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Development of Rules on E-Commerce in World Trade Organization and Regional Trade Agreements

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**Free Trade Area of Asia-Pacific Capacity
Building Workshop on E-Commerce Elements
in Free Trade Agreements and Regional Trade
Agreements**

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DEVELOPMENT OF RULES ON E-COMMERCE IN WTO & RTAs

**FTAAP Capacity Building Workshop on
E-Commerce Elements in FTA/RTAs**

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- 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)

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

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

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

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

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

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

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

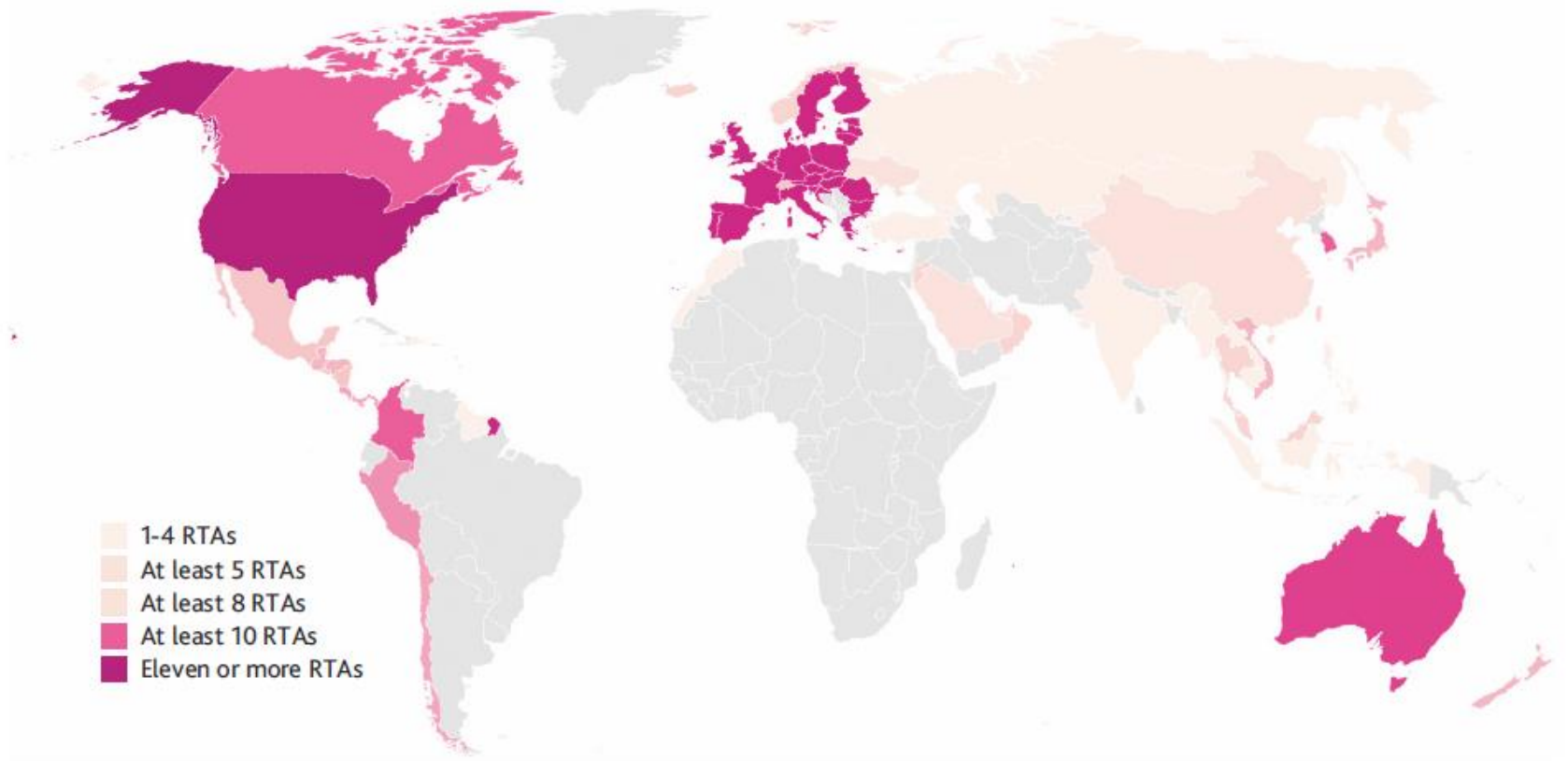
More Recent Efforts for Multilateral Rules on E-Commerce

❖ '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

RTAs with Rules on E-Commerce

❖ Number of RTAs with E-Commerce related Provisions (by country)



Source: Wu (2017)

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

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 (reference to APEC Privacy Framework and 2013 OECD Guidelines) • Key principles for protection of personal information • Ensurance <u>that restrictions on 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> (reference to APEC CBPR)

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)

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">• <u>Recognition of respective 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)

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>

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)• <u>Allow 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)• <u>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</u> (subject to safeguards against unauthorized disclosure)

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

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 	
<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 	

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 	

Prospects for Multilateral Rules on E-Commerce

- ❖ Different position of Members on digital trade related issues

