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E-commerce provisions in RTAs: Implications for negotiations and capacity building

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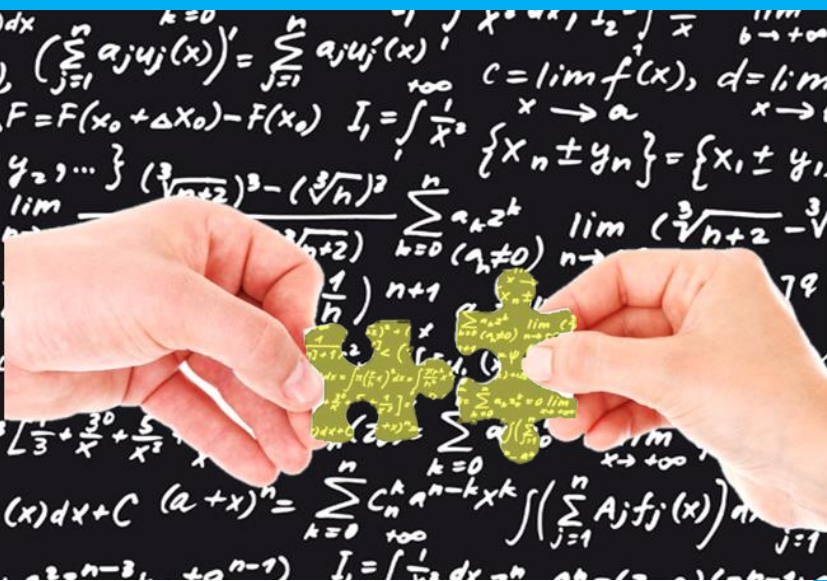
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E-commerce provisions in RTAs: Implications for negotiations and capacity building



Gloria O. Pasadilla

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E-commerce provisions in RTAs:

Implications for negotiations and capacity building

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Abstract

This paper addresses the regulatory and policy environments conducive for e-commerce to thrive. In particular, as regulatory issues affecting e-commerce have become more prominent in recent regional trade agreements (RTAs), the paper seeks to investigate their role in setting the regulatory standard in this area. Indeed e-commerce- or digital trade-related obligations and commitments have grown deeper and broader in more recent RTAs compared to earlier ones. Since RTAs have become laboratories for rule-making, it is likely that some of its e-commerce-related obligations would find its way in a plurilateral/ multilateral agreement on e-commerce if one gets agreed in the future. The paper reviews previous findings on RTA provisions in e-commerce and explains the rationale for the inclusion of certain provisions in relation to promoting growth in e-commerce. It zooms in on two recent RTAs, one involving the European union, and another the Unites States of America, as both are seen as building “model provisions” to follow by others. These two agreements were not covered in past studies so this paper contributes to the completeness of literature in this regard. Based on what emerge as typical obligations and commitments in past and recent RTAs, possible negotiations and capacity building implications for least developed and middle-income developing countries are discussed.

Keywords: E-commerce, Regional Trade Agreements, EU-Japan PTA, USMCA, capacity building, LDCs, MICs.

JEL codes: F10, F13, F15, F19, L81

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1. Introduction

This paper addresses the regulatory and policy environments conducive for e-commerce to thrive. In particular, as regulatory issues affecting e-commerce have become more prominent in recent regional trade agreements (RTAs), the paper seeks to investigate their role in setting the regulatory standard in this area. Indeed e-commerce- or digital trade-related obligations and commitments have grown deeper and broader in more recent RTAs compared to earlier ones. Since RTAs have become laboratories for rule-making, it is likely that some of its e-commerce-related obligations would find its way in a plurilateral/ multilateral agreement on e-commerce if one gets agreed in the future.

E-commerce interests all countries - developed, middle-income, and less developed ones – as a way to access global markets. Developed countries are able to export many digital content – their comparative advantage – at a cheap cost. Likewise, middle-income and less developed countries are able to help their small- and medium-enterprises enter the global market via online commerce. For example, in China, access to an e-commerce platform like Alibaba which connects SMEs to international businesses that are looking for cheap suppliers has been transformative. The same holds for small developing countries like Mongolia or Viet Nam or Papua New Guinea that may have unique products or services that the global market gets to know only through e-commerce.

The importance of e-commerce explains why e-commerce provisions are contained not only in trade agreements among developed countries but also in FTAs among developing and less developed ones (Monteiro and Teh, 2017). Admittedly, in the latter, the provisions are generally couched in more ‘cooperation’ or ‘capacity-building’ language, usually exempted from dispute resolution of the RTA, rather than binding obligations. However, given how e-commerce RTA provisions have evolved, it is not likely that such ‘soft’ language² would continue to hold in a future plurilateral or multilateral agreement without other binding obligations. If so, least developed countries (LDCs) and middle-income developing countries (MICs) need to prepare for

² ‘Soft’ language means that the provisions allow for a lot of flexibilities in the commitment, that any obligation stated is not hard and fast. This means that the actual concessions that Parties get is unclear.

such eventuality. The question is how and what areas to begin getting ready if they are to be able to agree to a 'higher quality' multilateral/plurilateral agreement containing e-commerce commitments. A review of e-commerce provisions in RTAs may be a good place to start to 'guess with high probability' what could be 'demanded' as future obligations. This review likewise helps identify baselines of LDCs' capacity to implement possible future commitments, and thus to tailor capacity building provisions or agreed timeline of 'accession' to help them realistically implement possible higher obligations.

In Section 2, the paper reviews previous findings on RTA provisions in e-commerce and explains the rationale for the inclusion of certain provisions in relation to promoting growth in e-commerce, then analyses two recent RTAs, one with EU and another with the US, that were not covered in past studies (Section 3). Based on what emerge as typical obligations and commitments in past and recent RTAs, possible negotiations and capacity building implications for LDCs and MICs are discussed (Section 4).

2. Trade growth and e-commerce provisions in RTAs

A. Overview of e-commerce in regional trade agreements

Regional trade agreements, like the WTO agreements, are usually comprehensive, covering chapters on goods, sanitary and technical standards, services, intellectual property protection, dispute resolutions mechanism, general exceptions, as well as development-related or capacity-building or cooperation provisions. Some provisions in these agreements are binding obligations, often subject to dispute resolution, and usually use language like 'Parties shall...' followed by the specific obligations that are mandated by the agreement. Other chapters or provisions are, on the other hand, 'softer' usually with languages that signify large flexibilities like "subject to Parties' domestic laws and regulations". Furthermore, the specific commitments by countries in the RTAs are usually put in a separate schedule of specific commitments. For example, in services chapters, if the RTA adopts a 'negative' list approach, the countries' list or schedule of non-conforming measures provide a gage of the actual market access that countries give as concessions. In a positive list approach, the yardstick would be the list of service sectors that countries are committing as well as

the level of openness it is allowing for those committed sectors which can range from 'none' which means full liberalization to 'unbound', meaning no commitment. In general, the actual benefit or level of market access that Parties get from engaging in trade agreements are not easy to analyse by just reading the provisions of the RTA without analysing the specific schedules of commitments.

A.1 Rise of stand-alone e-commerce chapters

In earlier RTAs, e-commerce was not included as a stand-alone chapter side by side with goods, services or intellectual property. Sometimes there were provisions in telecommunications or general exceptions or trade facilitation or in cooperation chapters that touch upon e-commerce but nothing that were substantially binding from the Parties. They were, in general, of the 'soft' language variety. This has changed in later trade agreements where e-commerce is given more prominence, either as a separate chapter, or with more substantial and binding provisions.

Most e-commerce-related articles in RTAs are geared towards the development and growth of cross-border e-commerce. For example, RTAs mandate non-discrimination for electronic products vis-à-vis traditional goods. This means that countries may not give less favourable conditions for imports of digital/electronic products for the simple reason that they are transmitted electronically as opposed to them entering the market in the form of physical goods – think e-books versus physical books. Such non-discrimination provision for electronically-transmitted products encourages growth of digital trade.

Concessions on tariffs for digital products are usually among the most consequential of e-commerce agreements. These tariff concessions can be on small parcel trade, where a high value of allowable small parcels ('de minimis' value) that are granted zero tariff helps spur e-commerce demand; conversely, a low 'de minimis' value does not encourage e-commerce. Other tariff concessions can be tariff moratorium on electronic transmissions (i.e. no tariff), or reduced tariff rates for digital and technology products.

Other provisions in recent RTAs relate to the soft infrastructures that facilitate e-commerce or the 'enablers' of e-commerce. For example, there are articles that

require Parties to have regulations governing e-authentication, or that establish the validity of e-signature as comparable to signed paper documents. There are also e-commerce-related provisions on paperless trading which obliges (or encourages) Parties to build the necessary support infrastructure that facilitate paperless trade. Other soft infrastructures that affect e-commerce are laws on consumer protection, data privacy and data protection, or online fraud security and protection from spam messages. The presence and absence of these laws can increase or decrease confidence and trust in doing transactions online, improve the demand for e-commerce or serve as barriers to its development. Provisions for cross-border data flows and local data storage are among the hotly discussed issues with respect to digital trade especially as more and more data migrate to the cloud whose servers may be located outside the territory. Recent RTAs, especially those in which the United States is involved, have very strong obligations with regard to the free cross-border flow of data.

A.2 E-commerce, other RTA chapters, and discipline on regulations

Other RTA chapters like services or investment chapters also impact e-commerce hence RTA disciplines thereto are relevant for e-commerce growth. For example, investment restrictions and conditionalities attached to investments, including investments related to technology or e-commerce, can limit the growth of digital trade. An example of such restrictions is requiring source code disclosures as condition for doing business in the domestic market. The mandatory disclosure raises concern over loss of competitive advantage by owners because of the risk of leakage of their intellectual property. Lack of IPR and copyright protection especially of creative ideas can hamper industry growth of e-commerce especially if it discourages growth in investment or prevents the trade of digital products for fear of IP infringement. RTA disciplines on intellectual property protection are therefore also important for e-commerce development.

A deeper study of e-commerce in RTAs requires analysis of other chapters that impinge on e-commerce. Among those most important are telecommunication and financial services chapter and indeed the services chapter with their corresponding schedules of commitments especially in e-commerce critical sectors such as

computer-related services, telecommunications, financial services, and logistics. Other chapters that are also important are investment, customs or border administration, intellectual property, and sometimes the goods chapter if the tariff commitment schedule includes those for small parcels.

Domestic regulations and policies related to e-commerce may, at times, be due to some legitimate policy concerns, such as for example uncertainty about data privacy protection. Others though may be due to protectionist interest especially as the digital economy has become more important and countries want to grow their own domestic digital/technology businesses. RTAs provide the discipline on when and how to craft domestic regulations that protect legitimate policy objectives but without adversely stunting the growth and development of digital trade and e-commerce due to protectionist measures that are extended in the digital sphere.

A.3 Variety of RTAs provisions on e-commerce

Studies that evaluate RTAs find that the depth and breadth of e-commerce chapters or e-commerce-related provisions are heterogeneous among RTAs. As mentioned, some RTAs have dedicated e-commerce chapters while others only have articles mentioning e-commerce, located in other chapters of the agreement such as in the chapter on cooperation. Some have more binding obligations attached to specific articles while others state only the need to have regulatory dialogues or cooperation arrangements or exchange of information or experiences on e-commerce regulations. Still others have capacity building or aid attached to e-commerce development.

The remaining part of this section briefly summarizes the results of various studies of RTA provisions on e-commerce according to the following categories: non-discrimination and market access; e-commerce enablers and users protection; data flows; intellectual property including intermediary liability; and trade facilitation.

B. Non-discrimination and market access

B.1 Removal of customs duties

Improved market access via removal of customs duties on digital products and on small parcels of goods is one of the prime objectives of e-commerce negotiations. Of these two, digital trade occupies the greater focus of debates and negotiations. In any case, the removal of customs duty commitment allows the wider use of e-commerce³ either by reducing the cost of digital purchases or of buying small quantities of a product from abroad usually via online or through an e-commerce platform. Likewise, a clear commitment on technological neutrality, that is, of not discriminating against products that are transmitted electronically vis-à-vis physical goods, helps fuel more e-commerce transactions.

In 56 out of 75 RTAs that Monteiro and Teh (2017) examined, there is at least one provision that refers to non-imposition of customs duties on electronic transmissions. Such provisions in RTAs essentially make permanent a commitment that in the WTO is periodically renewable and an occasion of intense negotiation every time it is up for renewal – the temporary moratorium on imposing customs duty on electronic transmissions.

B.2 Definition of digital products, carrier media

At times the provision on zero customs duty refers generally to electronic transmissions, but more often it refers specifically to digital products transmitted electronically. Definition of digital products differ in various RTAs. In RTAs inspired by the US, digital products are defined as ‘computer programs, text, video, images, sound recordings and other products that are digitally encoded’. Some RTAs state that digital products are all digitally encoded products, ‘regardless of whether they are fixed on a carrier medium or transmitted electronically’.⁴ While this looks straightforward, some

³ Understood as trade of both goods (e.g. textile, clothes etc) and digital products (both electronically transmitted or embedded on a physical carrier medium).

⁴ Japan-Switzerland FTA additionally lists plans and designs that are digitally encoded as digital products.

details vary in the application as Box 1 illustrates for customs duties on operating software and applications software.

Additionally, carrier medium is defined differently in RTAs but in general refers to any “physical object capable of storing a digital product... and from which a digital product can be perceived, reproduced, communicated... and includes (but is not limited to) optical medium, floppy disks and magnetic tapes.” Personal computer, server, new operating devices or smart phones are not considered carrier media by definition hence pre-loaded software inside these machines are part of the dutiable value (Box 1).

In practice, the carrier media exception is applied differently by countries which adds to the complexity for importers (Brouillard and Terwilliger, 2013). Additional complexity for valuing software comes from royalties and license agreements. A license agreement, a ‘right to use’ agreement, may be a one-time charge or a monthly payment that may not be present at the time of import. Various valuation models exist to account for these different commercial contracts which increase the compliance risk for importers in terms of paying the right amount of duties. Often, to avoid being penalized at some point in time, companies enter into negotiations with customs authorities with respect to the valuation method and the amount they are expected to pay. Growth in the Internet of Things (IoT) would further compound the complexity in valuation because appliances can have software solutions to perform specific tasks with just enough operating system to make the software run. As technology products continue to evolve, various interpretations of carrier media exception amplify the importers’ challenges.

Box 1. Customs duty on digital products vary in actual implementation

For example, a machine value with transaction value of USD120,000 is invoiced as follows:

Hardware value	USD 100,000
Software value*	20,000
Customs value	120,000
Duty rate	5%
Customs duty	USD6,000

In this example, software is embedded in the machine value when it is integral to the functioning of the machine. For example, in the case of computer, the operating system will be levied duty regardless whether it is licensed before or after the importation of the hardware.

Applications software on a carrier medium, however, can enter duty free as long as the commercial invoice separates the value of the software from the carrier medium.^{a/} In the example, if the software were not integral to the hardware, the dutiable amount would be USD100,000 instead of USD120,000.

a/ See for example, Viet Nam's Ministry of Finance Circular No. 60 issued in October 2019.www.bakermckinzie.com

B.3 Direct and indirect taxes

While customs duties on digital products are removed in many RTAs, most agreements do not usually preclude the removal of direct and indirect taxes (VAT and/or GST taxes) in all cases. Some RTAs make clear that customs charges and other fees in connection with the importation and exportation of digital products shall not be levied on digital products, but this is not true for other RTAs. This means that, in the latter case, customs charges and fees may be collected at the border along with other direct and indirect taxes, even though the customs duty may be zero. Box 2 illustrates the case of Indonesia where, despite its zero tariff on the newly included 'intangible goods' (or digital products) in the tariff classification, tax revenue can appear due to other customs charges and direct and indirect tax.

Box 2. Indonesia's new tariff line for intangible goods

Indonesia introduced a new line (Chapter 99) in its tariff system in 2018 to cover intangible goods (software and other electronically transmitted digital goods). In compliance with the WTO moratorium on zero customs duty for electronic transmissions, Indonesia puts 0% tariff on intangible goods. This may turn positive if the WTO moratorium is lifted. However, digital goods may now be subject to the VAT and GST of 10% and 2.5% respectively.

For example, a digital good with transaction value of USD100 will be taxed as follows:

Customs value	\$100
Customs duty	0%, hence import duty is \$0
Import value	\$100 +import duty of \$0
VAT on import value	10%
Income tax (GST)	2.5%
Tax collection	12.5% of import value (\$100) or \$12.5

Prior to the introduction of the new tariff line, the VAT of 10% (assumed as customs charge) does not apply although the indirect tax of 2.5% remains. If the customs duty were positive (customs duty is not zero), the import value would increase, and the taxable value and tax revenue would likewise rise.

Source: <https://www.bakermckenzie.com/en/insight/publications/2019/02/what-should-we-know>

B.4 Origin of digital content

While the removal of customs duty on digital products is a step forward in spurring growth in e-commerce, the fact that any RTA applies only to a limited number of Parties begs the question of how to determine the origin of digital content. Some RTAs eliminate this problem by indicating that electronic transmission would be duty free regardless whether it comes from Parties or non-Parties. Others, however, specify that the benefit is extended only to electronic transmissions from Parties in the agreement but silent on how they would determine the origin of digital products. Others specify that they would cooperate to work on a method for determining origin.

B.5 Benefits and costs

That removing customs duty on electronic transmissions or on small amount of goods imports encourages the growth of e-commerce is indisputable. What is not obvious is the overall balance of benefits to the country considering that: 1) the economy has reduced revenues from taxation; and 2) the seemingly unequal treatment for local importers and manufacturers who import materials in bulk and have to pay the full tax vis-à-vis importers (usually consumers) who buy in small quantities. In Indonesia as well as in some other countries, the de minimis threshold value is getting a re-look to supposedly level the playing field for local manufacturers. The most recent move is a drastic reduction of Indonesia's de minimis value from USD75 per shipment to USD3 per shipment for all imported goods shipped on a B2C basis.⁵

With regard to lost revenues from zero customs duties on electronic transmission, an OECD study suggests that a broader cost/benefit analysis should be used instead of a singular focus on revenue loss. In doing so, it can be shown that the lost tax revenues from the moratorium are likely to be smaller than the gains in consumer welfare and export competitiveness and productivity (Andrenelli and Lopez-Gonzalez 2019).

C. E-commerce enablers and users' protection

Safety and security in online transactions aid the development and growth of e-commerce. The more consumers are unafraid to transact online, the bigger the e-commerce market grows. Trust and security are facilitated by 'enablers' such as clear regulations governing e-signatures and e-authentication, consumer protection, data and privacy protection. However, diverse laws on these issues can complicate business compliance, especially those that carry out businesses across various jurisdictions. Agreed international frameworks and guidelines have a role to play in that they help domestic regulations and technologies be interoperable and interoperability of domestic regulatory frameworks add to the facilitation of cross-border e-commerce.

⁵ See <https://janio.asia/id/articles/indonesia-de-minimis-2020-what-the-changes-mean-for-e-commerce-importers/>

C.1 E signatures and e-authentication

With regard e-signature and authentication, there is a broad range of provisions in notified RTAs that address electronic authentication. Often the language is not strong and usually attenuated by phrases like “to the extent possible” or “according to domestic laws and regulations” or “if appropriate and necessary”. Several RTAs require that domestic laws and regulations on electronic transactions ‘take into account’ or be based on the 1996 UNCITRAL Model Law on E-commerce which contains principles of non-discrimination, technological neutrality, and paperless trading being functionally equivalent to paper-based ones. However, there is significant variations in national laws even if they were based on the UNCITRAL Model Law. For example, countries may have different standards about what constitutes an e-signature.

Another important international framework referenced in some RTAs is the UN Convention on the Use of Electronic Communications in International Contracts developed in 2005. This convention gives assurance (by signatory countries) that contracts concluded and exchanged electronically are enforceable and valid in courts or elsewhere. However, the binding commitment in RTAs to have e-commerce regulations and laws are subject to a caveat that the adoption be ‘as soon as practicable’ which provides some space for countries that do not have e-commerce regulations yet.

To validate online transactions, e-authentication technologies that are safe and secure and that can be used in courts in case of disputes are needed. One authentication mechanism can take the form of e-signature or the digital counterpart of the handwritten signatures required in paper-based contracts. Some RTAs stipulate that the legal validity of a signature cannot be denied simply because it is in electronic form. There may, however, be other authentication technologies. Some RTAs do not limit the authentication technology to only e-signature but rather allow Parties to prove in court that the electronic transactions comply with legal requirements.

Some RTAs venture to work towards mutual recognition of digital certificates and electronic signatures issued by governments which facilitate the interoperability

among authentication technologies. Some countries impose authentication requirements that are very specific and can only be met by a specific technology, such as the use of public key infrastructure (PKI) or cryptography; or require certification from designated authorities. Providing for mutual recognition eases this type of problem. EU FTAs tend to highlight regulatory dialogues on issues that relate to recognition of certifications, interoperability, or mutual recognition agreement on electronic signatures, but they are hardly binding commitments.

C.2 Protection from unsolicited messages

Some RTAs also include commitments to have laws that regulate unsolicited electronic messages, typically sent for commercial or marketing purposes. EU FTAs again tend to focus on regulatory dialogues and exchange of experiences governing treatment of spam messages. Other FTAs like those by Australia include more binding commitment such as “to take appropriate and necessary measures to regulate unsolicited commercial electronic messages” but provides a leeway by adding phrases like “according to Parties’ laws and regulations” (Monteiro and Teh, 2017).

C.3 Consumer protection

Articles on consumer protection in e-commerce (against fraud or fake merchandise for example) help increase confidence and trust of consumers to transact business online. Some RTAs’ provisions related to consumer protection require that government adopt or maintain consumer protection laws. Some qualify that these laws need to be transparent and effective and that they be equivalent to consumer protection in other forms of commerce (e.g. non-online). Other related provisions call for cooperation among consumer protection agencies.

Consumer protection is important for e-commerce because information asymmetry, for example with respect to the identity, location or credibility of the seller, is worse in online transactions. Yet, many developing countries still lack consumer protection laws. Absent consumer protection regulations, e-commerce players self-regulate and establish codes of conduct for businesses registered in their platforms. Many also

make reputation signalling transparent through trust marks or customer review boards which aid consumers in their purchase decisions.

C.4 Personal privacy and data protection, cybersecurity

Data protection, like consumer protection, improves confidence in online transactions hence it is important for the growth of digital trade and e-commerce. More recent FTAs include personal data protection provisions in e-commerce chapters, at times referencing privacy frameworks, principles and guidelines developed by relevant international bodies like the OECD or APEC. In addition, some RTAs indicate that compliance to data protection commitment can be through measures that Parties deem appropriate and necessary but do not oblige adoption of domestic laws or regulations for personal data protection. Others, however, indicate that compliance may include having comprehensive privacy laws, sector-specific laws, personal data protection laws or laws that allow private sector enforcement via voluntary undertakings. In any case, some RTAs mandate that domestic data protection regulations take into account, or ensure compatibility with, international standards of personal data protection. EU FTAs, in contrast, usually focus more on regulatory dialogues and only recently included data protection and privacy in negotiating FTAs. In RTAs that do not have e-commerce chapters, data protection is sometimes mentioned in the Telecommunications chapter (for example, Japan-Switzerland) or in General Exemptions (Japan's FTAs with some ASEAN member countries).

A related provision is on cybersecurity which is important for augmenting trust in the internet. Criminal activities over the internet such as cybertheft, cyberattack, or cyberespionage is addressed in FTAs through dialogues, cooperation, and sharing of information.

D. Cross-border data flows

As more countries pass data protection laws that include data localization and restrictions on cross-border data flows, recent RTAs, especially with the US and

others, have included provisions that seek to put discipline on these types of regulations. Data localization are measures that either require data be stored in its territory and/or not be transmitted outside of its jurisdiction. Businesses, especially multinational ones, that depend on the free flow of data complain that these regulations lower their efficiency, increase their operational cost as well as compliance risk, particularly if different countries have divergent data regulations. RTA provisions on data flows clarify what is acceptable in the pursuit of legitimate policy objective (i.e. data privacy and protection). More detailed discussion of these provisions is in the next section.

E. Intellectual property: source codes and intermediary liability

Previous RTAs did not have provisions on the transfer of source code. Perhaps among the first to contain commitment of not forcing transfer of source codes as a condition for market access is the Japan-Mongolia FTA. The provision, however, applies to commercial software but excludes software used for critical infrastructure. Recent FTAs, especially the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada (USMCA) contain strong provisions on source codes transfer and will be discussed in the next section.

Another issue is the liability of intermediary service providers (ISPs). ISPs provide various services such as caching or hosting services (storage of information), transmission, routing, or connection services. The question is how much liability do ISPs (considered as third party) have for the content, be it copyrighted or immoral content, that is illegally transmitted.

Most RTAs contain only cooperation language with respect to third party liability. However, recent FTAs with the EU spell out that third parties are not liable for illegal content provided they meet specific conditions, for example, whether they merely provide conduit, hosting and caching services without any role in content creation. Moreover, a court or administrative authority can require ISPs to terminate or prevent an infringement according to domestic laws. The provisions do not impose obligation for ISPs to actively seek facts or circumstance indicating illegal activity, but upon

request, should inform competent public authorities of alleged illegal activities or information. Some RTAs have third party liability provisions included in the e-commerce chapter; some in the intellectual property chapter; others in both e-commerce and IP chapters.

F. Paperless trading

Agreements on paperless trading predated e-commerce agreements. In fact, the very first e-commerce provision is found in an article on paperless trading in the 2001 FTA between New Zealand and Singapore (Monteiro and Teh 2017), establishing the need for an electronic environment for customs administration and trading community. ESCAP member States also adopted a regional agreement entirely dedicated to facilitating cross-border paperless trading.⁶ Paperless trading articles in RTAs are usually also found in chapters on customs procedures or trade facilitation (ESCAP, 2017).

The provisions in RTAs on paperless trading vary. In some, it refers to making trade administration documents that importers and exporters submit be electronically available and accepted as legally equivalent to their paper version.⁷ Other provisions refer to implementation of initiatives, for example, of the development of a single window. Some mention taking into account international standards developed by international organizations like the World Customs Organization. Other types of provisions refer to cooperation, sharing of information and experiences, regulatory dialogues or forming joint committees to oversee implementation of paperless trading initiatives.

⁶ Full text and explanatory note of the Framework Agreement on Facilitation of Cross-Border Paperless Trade is available at: <https://www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific-0>

⁷ Monteiro and Teh (2017) find that the RTA between Australia and China stipulates that each party shall accept the electronic versions of trade administration documents as the legal equivalent of paper documents except where (i) there is a domestic or international legal requirement to the contrary; or (ii) doing so would reduce the effectiveness of the trade administration process.

3. Assessing e-commerce-related provisions in EU-Japan and USMCA

The European Union and the United States have different models for free trade agreements, especially with respect to data flows which affect e-commerce and digital trade. While these two have signed various FTAs with many other countries, this section will discuss only two that are deemed to be templates⁸ for its other FTAs – the Agreement between the European Union and Japan for an Economic Partnership (EU-Japan EPA and the United States-Mexico-Canada Agreement Free Trade Agreement (USMCA). For example, a comparison of EU-Singapore and EU-Japan shows little divergence both in substance and structure.⁹ Likewise, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the USMCA are almost identical except for a few noteworthy differences. For example, the USMCA has a stronger language on cross-border data flows. While the CPTPP states “each party shall allow the cross-border transfer of information...”, the USMCA states: “no Party shall prohibit or restrict the cross-border transfer of information...”. On localization of computing facilities, the USMCA provides no wiggle room while the CPTPP allows room for exceptions for legitimate public policy objectives (Pasadilla, 2020).

Table below provides a summary of major provisions related to e-commerce in the EU-Japan and USMCA. In many ways, many issues such as electronic signature, consumer protection, unsolicited e-communication, e-authentication, cybersecurity, source codes are addressed in both agreements in substantially similar way. While there is an obvious absence of some provisions on, for instance, location of computing facilities, third party liability for interactive computer services suppliers/users or open government in the EU-Japan agreement, there is no known major disagreements between EU and US positions on these issues. Where they differ in a major way is on cross-border data flows.

⁸ Or are expected to be templates for future FTAs especially with respect to the US.

⁹ EU-Singapore has a shorter e-commerce section under the chapter on services, investment liberalization and e-commerce. It also has fewer carve outs; in particular, betting and gambling as well as broadcasting services are among those not explicitly included in the scope of the chapter, unlike in the EU-Japan EPA.

Table Comparing e-commerce provisions in EU-Japan Economic Partnership Agreement and US-Mexico-Canada FTA

	EU-Japan Economic Partnership Agreement	US-Mexico-Canada FTA (USMCA)
Exclusions from coverage	Excluded from Chapter 8 sub-section on e-commerce: gambling, betting, broadcasting services, audio-visual services, notary services, legal representation services (Art 8.70.5)	Covered person excludes: financial institutions and “cross-border financial service supplier that is subject to regulation, supervision, and licensing, authorization, or registration by a financial regulatory authority” of the Parties. (Art 19.1 Definition) Coverage: need to check sectors in non-conforming measures annexes
Customs duties moratorium on electronic transmission	Yes (Art 8.72)	Yes (Art 19.3)
Non-discriminatory treatment of digital products	No term ‘digital product’ found in the agreement; But recognize importance of technological neutrality in e-commerce (Art 8.70.3); (which is usually taken to mean non-discrimination between electronic or traditional delivery). Also, Art 8.75 “...endeavour not to impose prior authorisation or any other requirement having equivalent effect on the provision of services by electronic means” ... “without prejudice to authorisation schemes which are not specifically and exclusively targeted at services provided by electronic means”	Art 19.4 “No Party shall accord less favourable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products” Digital product defined as: “computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically (Art 19.1)
Domestic legal framework governing electronic transactions	Art 8.74 “...shall ensure that all its measures of general application affecting electronic commerce	Art 19.5. Obligation to maintain a legal framework governing electronic transactions consistent

	<p>are administered in a reasonable, objective and impartial manner”</p> <ul style="list-style-type: none"> - No reference to UNCITRAL Model Law on E-Commerce (1996) 	<p>with UNCITRAL Model Law on E-Commerce (1996).</p>
<p>Electronic authentication and electronic signature</p>	<p>Art 8.77. Legal validity of electronic signature.</p> <ul style="list-style-type: none"> -Parties can mutually determine electronic authentication methods; and <p>to grant “opportunity to establish before judicial or administrative authorities that their electronic transactions comply with any legal requirements with respect to electronic authentication and electronic signature.”</p>	<p>Art 19.6. Legal validity of electronic signature; mutual determination of authentication methods; possibility to prove compliance with legal requirements</p> <ul style="list-style-type: none"> -Interoperability of electronic authentication is encouraged.
<p>Online consumer protection</p>	<p>Art 8.78. Recognize importance of adopting or maintaining consumer protection measures applicable to electronic commerce</p>	<p>Art 19.7.2. Obligation to adopt or maintain measures to protect consumers when they engage in digital trade</p> <p>Art 21.4.3 through 21.4.5 cooperation activities including exchange of consumer complaints and other enforcement information.</p>
<p>Personal information protection</p>	<p>Art 8.3.2.c.ii. Under General Exceptions, Parties may enforce measures relating to the protection of data privacy, subject to measures not being applied... as disguised restriction...on trade in services</p>	<p>Art 19.8.2. Obligation to adopt or maintain a legal framework protecting personal information of users of digital trade.</p> <ul style="list-style-type: none"> -Take account of relevant principles and guidelines; reference to APEC Privacy Framework and OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013) -Publication and transparency (Art 19.8.5) -Encourage the development of mechanisms to promote compatibility between different

		privacy regimes. Recognition of the <i>APEC Cross-Border Privacy Rules</i> system as a valid mechanism to facilitate cross-border information transfers while protecting personal information. (Art 19.8.6)
Cross-border transfer of information by electronic means	Art 8.81. To review the Agreement in three years whether to include free flow of data into the FTA. Separate negotiation on cross-border data flow through Adequacy Ruling under the Global Data Privacy Rules (GDPR)	Art 19.11.1 Obligation not to prohibit or restrict cross-border transfer of information including personal information for the conduct of the business of a covered person. Art 19.11.2. Necessity test for measures that restrict cross-border transfer of information. “...(measures) do not impose restrictions greater than necessary to achieve the (legitimate policy) objective” Footnote 5: In particular, measures do not satisfy necessity test “if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party.”
Paperless trading	Art 4.4.4 (Customs Matters). “Parties shall promote the development and use of advanced systems...to facilitate exchange of electronic data between traders, operators, customs authority and other trade-related agencies” Art 8.76. Validity and enforceability of contracts concluded by electronic means	Art 19.9. Weak obligation. “Endeavour to accept...trade documents submitted electronically”
Location of computing facilities	No provision in the Agreement.	Prohibited to require location of facilities as condition to do business in the territory (Art 19.12)
Unsolicited electronic communication	Art 8.79. Same as in USMCA	Obligation to adopt/maintain measures regulating unsolicited electronic communications;

		consumers can prevent ongoing reception; consent required to receive them; to provide recourse against suppliers of electronic communications (Art 19.13)
Cybersecurity	Mentioned in Cooperation on E-commerce Chapter (Art 8.80). Dialogues, exchange of experiences, etc.	Art 19.15. Preference for risk-based approaches over prescriptive regulations in addressing threats.
Source Code	Art 8.73. Prohibits transfer/access to source code of software (including products with software); exception for voluntary transfers in commercially negotiated contracts or in the context of government procurement.	Art 19.16. Similar to EU-Japan. Mentions additional exception for compliance with regulatory bodies or judicial authorities subject to safeguards against unauthorized disclosure.
Interactive computer services (ICS) (third party liability)	No provision.	Art 19.17. Treatment of ICS supplier/user as different from information content provider. Exempts ICS supplier/user from liability for harms related to information stored, processed, transmitted, distributed through ICS unless they (at least partly) created/developed the content. Par 3 gives latitude to ICS supplier/user to restrict access (taken in good faith) to materials that it considers harmful/objectionable
Cooperation	Most of the language on e-commerce, but especially Art 8.80, are on cooperation, dialogues, sharing of experiences, cooperation and participation in multilateral fora, including on cybersecurity, consumer protection, spam messages, e-authentication, facilitation of cross-border certification, intellectual property, e-government.	Art 19.14. Shall endeavour to exchange experiences on regulations, policies, enforcements and compliance... including: personal information protection, with the view to strengthening international mechanisms...in enforcing laws protecting privacy, security in e-communications, authentication and government use of digital tools and technologies; Makes reference to the APEC Cross-Border Privacy Rules as mechanism

	Does not mention personal information protection.	for interoperability of privacy regimes; Encourages development of methods of self-regulation by the private sector
Open government	No provision	Art 19.18. Access to and use of government information. Shall endeavour to cooperate to identify ways to expand access to and use government information that the Party has made public.

In terms of structure, EU-Japan includes e-commerce as one of six sections in the chapter on services, investment, and e-commerce. It is not a stand-alone chapter. USMCA, in contrast, has a dedicated chapter for digital trade and, consequently, with far more details than in the EU-Japan TPA. The term ‘digital product’ does not appear in EU-Japan, while it is clearly defined in the USMCA.¹⁰

A. Customs duties, non-discrimination, legal framework

Both EU-Japan and USMCA have a moratorium on customs duties for electronic transmission. Both require non-discriminatory treatment, at least for electronic transmissions, if not for all digital product (since digital product does not appear in EU-Japan). The mandate for technological neutrality which is usually taken to mean non-discrimination between electronic and traditional delivery is, in part, similar to non-discrimination of digital products but especially services transmitted electronically in the context of EU-Japan. Both FTAs want that there be a legal framework governing electronic transactions, although the USMCA makes explicit reference to the UNCITRAL Model Law on E-Commerce while EU-Japan merely states that measures be administered in a “reasonable, objective and impartial manner”.

B. E-authentication, e-signature, consumer protection, spam messages

Both EU-Japan FTA and USMCA want legal validity of electronic signature. Cross-border authentication is a desirable ideal and inter-operability of authentication methods is encouraged in the USMCA. Where authentication methods differ, both Agreements want opportunities (for suppliers of Parties) to establish compliance with legal requirements with respect to electronic authentication and e-signature.

¹⁰ Digital product is defined as “computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically.”

Both Agreements want that there be consumer protection measures applied to online transactions; the difference is in the strength of the obligation. EU-Japan merely states that it recognizes its importance, while USMCA makes it an obligation that such measures be adopted or maintained.

As for unsolicited electronic communication, the two FTAs have an almost identical language. The Article obliges Parties to adopt/maintain measures that regulate spam messages whereby consumers have to give consent to receive them, have control about its ongoing reception, and have recourse against suppliers of electronic communications.

C. Paperless trading, cybersecurity, source code

Paperless trading, meant to make customs transactions more efficient, has been a hallmark of trade facilitation programs. EU-Japan has no explicit chapter on paperless trading but it is indirectly remarked in one of the paragraphs in the chapter on Customs Matters by mentioning the use of advanced systems to “facilitate exchange of electronic data between traders, operators, customs authority and other trade-related agencies.” Exchange of electronic data between these trade actors can only happen through paperless trading. In contrast, the USMCA has a chapter on paperless trading but the language entails a relatively weak commitment to accept trade documents submitted electronically.

Cybersecurity is recognized as important in both Agreements but the articles addressing it is more on cooperation. The EU-Japan mentions it in the article on cooperation on e-commerce entailing dialogues, exchange of experiences and others. The USMCA is more concerned with building capacities for national entities that take charge of cybersecurity incident response and states its preference for risk-based approaches for addressing threats.

The language on transfer/access to software source code is similar in the two Agreements. Both prohibit forced transfer of source codes but allows for voluntary transfers in commercially negotiated contracts or in government procurement. The USMCA adds that it also allows disclosure to comply with requirements of regulatory bodies or judicial authorities subject to safeguards against leakage.

D. Localisation, third party liability

The USMCA prohibits localisation of computing facilities without any exception, in contrast to the CPTPP which provides exception in pursuit of legitimate policy objectives albeit limited by the necessity principle. Furthermore, unlike the CPTPP, the prohibition on localisation is also found in financial services chapter of the USMCA. In the latter, however, the prohibition is tempered by the need by regulatory authorities for “immediate, direct, complete, and ongoing access to information processed or stored on computing facilities” that may be located outside its territory. In these cases,

Parties shall provide opportunities to remediate any lack of access before requiring location of computing facilities. In contrast to the USMCA, EU-Japan has no provision on localisation of computing facilities. However, in other FTAs that EU is negotiating with countries like Australia or Indonesia,¹¹ articles on localisation are present with the same prohibition obligation as in the USMCA.

On third party liability of interactive computer services, the USMCA spells out that ICS suppliers/users are distinct from those that develop or provide content. Hence, they are exempt from liability for harms related to information that the computing facilities store, process, transmit or distribute, unless they, at least partly, contributed in the creation of the content. It also gives latitude to ICS supplier to restrict access, if taken in good faith, to materials it considers harmful or objectionable. This latter provision provides almost absolute discretion on ICS supplier in what they deem harmful/objectionable and what they can allow the public (users) to see/read. For some, this can come as complete control on information dissemination.

E. Personal data protection, cross-border transfer of information

Where the divide between EU and US FTAs is deeper is with respect to personal data transfer. It is not a question of whether to protect personal data or not because both FTAs have provisions that such a legal framework may (EU-Japan) or must (USMCA) exist. Both are also clear that the measures take account of international guidelines such as the APEC Privacy Framework or the OECD Council Recommendation (USMCA), or that they not be applied as disguised restrictions on trade (on services) as in EU-Japan.

However, they diverge on the issue of cross-border transfer of information by electronic means. The EU-Japan stipulates that the Parties will revisit whether to incorporate free flow of data into the FTA after three years of the date of entry into force of the Agreement. It is an issue that is important for Japan but which EU is choosing to tackle in a different way (see Box 3). At least in the EU-Japan, EU preferred to have data transfers outside of trade negotiations, but in other FTAs that EU is currently negotiating, for example with Indonesia and Australia, provisions affecting data transfers are already included as part of the FTA.

¹¹ For example, see https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157129.pdf

Box 3. EU Adequacy Ruling for Japan

EU-Japan TPA does not cover data transfer. Instead, to assuage Japan's concerns, EU and Japan gave a mutual adequacy ruling on both their data regulations almost immediately after the conclusion of their trade agreement in order for data to flow freely between the two economies. From Japan's perspective, EU's Global Data Privacy Rules (GDPR) satisfies its data privacy protection requirements. From EU's perspective, Japan needed additional changes to its privacy regulations and government assurances to make it comparable to EU's own level of data protection before the adequacy ruling could be given.

In particular, Japan introduced a set of supplementary rules to bridge differences between its privacy system and the GDPR. This includes: 1) expansion of its definition of 'sensitive' data; 2) providing conditions when EU data can be further transferred from Japan to third countries; and 3) ensuring that EU individuals can access and rectify their personal data. These supplementary rules are binding on Japanese companies that transfer data from the EU and enforceable in Japanese courts and by the Japanese data protection authority.

In addition to the supplementary rules, the Japanese government gave assurances to the EU that access by Japanese authorities for law enforcement and national security purposes would be limited to what is necessary and proportionate and subject to oversight by the independent Japanese data protection authority.

Lastly, Japan established a dispute resolution mechanism for complaints from EU citizens and residents under the supervision of the Japanese data protection authority.

USMCA, on the other hand, maintains an obligation not to prohibit or restrict cross-border transfer of information for the conduct of the business of a covered person. In the financial services chapter, it says "for the conduct of business within the scope of license, authorization or registration of that covered person (Art 17.17)." The latter specifies the scope of the meaning of 'conduct of business' of a covered person because without specifying, 'conduct of business' can be interpreted narrowly or broadly. For example, to transfer personal information so a package bought through an e-commerce site would be delivered to the right person and address may be for the conduct of business, but what about the storing and transfer of many consumer information including their history of purchases for the purpose of future marketing pitches, or for future sale to data analytics firm and advertising agencies? Are these included in the covered person's 'conduct of business'?

Moreover, the USMCA imposes a necessity test for measures that restrict cross-border information transfer. The footnote in the article further makes clear that a measure does not satisfy the necessity test "if it accords different treatment to data

transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition” that is adverse to service suppliers of another Party.

F. Cooperation, open government

EU-Japan’s Article on cooperation in e-commerce includes regulatory dialogues, sharing of experiences, cooperation and participation in multilateral fora, on e-commerce-related issues including cybersecurity, consumer protection, spam messages, e-authentication, cross-border certification, intellectual property, e-government. But it, noticeably, does not include cooperation on personal information protection, presumably in line with EU position that data protection is outside the ambit of trade rules and negotiations but something else altogether within the realm of human rights.

The USMCA, on the other hand, has personal information protection billed on top, along with cybersecurity, authentication and e-government, as issues for cooperation. It, furthermore, highlights the APEC Cross-Border Privacy Rules (CBPR) as a mechanism for interoperability of data privacy rules and a way to facilitate cross-border data transfer. Self-regulation by the private sector is also encouraged.

On open government, the EU-Japan has no provision while USMCA has a weak language (“shall endeavour to cooperate”) on access and use of public information.

4. Implications for negotiations and capacity building

The RTAs have been laboratories for rule-making especially for e-commerce. The recent RTAs’ provisions on digital trade provide insights on what are likely to be the content of future negotiations, whether in future RTAs or plurilateral or multilateral agreement in the WTO. How can developing and less developed countries prepare when such event happens? This section identifies the key areas that LDCs and MICs should examine to determine their preparedness to undertake stronger commitments in e-commerce and what they could also demand from their Partners.

On opening up their markets to cross-border e-commerce, LDCs and MICs need to understand the scope and implications of zero tariff on digital products and the discussions on internet taxation. Market access may be broader depending on the definition of what constitutes digital products that they agree to. For example, if they agree that digital products include industrial designs encoded on a carrier and digital products are to be allowed entry duty-free, this can entail enormous amount of foregone revenues on top of the foregone duties they would lose for digital products other than industrial designs. Depending on the extent of their dependence on customs duties for fiscal revenues, they might need to find alternative avenues from which to collect taxes to make up for lost tax incomes from digital products in general.

Tax collection on digital products and e-commerce may require access to advanced technologies by customs and tax authorities. Think for instance of the multiplication of small parcels that custom authorities now need to examine and how to be able to speed up clearance and tax collection for them. They may also need legislations on modern tax administration systems especially for consumption taxes in the digital era. Think on how to catch undeclared electronic transactions for example.

LDCs and MICs can demand that the cooperation/ capacity building chapters which are usually part of RTAs include targeted capacity building related to e-commerce taxation. However, introducing direct and indirect taxes may help boost revenues but countries have to be also wary about their dampening effect on both domestic and foreign e-commerce participants.

As for e-commerce enablers, those that enhance countries e-commerce readiness, capacity building that would be agreed should include the important task of improving both their hard-digital infrastructure as well as soft infrastructure. Hard infrastructures include ICT infrastructure development that can allow greater access to the internet at affordable prices. It also includes other infrastructures that make the e-commerce ecosystem function smoothly, such as logistics and transportation infrastructure, especially postal delivery which usually takes care of the last-mile delivery. Power infrastructures also need to be enhanced as ICT depends on reliable power supply. Payment infrastructure is another node of the e-commerce ecosystem that needs to function well if e-commerce were to grow. Capacity building targeted on payments can include thinking through the local conditions so that payments solutions mechanism could be tailored to local situation.

For soft infrastructures, LDCs and MICs should begin with a gap analysis of the status of their current regulatory infrastructure vis-à-vis what possible commitments are required as shown in recent RTAs. For example, is their consumer protection law applicable to online/digital transactions? Do they have data privacy protection regulations that are consistent with international guidelines and principles? Do they have e-commerce laws and if yes, is there provision for e-signatures and e-authentication? Is it modelled after the UNCITRAL model law on e-commerce? How does it vary and whether the variance is not consistent with what can facilitate cross-border e-commerce? Is the e-authentication mechanism interoperable with those of other countries that it can facilitate cross-border e-commerce? Are their intellectual property rights protection regime sufficient? They should demand of Partners specific capacity building activities on these various issues, including the conduct of a gap analysis.

Another capacity building that they can demand is understanding intellectual property rights implementation and enforcement in the digital world. In general, there is great need for skills training, not only for sellers and consumers of e-commerce, but also for government regulators and especially judges who are supposed to enforce the laws on e-commerce.

Along with the gap analysis of their regulatory infrastructures, LDCs and MICs should also conduct a SWOT (strength, weaknesses, opportunities and threats) analysis of their export potentials in e-commerce. For example, can they develop their potential in software development, audio-visual production, data processing and analytics, or tourism? What are the required government support to make it come about, for example, specific skills development/ training support? For e-commerce goods for export, what specific products that are unique to their countries can be exported via e-commerce and how can they be made scalable to supply a global market? What can the government do to enhance the credibility of their e-commerce sellers and increase trust in online commerce?

As LDCs and MICs prepare for future possible e-commerce agreements, it is important to have the conviction that as they review their regulatory infrastructure, the benefits should ultimately redound to the country and that they are not merely altering their existing regulations just to comply with future e-commerce commitments. Strengthening their regulatory infrastructures should serve the purpose of not only boosting their attractiveness as FTA partners but also of doing what is good for their own economies.

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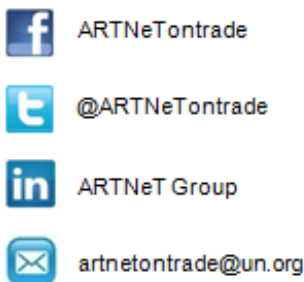
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