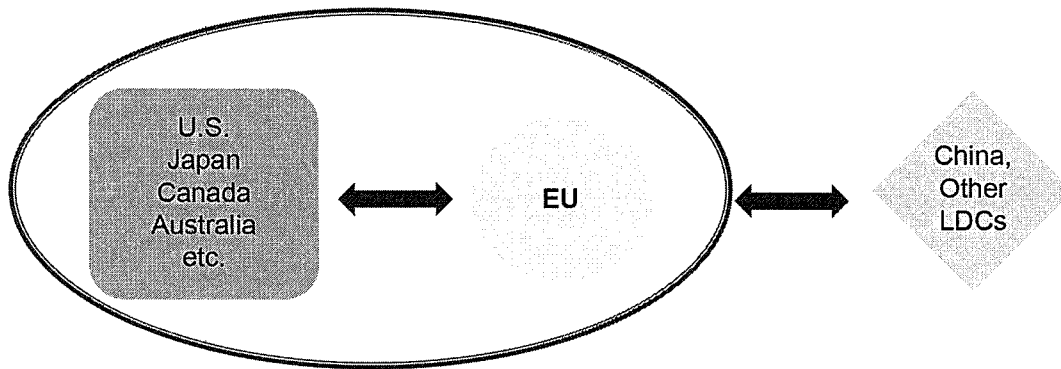
❖ Source Code & Exceptions

U.S. proposal	EU proposal	China's proposal
<ul style="list-style-type: none"> Prohibition of requiring transfer or access to source code or source code algorithm 	<ul style="list-style-type: none"> Prohibition of requiring transfer or access to source code or software (not apply to voluntary transfer or access to source code on commercial basis in public procurement transaction) 	
<ul style="list-style-type: none"> Allow regulatory body or judiciary authority to require preservation and make available the source code to regulatory body for specific investigation, inspection, examination, enforcement action, or judicial proceeding (subject to safeguards against unauthorized disclosure) 	<ul style="list-style-type: none"> General exceptions, security exceptions, exceptions in GATS Annex on Financial Services apply to measures on certification procedure Allow transfer or access to source code when required by court, or authority to remedy violation of competition law; for IPR protection and enforcement; necessary for protection of essential security interests 	<p>(Security Exceptions)</p> <ul style="list-style-type: none"> Prohibit requiring any Member to furnish information contrary to Member's essential security interest; preventing any Member from taking action it considers necessary for protecting essential security interests; preventing any Member from taking action in pursuance of UN Charter obligations

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Prospects for Multilateral Rules on E-Commerce

- ❖ Different position of Members on digital trade related issues



E-Commerce Issues in the FTA Negotiations



Kyu Yub LEE

Research Fellow

(Korea Institute for International Economic Policy)



E-Commerce Issues in the FTA Negotiations

Kyu Yub Lee (KIEP)

FTAAP CBNI E-Commerce Workshop

Sep. 17, 2019

Plan of Talk

- E-Commerce-related domestic laws
- Current State of RTAs with E-Commerce-Related Provisions
- Several Facts
- Cutting-Edge Issues
- Protection of Users of E-Commerce
 - Economic reasoning
- General Provisions
- Market Access
- Enabling E-commerce
- Looking Ahead

E-Commerce-related domestic laws

Type	Legislation	Draft	No Legislation	No Data
e-transaction	79	9	5	7
consumer protection	52	6	10	32
data protection, privacy	58	10	21	12
cybercrime	72	9	18	1

Source: UNCTAD, Adoption of E-Commerce Legislation Worldwide

Current State of RTAs with E-Commerce-Related Provisions

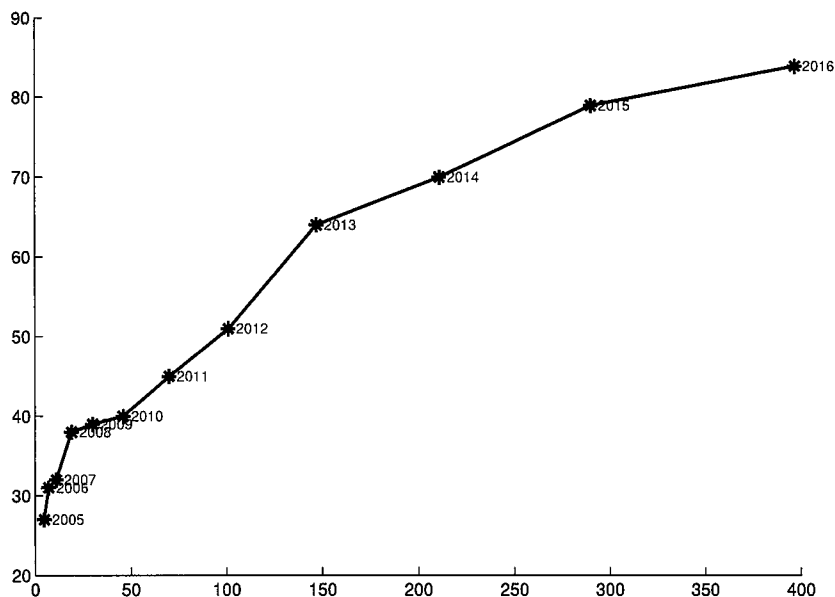


Fact 1: USA's FTAs

FTA	Year	Duties	Non Discr.	Data Flows	Localization	Source code
Morocco	2004	O	O	X	X	X
Chile	2004	O	O	△	X	X
Australia	2005	O	O	X	X	X
Barrain	2006	O	O	X	X	X
Peru	2009	O	O	X	X	X
Auman	2009	O	O	X	X	X
Korea	2012	O	O	△	X	X
Columbia	2012	O	O	X	X	X

Notes: Customs duties(Duties), non-discriminatory treatment(Non Discr.), cross-border transfer of information(Data Flows), data localization(Localization). O, △, and X represent, respectively, 'included', 'cooperation', and 'not included'

Fact 2: data localization measures



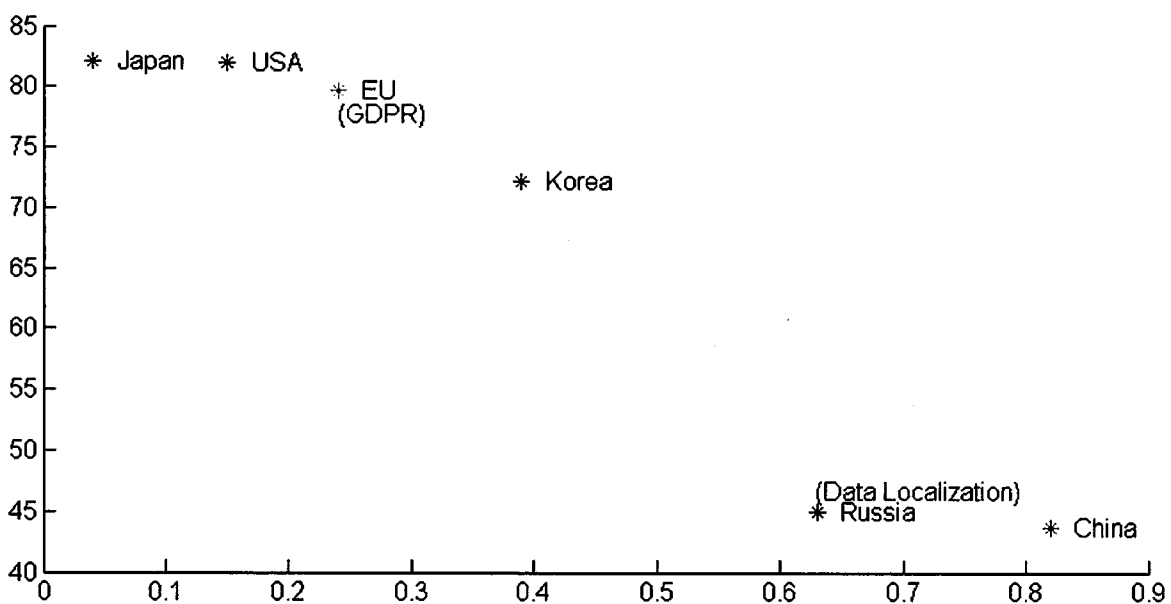
Notes: Author's calculation. The horizontal line represents terabits per second and the vertical line represents the number of data localization measures.

Fact 3: USMCA, CPTPP, KORUS

Provisions	USMCA	TPP	KORUS
Customs duties	19.3	14.3	15.3
Non-Discriminatory treatment	19.4	14.4	15.3
E-Authentication/Signatures	19.6	14.6	15.4
Online consumer protection	19.7	14.7	15.5
Cross-border transfer of info.	19.11	14.11	15.8
Personal Information protection	19.8	14.8	-
Location of computing facilities	19.12	14.13	-
Source code	19.16	14.7	-
Interactive computer service	19.17	-	-
Open government data	19.18	-	-

Source: Digital trade chapter 19(USMCA), Electronic Commerce chapter 14(TPP), Electronic Commerce chapter 15(KORUS)

Fact 4: digital trade environment



Source: Author's calculation by using ECIPE and BSA data

Cutting-Edge Issues

- Cross-border data flows
 - the ability to transfer data across borders is **vital** to the functioning of e-commerce
 - “shall allow the cross-border transfer of information by electronic means, **including personal information**, when this activity is for the conduct of the business of a covered person”
- Data localization
 - ex) some gov'ts require a copy of data stored within its territory
 - protecting citizens' data vs. protectionist policy
 - “**no party shall require** a covered person to use or locate computing facilities...”
- Treatment of source code

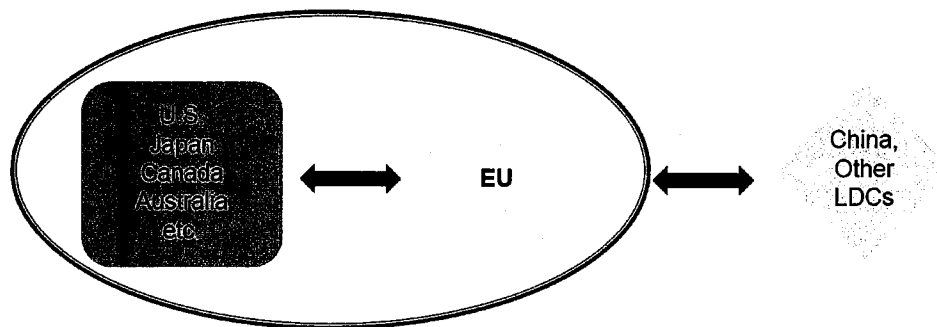
Protection of Users of E-Commerce

- Consumer protection
- Protection of Personal Information
 - **Many of the FTAs** include language **requiring** each party to take into account international standards and the criteria of relevant international bodies
 - **A few FTAs** have **weaker** language in which the parties simply recognise the need for such protection and/or employ the “shall endeavour” language
 - EU GDPR, APEC Privacy Framework
- Unsolicited electronic messages

Wait a minute: let's think

- Unlike many advanced countries, the EU effectuated the GDPR.
- Unlike many advanced countries and the EU, developing countries enacted data localization measures.
- Why do many advanced countries want free data flows unlike the EU GDPR and want to ban data localization measures?

❖ Different position of Members on digital trade related issues



The EU General Data Protection Regulation

- The EU GDPR is effective on May 25, 2018 and applies to all firms processing the personal data of data subjects in the EU.

What is about?

The GDPR protects all EU citizens from privacy and data breaches

What to protect?

For example, age, sex, name, home address, ID numbers, income, web data location, IP address, cookie data, RFID tags, health and genetic data, biometric data, racial or ethnic data, political opinions, sexual orientation, etc

What is the goal?

It aims to achieve a higher institution quality by harmonizing data privacy laws across Europe

Data Localization measures

What countries?

China, Russia, Indonesia, India, many others (see NTE report by USTR)

Why?

To prevent or relieve increasing concerns of privacy violations and online security issues.

How?

Countries impose measures requiring data about a nation's residents that be collected, processed, and/or stored inside the country.

Key question and related literature

- What is the **welfare effect** of the EU GDPR? How about data localization measures?
 - both the EU GDPR and data localization measures can affect optimal pricing decisions of firms and ultimately welfares in trading partners!
- Welfare effects: in a quantitative model
 - Constantin et al.(2013): DSGE
 - Baur et al.(2014): CGE
 - **Mine(2018)** is based on a quantitative trade model with data regulation, which is sharply contrasted with above papers(at least in terms of methodology)

General features of new data regulations

Regulation/compliance/implementation costs

both the EU GDPR and laws including data localization measures

Fines as penalties

For example in the EU GDPR, (up to) 4% of annual global turnover or 20 million Euros (whichever is greater)

Fixed exporting costs

Building data facilities/servers within a country's territory

(Math) Data regulation and firm's problem

The firm's max problem is

$$\max_{p_{js}} \Pi_{is}(p_{js}) = \underbrace{\frac{p_{js}q_{js}(p_{js})}{1 + f_{ijs}}}_{\text{fines}} - \underbrace{\frac{r_{ijs}x_{is}^p q_{js}(p_{js})}{z_{is}}}_{\text{regul. costs}} - \underbrace{x_{ijs}^{ex} \delta_{ijs}}_{\text{fixed costs}}$$

- f_{ijs} : fines imposed on exporting firm's revenue
 - facing risk of being fined penalited when it violates data regulation in country j
- r_{ijs} : frictions(costs) when complying data regulations
 - ex) man power
- δ_{ijs} : fixed exporting costs
 - ex) data facilities/servers

(Math) Welfare calculation

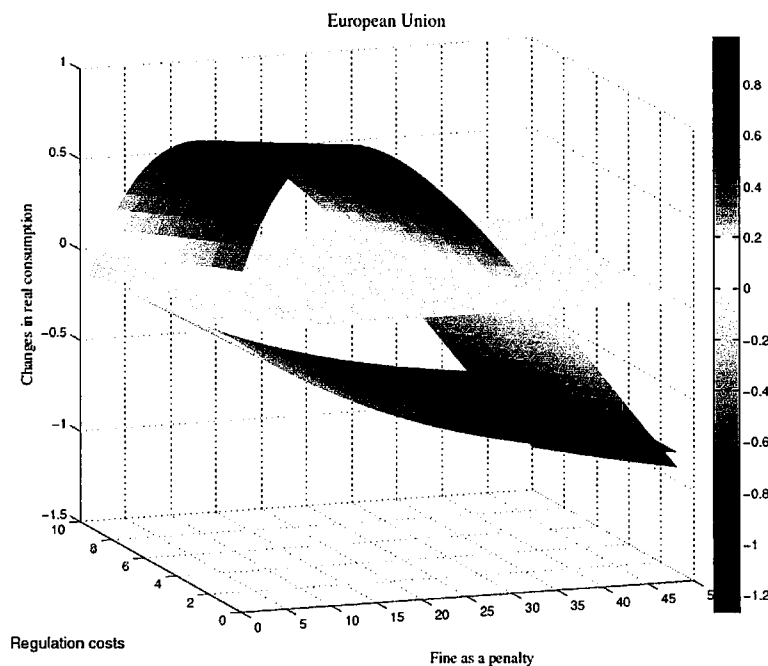
(Equilibrium) For given fines $\{f_{ijs}\}$, regulation costs $\{r_{ijs}\}$, and fixed exporting costs $\{\delta_{ijs}\}$, a trade equilibrium can be described by bilateral expenditure share at the sector-level $\{\pi_{ijs}\}$, sector-level expenditures $\{E_{is}\}$, sector-level revenues $\{R_{is}\}$, and aggregate income levels $\{Y_i\}$.

The **WELFARE** measured in terms of real consumption is

$$Q_j = \left(Y_j + \frac{\sum_{i=1}^N \sum_{s=1}^S \rho^s \frac{f_{ijs} \pi_{ijs}}{1+f_{ijs}} \left(\alpha_{js} Y_j + \sum_{k=1}^S \gamma_{j,sk} R_{jk} \right)}{1 - \sum_{i=1}^N \sum_{s=1}^S \alpha_{js} \rho^s \frac{f_{ijs} \pi_{ijs}}{1+f_{ijs}}} \right) \frac{1}{P_j}$$

with $P_j = Y_j \prod_{s=1}^S \prod_{k=1}^S \pi_{jkk}^{-1} [R_{jk} E_{jk}^{\mu^s} B_k]^{-\frac{\alpha_{js} \gamma_{j,sk}}{\epsilon^k}}$.

Welfare effects by GDPR



Source: Author's calculation.

Welfare effects by data localization

Country	Changes in real consumption
Australia	-0.13%
Brazil	-0.18%
China	-0.70%
India	-0.36%
Indonesia	-0.57%
Japan	-0.11%
Korea	-0.36%
Russia	-0.26%
US	-0.04%
EU	-0.06%

Source: Author's calculation.

Explanations

- Data localization measures can create additional trade costs
 - which can be trade barriers for firms in trading partners that rely on cross-border data flows.
- The EU GDPR aims to protect all EU citizens from privacy and data breaches, leading the EU to achieve a higher institutional quality by harmonizing data privacy laws across the Europe.
 - however, the EU's achievements by the GDPR may come mainly at a cost of trading partners consisting of non-EU countries.

General Provisions

- Definitions
 - Digital Product
 - Electronic authentication
 - Electronic transmission
 - Unsolicited commercial electronic message
- Non-discriminatory treatment of digital products
 - NT
 - MFN

Market Access

- Customs duties
 - By far, the most common provision found in FTAs with electronic commerce provisions is an obligation to not impose customs duties on digital products
 - ex) software, e-books, music, movies, etc
- Services

Enabling E-commerce

- Adoption of the UNICTRAL Model Law
- Electronic Authentication/Signatures
- Paperless trading

Looking Ahead

- FTAs are likely to remain the laboratories through which updated e-commerce rules evolve for the near future

E-COMMERCE NORMS IN THE GLOBAL TRADING REGIME

- CURRENT STATUS AND FUTURE

Jaemin Lee

School of Law, Seoul National Univ.

FTAAP Capacity Building Workshop

September 18, 2019

Contents

- Where We Stand
- E-Commerce and Trade
- Importance of E-Commerce Norms
- Limitation of Current Norms
- Elements of Future Norms
- Concluding Remarks

Where We Stand



Images taken from google

Where We Stand

- Protectionism surging, spreading, globally
- Even protectionism-fatigue settles in
- In the meantime, multilateralism is in limbo
- Not just a single, passing incident
- Involves structural, fundamental problems
- “Broken window” phenomenon
- Existing GVC does not work any more?

Eroding Leadership of WTO

- Failing to stop the current trend
- Disputes have been on the rise
 - 586 disputes as of September 9, 2019
 - Length of time needed for the proceeding
 - Structural problem of implementation
- DDA negotiations long stalled
- Even DSM to be stalled soon
 - DSM: Dispute Settlement Mechanism
- Multilateralism in crisis

Eroding Leadership of WTO - 2

- Many norms out of date
 - 1986 vs. 2018
 - Societies & businesses have seen a sea change
- New norms are missing
 - Consider digital economy, Artificial Intelligence
- So, inevitably
 - Disputes bound to increase
 - Rulings bound to be dissatisfactory
 - Panel/AB decisions unable to resolve disputes
- A vicious circle

Now Even the DSM is Faltering

- A crown jewel of the WTO regime
 - 586 disputes at the WTO since 1995
 - Strengthening rule of law
 - Trailblazer in many respects
- Other international courts look to WTO's DSM for insights and guidance
 - ISDS reform
 - FTA dispute settlement mechanisms
- But now in crisis in many respects
- Future is uncertain

Overall Challenges...

- A widening gap between norm and reality
 - Current agreement reflects situations of Uruguay Round
 - Over the past 24 years, drastic changes in
 - Business sectors
 - Governmental sectors
 - Personal lives
 - Provisions, however, remain at standstill
- Disputes are bound to increase
 - Different views and positions
 - Fiercer competition
 - Different dynamics in the international community

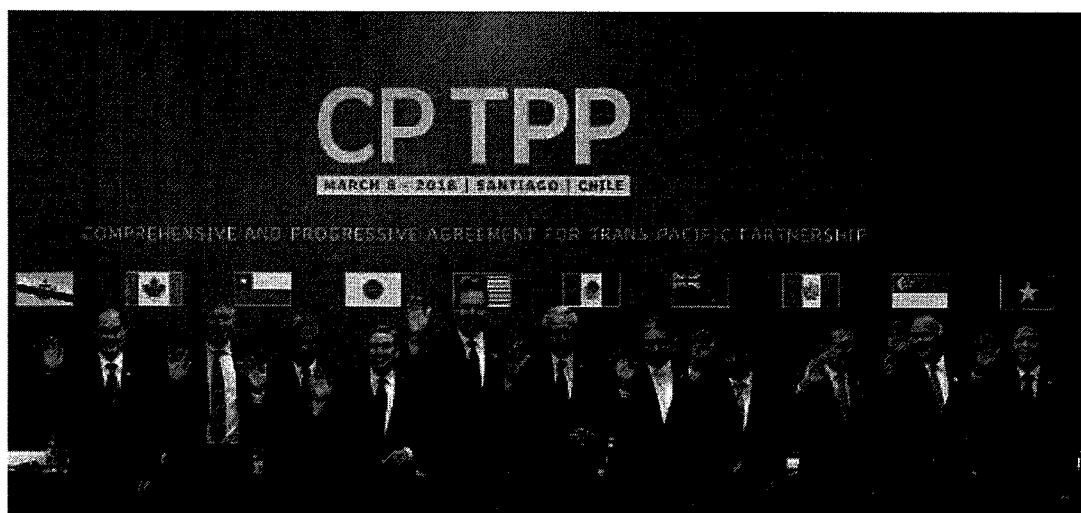
Overall Challenges...

- WTO negotiations at present aim to harvest only low-hanging fruits
 - Fisheries subsidies, State-Owned Enterprises, Industrial subsidies
- Not ready for
 - The larger, and more important project of overall updates of trade agreements
 - Reflection of drastic changes in business
- Disputes will be bound to increase

Regional Trade Agreements

- Notable contribution for
 - Filling the gap and ensuring trade
 - Free Trade Agreements, Economic Partnership Agreements, etc.
 - Market liberalization
 - Adoption of new rules and norms
 - In particular, mega-FTAs
 - CPTPP, RCEP, FTAAP
 - Mega-regionals are different from other FTAs
- Challenges still remain, however
 - The core problem of norm-reality mismatch remains and widens, even with FTAs

CPTPP Comes into Force



E-Commerce and Trade

E-Commerce Surging

- E-Commerce has become a major source and means of global trade
- Demand from the market and consumers
- Takes place in various forms
- Constant changes and evolution
- Operates in a different framework
 - Combination of goods trade and services trade
 - Does not fit in the conventional box

WTO and E-Commerce

- WTO realized the uniqueness early on
 - Some disputes handled this
 - *U.S.-Gambling, China-Audiovisuals*
 - Negotiations continued and produced results
- Development, yet long way to go because:
 - Changes we see are more fundamental
 - A lot at stake in the Digital Economy
 - Consensus on specifics is still weak and fragile
 - Disputes arise and intensify

FTAs and E-Commerce

- Recent FTAs attempt to address this issue
 - Complement the WTO regime
 - Provide updates and upgrades in trade norms
- Yet, still inherent limitations
 - Basically a fragmented approach in different FTAs
 - Not compatible with the Digital Economy itself
 - Global consensus on key issues still elusive
 - Mainly bilateral experimental
 - Concrete future course of action uncertain

Importance of E-Commerce Norms

E-Commerce Norms Affect Entire Trade

- Not about “order and delivery” via internet
 - Conventional E-Commerce
- Involves a wide range of areas
 - Goods, Services, IPRs, and Investment
- Dictates future trade
 - 4th Industrial Revolution, Digital Economy, AI
- National borders become meaningless
- Affects trade interest of many countries

Also Affect Sensitive Areas and Issues

- Relates to core legitimate concern of states
 - Privacy, cyber security, national security
- Consensus is still in the process of forming
 - Different countries have different views
- More prone to take defensive measures
 - Growing domestic demand and request
- Collision of sovereignty and free trade
 - Claims of trade agreement violation, investment agreement violation, justification by exceptions?

LOCALIZATION BARRIERS TO TRADE

- LBTs measures designed to protect, favor, or stimulate domestic industries, service providers, and/or intellectual property (IP) at the expense of goods, services, or IP from other countries. Localization barriers are measures that can serve as disguised trade barriers when they unreasonably differentiate between domestic and foreign products, services, IP, or suppliers, and may or may not be consistent with WTO rules
- Examples:
 - Local content requirements, i.e., requirements to purchase domestically-manufactured goods or domestically-supplied services
 - Subsidies or other preferences that are only received if producers use local goods, locally-owned service providers, or domestically-owned or developed IP, or IP that is first registered in that country;
 - Requirements to provide services using local facilities or infrastructure;
 - Measures to force the transfer of technology or IP ;
 - Requirements to comply with country- or region-specific or design-based standards that create unnecessary obstacles to trade
 - Unjustified requirements to conduct or carry out duplicative conformity assessment procedures in-country

Limitations of Current Norms

Development of New Norms

- New norms are being introduced
- But they are mainly geared toward:
 - Facilitation of cross-border trade via internet
 - Tariff elimination of ICT products
 - Prevention of Non-Tariff Barriers
- Instead of offering new norms for:
 - The future digital trade
 - New types of trade combining trade and goods
 - Core elements of such trade: data flow

E-Commerce: Remaining Challenges

- Vagueness
 - The term and scope unclear and fluctuate
- Conflict
 - Incompatible with existing trade norms
- Data processing
 - Essential element but requires protection
- Data protection
 - Conflicting views on data protection

E-Commerce?

- For instance, “E-Commerce” is used differently in different agreements
 - Conventional E-Commerce
 - Digital Products
 - ICT Services
 - Digital Economy
 - Data flows
- Above concepts are selectively merged and combined

E-Commerce Norms

- Norms are still in an early stage
 - Global negotiations are still slow
 - Unable to keep up with drastic changes
 - More changes come at a faster speed
 - Invite further disputes
 - Stoke complaints from the business
 - Undermines trust in global trading regime
- A Vicious Circle?

Elements of Future Norms - Data Protection Issue

Data as Enormous Business Potentials

- What underpins 4th Industrial Revolution:
 - Internet of Things, Cloud, Big Data, Mobile, Artificial Intelligence
 - They are mixed and combined to produce new goods and services
- Key Traits
 - Hyper connectivity
 - Hyper intelligence
 - Hyper reality
- Data constitutes the essential element for all this
 - Carries extreme commercial value and business potential

Data Protection as a Key Issue

- At the same time, data is a sensitive issue
 - Personal privacy
 - National security
 - Regulatory tools
- Finding a right balance is necessary
 - Utilization of data vs. Protection of data
- Different countries have different views
 - United States, EU, China, Russia, Japan, Korea

The Role of Trade Agreements in Eliminating Unnecessary Barriers to Cross-Border Data Flows

Emerging rules on CBDF in major RTAs

	KORUS	CPTPP	USMCA
Free flows of data	Recommended	Mandatory	MANDATORY
Exceptions	N/A	Allowed	ALLOWED
Ban on data localization	N/A	Mandatory	MANDATORY
Exceptions	N/A	Allowed	N/A
Financial data carve-out	N/A	Carved-out	N/A
Machine-friendly government data	N/A	N/A	RECOMMENDED
Public access to government information	N/A	N/A	RECOMMENDED

Source: Dr. Dongchul Kwak, *Digital Trade Liberalization in Analogue Trading Regime*, Ph.D. Thesis, SNU GSIS, August 2019

Concluding Thought

Going Forward

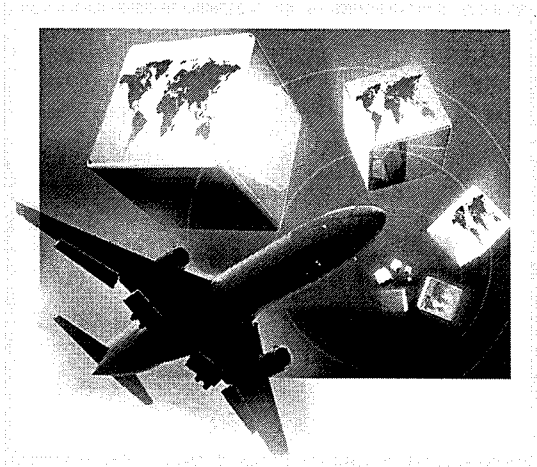
- Realizing E-Commerce as a Core Pillar of Future Trade Norms
- Bilateral Level
 - FTAs should explore new norms on E-Commerce in addition to market liberalization & facilitation
- Multilateral Level
 - Consensus building for WTO Membership
 - Incorporating results from mega-FTAs (i.e., CPTPP, USMCA, RCEP, etc.)
 - Introduction and experiment of new trade rules
 - More importantly, updates of existing norms
- APEC is the best forum for this experiment

Going Forward

- In the meantime, for E-Commerce issues states could consider “Plan B” options
 - At APEC and WTO
- Perhaps we could consider:
 - Facilitation of non-binding DSM
 - Facilitation of TPRM
 - One-point reform of the DSU
 - Standing panel, shortening the time for proceedings
 - More active roles for Ministerial Council
 - Interpretative guidelines
 - Sometimes binding interpretations
 - Standstill Agreement for global protectionism
 - At least for the time being
 - Monitoring and reporting on a regular basis

Thank you

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Future Development of E-Commerce Norms



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WHITE & CASE

Future Development of E-Commerce Norms

FTAAP Capacity Building Workshop on E-commerce Elements in FTAs/RTAs

Charles Julien, White & Case LLP

18 September 2019



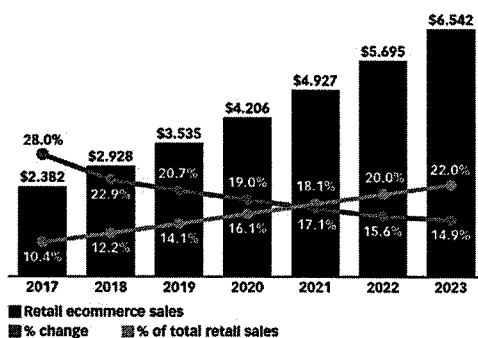
Agenda

- Why looking ahead matters? – The growing importance of E-commerce norms
- Where do we stand ? – Brief history of the development of E-commerce norms
- Where do we go ? – Foreseeable developments of E-commerce norms

The growing importance of E-commerce norms

The growing importance of E-commerce norms

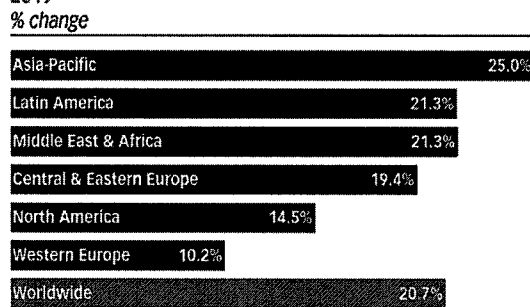
Retail Ecommerce Sales Worldwide, 2017-2023
trillions, % change and % of total retail sales



Note: includes products or services ordered using the internet via any device, regardless of the method of payment or fulfillment; excludes travel and event tickets, payments such as bill pay, taxes or money transfers, food services and drinking place sales, gambling and other vice good sales
Source: eMarketer, May 2019

T10305 www.eMarketer.com

Retail Ecommerce Sales Growth Worldwide, by Region, 2019



Note: includes products or services ordered using the internet via any device, regardless of the method of payment or fulfillment; excludes travel and event tickets, payments such as bill pay, taxes or money transfers, food services and drinking place sales, gambling and other vice good sales
Source: eMarketer, May 2019

T10315 www.eMarketer.com



Brief history of the development of E-commerce norms

Brief history of the development of E-commerce norms

- 1998 : WTO Work Programme on e-commerce and moratorium on customs duties
- Around 2000 – today: apparition and expansion of e-commerce norms in national regimes and FTAs/RTAs

Major FTAs between APEC Members with E-commerce Chapter

FTA's	Signed
Singapore - NZ	November 2000
Singapore - Australia	February 2003
US - Singapore	May 2003
US - Australia	May 2004
Australia - Thailand	July 2004
US - Korea	June 2007
ASEAN - Australia - NZ	February 2009
Australia - Korea	April 2014
Japan - Australia	November 2014
China - Australia	June 2015
CPTPP	March 2018

- 25 January 2019: 76 WTO Members commence WTO negotiations on trade-related aspects of electronic commerce

Foreseeable developments of E-commerce norms

-
- 90 per cent of global trade represented
 - Presence of both China and the United States
 - Participation of a wide range of developing countries and LDCs

The importance of developing a framework for the negotiations

- ❑ First step of any negotiations: defining the objectives (took 4 years and 3 declarations in the Doha round)
- ❑ No specific objectives were listed in the 26-January joint statement despite a statement of intention to “commence WTO negotiations on trade-related aspects of electronic commerce” and “seek to achieve a high standard outcome that builds on existing WTO agreements and frameworks”
- ❑ Digital trade is implicating a wide range of issues
- ❑ Deep schisms exist amongst the current crop of participants on what to address and how to address it

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Confidence to treat e-commerce within existing WTO legal framework in 1998

- ❑ Nothing fundamentally new: e-commerce defined as “the production, distribution, marketing, sale or delivery of goods and services by electronic means”
- ❑ WTO-traditional issues identified in relation to e-commerce in 1998 such as MFN, national treatment, transparency, market access, rules of origin, valuation, protection of IP rights
- ❑ Different councils mandated the examine the treatment of electronic commerce *within* WTO existing legal framework
 - Council for Trade in Services: **GATS** discipline considered relevant for: (a) the provision of Internet access services themselves ; (b) the electronic delivery of services, meaning transactions in which services products are delivered to the customer in the form of digitised information flows; (c) the use of the Internet as a channel for distribution services, by which goods and service are purchased over the net but delivered to the consumer subsequently in non-electronic form.
 - Council for Trade in Goods: **GATT** discipline considered relevant for: (a) electronically conducted transactions combined with physical delivery of goods; (b) trade in goods related to electronic commerce (e.g. computers);
 - Council for TRIPs: **TRIPS** discipline considered relevant for: (a) protection and enforcement of copyright and related rights; (b) protection and enforcement of trademarks.

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Ambitious agenda: Cross-Cutting Issues Identified by WTO Members in 2001

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WTO ambition stopped by classification issues

- How to classify (good or services) products which can be delivered both in tangible form and in electronic form via Internet download such as mp3 music files, e-books, or downloaded movies?
- Non-discrimination discipline at the center of the debate:
 - Different obligations triggered depending on the agreement:
 - GATT = unconditional MFN and national treatment (+ prohibition of quantitative restrictions)
 - GATS = MFN, national treatment (+ market access) conditioned by discretionary commitments
 - Opposite interests. E.g.
 - US: competitive software industries = desire to classify e-commerce as a "good" to trigger the general principle of non-discriminatory obligation
 - EU: sensitive need of cultural protection such as audio-visual industry = desire to classify e-commerce as a "service" which each Member has a discretion to make reservation on the commitment
- Additional issues entering the debate: risk that software downloaded over the internet, resulting in a series of interactions between customer and vendor, would not be a "like" product. Need for special discussion on "like products" in this context.

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Emergence of new key issues, addressed mainly through soft obligations

- **E-contracts and e-signature**, to facilitate the conclusion of contracts by electronic means
- **Protection of end users**, to ensure protection against unsolicited direct marketing communications
- These issue arose years ago but States are still learning how to regulate them:
 - Most EU FTAs do not contain sections dedicated to these issues but instead mention them in the "cooperation" section as issues on which further discussion is necessary (e.g. CETA Article 16.6; EU – Korea FTA Article 7.49).
 - Some obligatory language is however found in most recent agreements. E.g. EU – Japan EPA, Article 8.76 on the conclusion of contract by electronically:
 - Party shall not adopt or maintain measures regulating electronic transactions that: (a) deny the legal effect, validity or enforceability of a contract, solely on the grounds that it is concluded by electronic means; or (b) otherwise create obstacles to the use of contracts concluded by electronic means

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Most recent issues creating schisms among Members

- Recent issues (not dealt with in the CETA, EU and Canadian officials having just begun to heard about it when e-commerce chapter was completed in 2012!) include:
 - **Data flows & data localization**
 - Data as an important raw material for digital businesses vs privacy, data security and government surveillance
 - First addressed in the CPTPP
 - **Requirements on the transfer of or access to software source code, as a condition of market access**
 - First addressed in the CPTPP
 - Included in the recent EU – Japan EPA (Article, 8.73)
 - **Free and open Internet**

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Which issues to select for the ongoing negotiations at the WTO?

- Specific provisions with obligatory language already proposed while objectives not defined
- Proposals for the objectives of the negotiations tabled. The EU for example tabled initial negotiating proposals for a broad set of rules and commitments that would:
 - Guarantee the validity of e-contracts and e-signatures
 - Strengthen consumer consumers' trust in the on-line environment
 - Adopt measures to effectively combat spam
 - Tackle barriers that prevent cross-border sales today
 - Address forced data localization requirements, while ensuring protection of personal data
 - Prohibit mandatory source code disclosure requirements
 - Permanently ban customs duties on electronic transmissions
 - Adhere to the principle of open internet access
 - Upgrade existing WTO disciplines on telecommunication services to ensure that they are fit to support today's vibrant internet ecosystem that is the main enabler of e-commerce
 - Improve market access commitments in telecommunication and computer related services

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The importance to institutionalize e-commerce

- Diversity of issues dealt with and approaches in FTAs/RTAs → States are still learning how to regulate in this domain
- An essential step in learning = generating information and discussing it
- No existing requirement to:
 - notify the limitations the place on the location of computing facilities or restrictions they place on data flows
 - explain implementation of their privacy rules in a way that could be discussed in a committee
- Necessity of the establishment of a Secretariat that could draw on notifications as well as a specific committee to discuss any concern not fitting existing WTO legal framework

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Conclusion

Questions?



Thank you

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