



**Asia-Pacific
Economic Cooperation**

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

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Committee on Trade and Investment (CTI)

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Table of Contents

I. Introduction

II. Summary of Workshop

Opening Remarks

Session 1: *Recent Developments and Perspectives on E-Commerce in the Asia-Pacific Region*

Session 2: *Key Issues related to E-Commerce at the WTO*

Session 3: *Opportunities and Challenges of the E-Commerce Sector: From the Perspectives of Entrepreneurs*

Session 4: *E-Commerce Issues in the FTA Negotiations*

Session 5: *Future Development of E-Commerce Norms*

III. Discussions

Session 6: *General Discussions on the Future Development of E-Commerce Norms*

IV. Conclusion

Appendix: Workshop Program

I. Introduction

Korea delivered the **FTAAP Capacity Building Workshop on E-commerce Elements**, co-sponsored by Viet Nam; Indonesia; Peru and Chile, on 17-18 September 2019.

This workshop was conducted as one of the activities under the Action Plan Framework for Regional Economic Integration (REI) Capacity Building Needs Initiative (CBNI) initiated by Korea since 2012, and was aimed at in-depth capacity building for negotiators and policymakers on E-commerce area through sharing the best practices and experiences of negotiations.

APEC has been carrying out the CBNI as part of its efforts to strengthen member economies' capacity for FTA negotiations. The major aim of the initiative is to narrow the widening gap in the negotiating capabilities of member economies so that it does not become a stumbling block in further advancing regional integration. The REI CBNI has already gone through two phases, from 2012 to 2014, and from 2015 to 2017, respectively. Currently, projects have started under phase 3 of CBNI from 2018 to 2020.

In the meantime, earlier this year, a number of WTO members announced that they wanted to start negotiations on e-commerce area in order to achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO members as possible. More than 70 FTAs/RTAs including the CPTPP and PA provides the chapters on e-commerce separately since existing WTO agreements such as the GATT are insufficient to address the issues related to e-commerce.

In this respect, this project was prepared to help the workshop's participants learn the up-to-date information on key issues related to e-commerce at the WTO, and recent developments, perspective and domestic legal system of e-commerce in the APEC region as well.

Thereby, the workshop attempted to equip FTAs/RTAs negotiators to enhance their knowledge on E-commerce policies, leading to a desirable E-commerce chapter in future FTAs/RTAs. The workshop also served as a basis for APEC economies to enhance their understanding of negotiations through relevant case studies and provided a venue for an extensive exchange of views on matters concerning newly emerging issues in FTA/RTA negotiations.

This workshop was participated by **40 attendees from 16 member economies including 7 speakers**. The details of speakers and moderator are as follows;

- **Mr. Young-jae KIM**, Director General for International Economic Affairs, Ministry of Foreign Affairs and Trade, Korea (Opening Remarks)
- **Mr. Sungbum LEE**, Partner, Yoon & Yang, Korea (Moderator)
- **Mr. Jeong-Gon KIM**, Head of India and South Asia Team, Korea Institute for International Economic Policy

- **Mr. Hamid Mamdouh**, Senior Counsel, King & Spalding LLP and former Director of Trade in Services and Investment Division of the WTO
- **Mr. Jun-Seon YUN**, Head of Next Commerce Lab, Interpark
- **Ms. Hyo-Young LEE**, Professor, Korea National Diplomatic Academy
- **Mr. Kyu-Yub LEE**, Research Fellow, Korea Institute for International Economic Policy
- **Mr. Jaemin LEE**, Professor, Seoul National University
- **Mr. Charles JULIEN**, Counsel, White & Case LLP

This workshop comprised of seven sessions. Session 1 ***Recent Developments and Perspectives on E-Commerce in the Asia-Pacific Region***; Session 2 ***Key Issues related to E-Commerce at the WTO***; Session 3 ***Opportunities and Challenges of the E-Commerce Sector – From the Perspectives of Entrepreneurs***; Session 4 ***E-Commerce Issues in the FTA Negotiations***; Session 5 ***Future Development of E-Commerce Norms***; Session 6 ***General Discussions on the Future Development of E-Commerce Norms***; and Session 7 ***Wrapping Up and Evaluations***.

We examined recent developments and perspectives on E-commerce by focusing on Asia-Pacific region in Session 1, and explored key issues concerning E-commerce which have been considered in the context of the WTO in Session 2. In Session 3, we invited practitioners working at Interpark, one of the major companies in Korea in the field of E-commerce, and had opportunities to learn lessons from entrepreneurs about what they have experienced while doing business. We reviewed the chronological development of E-Commerce Chapters in the FTAs/RTAs and analyzed their normative features in Session 4, and desirable way of future development related to the E-commerce norms were discussed in Session 5. In Session 6, panelists discussed the future development of E-commerce by reviewing issues pointed out during the one and a half day of workshop.

II. Summary of Workshop

Opening Remarks

Korea's Director General for International Economic Affairs in the Ministry of Foreign Affairs opened the workshop by delivering opening remarks. He welcomed all the participants. He introduced the meaning and importance of APEC's CBNI conference which was launched in 2012 by Korea's active participation and is already on phase 3 this year.

He touched on the question why E-commerce is of critical importance at this time by raising two aspects. First, historically, trade liberalization or free trade has been vital growth engine of the world economy since the inception of the multilateral trading system represented by GATT, WTO, APEC and many other regional and bilateral FTAs. But now we are in challenging

times for the global economy and seeing increased economic uncertainty due to widespread protectionist practices. While our global community is still at a loss on how to revitalize the international trade system, we arrived at the era of 5G in which technology transfers vast amount of data and a guidance of so called the “fourth industrial revolution” is required. Second, unlike in the past trade negotiation, we cannot be too optimistic of the prospects of current E-Commerce negotiation in the WTO as business interest is coming into focus and the so called “technology war” between super powers is getting serious.

Emphasizing global economic conditions in the current, Director General encouraged participants to actively engage in the workshop so that they can share experience and concerns and find collective intelligence.

Session 1. Recent Developments and Perspectives on E-Commerce in the Asia-Pacific Region

Mr. Jeong-Gon Kim, Head of India and South Asia Tem in Korea Institute for International Economic Policy made a presentation on “E-Commerce: A Driver of Digital Innovation.” He introduced issues and background surrounding the E-Commerce especially in the context of FTAs and RTAs.

In the presentation, Mr. Kim talked about the concept of E-commerce and current trend of E-commerce in the region of Asia and the Pacific. Currently, while E-Commerce is important by itself in the digital innovation and digital economy as a whole, the concept of E-Commerce is diverse venue by venue. He picked OECD’s definition as a quite accepted one and emphasized that E-Commerce is based on methods specifically designed for the purpose of receiving or placing orders. According to his explanation, receiving and placing order on the internet or in the network is crucial when defining E-Commerce.

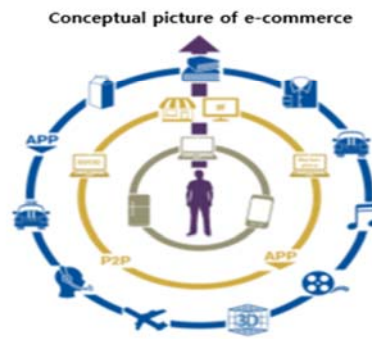
General definition of e-commerce

- **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

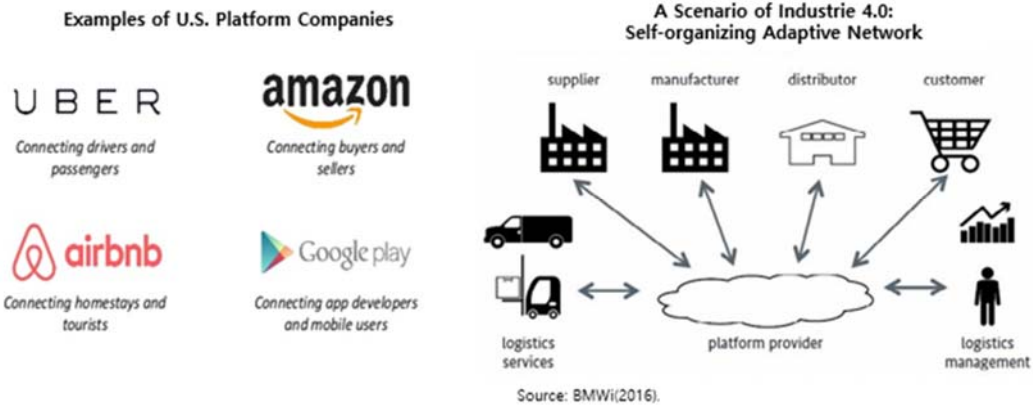
- **How is e-commerce conducted?**

- **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

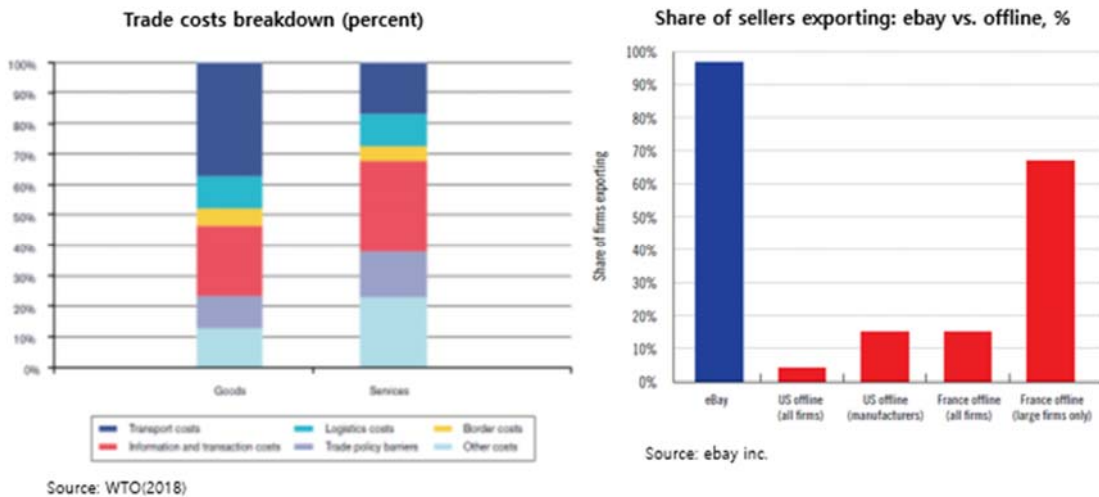


Source: Kommercelegium(2015)

Also, not only the subject but the players of E-Commerce are quite diverse, and E-Commerce is conducted with diverse devices such as desktops, tablets, smart phones, etc. According to the data presented by Mr. Kim, the Asia-Pacific region holds the largest share in the total B2C market and the region leads the growth of global cross-border E-commerce.



With regard to benefits of E-commerce, he emphasized that E-commerce can provide substantial export opportunities by reducing firms' operational cost, by providing opportunities for innovation and new forms of businesses, and by widening market scope in the benefit of the reduction in transaction costs. E-commerce can promote exports in services, as some services are now tradable across borders through innovative business models which leverage digital technology.



Among the challenges, Mr. Kim emphasized that balancing freer cross-border flows and protection of data is the foremost one both globally and domestically. He also mentioned that there are plenty of issues where international cooperation is necessary in order to deal with challenges in the field of E-commerce. Hoping that APEC CBPR becomes minimum standard for each member economy's data protection and useful tool to be used in APEC level, Mr. Kim

wrapped up his presentation focused on recent developments and perspectives on E-commerce.

Q&A

Question 1)

“How does the E-Commerce finally affect productivity and what has the Korean government done as a sovereign?”

Mr. Kim pointed out that one important issue may be people’s attitude about commercial process, that is, there should be some kind of trust on buying online. In Korea, people are accustomed to order directly from online marketplace and it helps increase productivity.

Question 2)

“What progress has Korea reached in terms of establishing effective and trustworthy B2C resolution system? Because it is truly important to protect the consumer.”

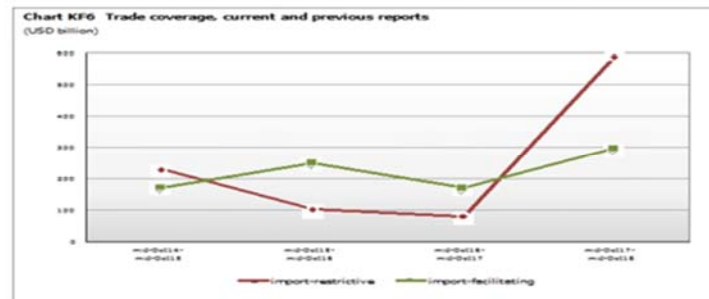
Assuming that the question is about B2C Consumer protection, he answered that there are no globally accepted system related to online consumer protection. There are some efforts being made. However, Korea has long history of consumer protection as Korean consumers are very sensitive and they make many complaints. Not only Korea consumer agency but also private agencies have long histories and they support individual consumers with regard to protection issues. One effort that Korean consumer protection agency has made is effective cooperation network with other economies. Korean people export to other economies like China and Southeastern Asian economies, so Korean agency makes formal public network with consumer agency in each economy. Also, Korean agencies conclude cooperation MOUs and make regulations to cooperate with other economies.

Session 2. Key Issues related to E-commerce at the WTO

Mr. Hamid Mamdouh, Senior Counsel and former Director of Trade in Services and Investment Division of the WTO made a presentation on “E-commerce in the WTO.”

After explaining the expected WTO functions and the current trade environment where protectionist or unilateral measures are prevalent, Mr. Mamdouh explained the WTO’s existential challenges by using the term “triangular challenge” which explains the phenomena of leadership deficit, increase in the complexity of trade policy issues, and no more “common purpose” existing. Among the failures in the WTO functions, he raised failures in negotiations, dispute settlement, and compliance with WTO Agreements as three vital ones.

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



However, as the services trade is the backbone of E-commerce and the meaning of international trade was redefined to include services when we established the WTO, the issue of E-commerce is to be dealt with in the forum of the WTO. Mr. Mamdouh argued that the legal definition of E-commerce would be trade through digital means because the WTO deals with trade and E-commerce has trade-related aspects.

The WTO is not a standard setting body and the role of trade rules is to ensure least trade restrictiveness while not intruding on regulatory sovereignty. He emphasized that sound legal rules and disciplines to strike that balance and ensure its continuity are critical. However, we need to distinguish between what can be achieved in the WTO and what can be achieved in RTAs. RTAs in definition are required by the WTO to be more far reaching and more liberal in law, and there is no presumption of all that what we achieve among 160 WTO members would be equal to what we achieve in a group of like-minded economies in the regional level. RTA is a different sphere and there is a different architecture.

Arguing that we should put everything in the WTO and expect it to work as RTAs might not have us take whatever we find in RTAs, he raised a question on which way we are going. According to Mr. Mamdouh, it is time for us to choose the direction by considering the pros and cons of following different options: adopting a new standalone WTO agreement, scheduling new commitments under the GATT and the GATS, or clarifying interpretative statements on certain WTO provisions.

Q&A

Question 1)

“We learned from your presentation that most of the substances about commercial aspect is discussed in the WTO. Every economy has its own priority in policy and it is important for society, culture and everything. What is your opinion about the non-commercial aspect in the WTO?”

Pointing out that the question is exactly related to “regulatory interface,” the interface between trade and non-trade issues, trade and regulations, Mr. Mamdouh argued that trade agreements would have to give space to regulators, for their sovereign choices, and emphasized that this is why regulatory cooperation is important. Furthermore, as the non-

trade concerns require more regulatory cooperation, the trade negotiations left them out and made economies do what they want but, instead, do in a least trade restrictive way. We have been doing it for many years in merchandise trade, and we need to adopt the way to deal with digital trade issues as well.

Question 2)

“Is digital divide a hurdle or a concern that needs to be addressed for reaching an E-Commerce Agreement at the WTO? Also, as E-Commerce is multidimensional, is it easier or technically feasible to have a stand-alone agreement than different aspects of GATT or GATS being amended separately?”

With regard to the first question, Mr. Mamdouh answered that these negotiations are very good opportunity to address, to make a contribution to the digital divide solution. Dealing with digital divide requires a number of enabling factors: (a) physical infrastructure, and (b) soft infrastructure – it is the software that runs in the physical infrastructure. Regulatory infrastructure needs skills for operators and consumers, and a right trait outcomes are required as well. Asking what kind of outcomes we have in an E-Commerce, he referred to what came out from the Trade Facilitation Agreement, in linking some of the regulatory reforms that might be required with some kind of assistance to regulate and to re-regulate. That could help on the regulatory infrastructure side. On the side of capacity building and on the side of helping those economies to come along, there is a lot that can be done, but there needs to be a more detailed discussion about how these negotiations can contribute.

With regard to the second question, he said that the complication of having a stand-alone agreement is huge. People might think it is simpler because it is easier to write, but, to Mamdouh’s understanding, it is not. Arguing that there are no legal impediments at all against scheduling new rules under the GATT in states’ tariff schedules, and the schedule even has the section for non-tariff measures, he said that participants will just need to submit draft schedules on goods and services if we have a template which lists all the market access and regulatory commitments that we are going to have under the GATT and the GATS.

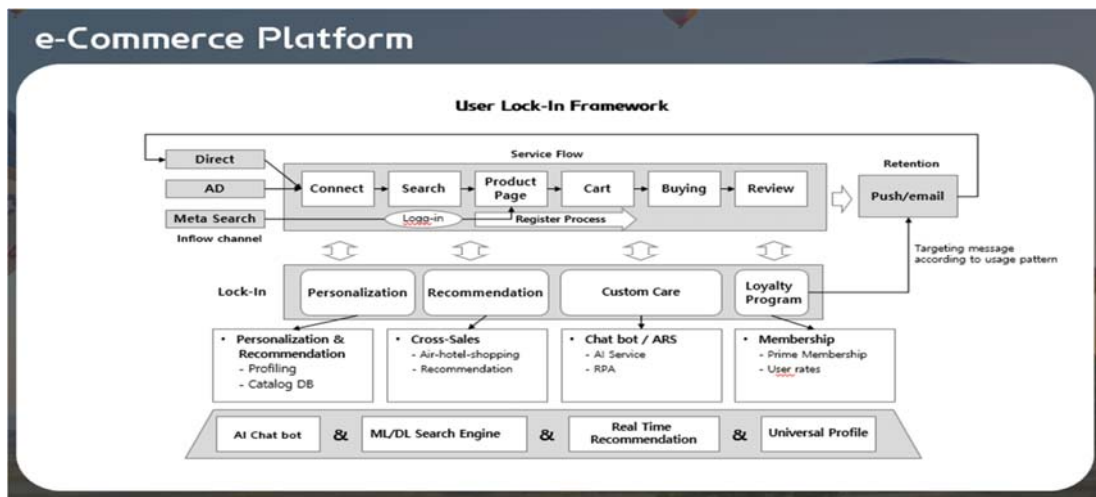
Session 3. Opportunities and Challenges of the E-commerce Sector – From the Perspectives of Entrepreneurs

Mr. Jun-Seon Yun, Head of Next Commerce Lab in Interpark made a presentation on “Opportunities and Challenges of the E-commerce Sector.” He firstly introduced the company, Interpark, and moved on to the issues of E-commerce market and E-commerce platform, respectively. Finally, he wrapped up the session after analyzing opportunities and challenges of the E-commerce sector.

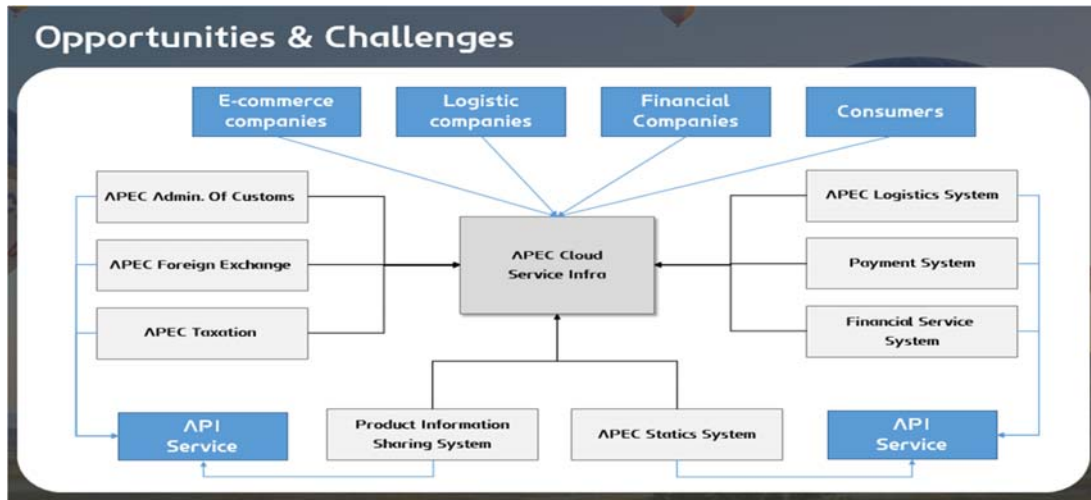
With regard to the issue of E-commerce market, he forecasted global E-commerce sales to continue to grow. According to the data, global E-commerce market will exceed USD 3 trillion by the end of 2020 and grow to 6 trillion by 2023. It is noteworthy that Asian market is growing faster than the global market.



The E-commerce platform consist of three parts: users, suppliers, and the platform which networks between the users and the suppliers. The suppliers make contracts, register product, and then sell, deliver and check review. From the user side, because they want to connect to various platforms to find cheaper product, a new operation comes out such as a channel management service (CMS) and price comparison service. The suppliers provide information to Channel management service, and CMS provides information in all platforms. Then, the users can compare price in one place without visiting all the platforms one by one. In the process, the E-Commerce companies increase the number of visitors and become able to get benefit by activating user lock-in framework.



At the end of the presentation, Mr. Yun suggested that APEC become a forum for cooperation by building a cloud service platform with global standardizations which will result in APEC's digitalization and infrastructure. In order for members to survive in the competitive online retail market and to be able to face obstacles in the E-commerce sector, he expected that the workshop would be an initiation for the plan.



Q&A

Question 1)

“As a middle man between suppliers and demanders, do you have any mechanism to address consumer’s complaints from cross-border transactions?”

Mr. Yun answered that under the platform, when there is customer issue, people do write on the CS board where they can call the firm’s own call center. The firm has local partners who would return and do customer cases. If the issue is something that the CS center cannot handle, it will go to the product manager who handles the actual product. Also, the firm is trying to make AI chatbot service. As Interpark has been running this business for almost 5 years, so they have a lot of data from users. They analyze the customers and make the AI to automatically answer. In the near future, if the users ask some questions, the AI can answer automatically. Also Interpark made an RPA which is a robotic processor automation, so if the users want to change the address and they cannot get any product, then they can simply click and it would automatically process behind.

Question 2)

“From your point of view, what is the main difficulty for SMEs to adopt E-Commerce? Can you also share any long term plan from the Korean government on supporting SMEs for E-Commerce adoption?”

Mr. Yun explained that to support SME businesses, the government agencies provide the education programs for SMEs and KITA (Korea International Trade Association) also has the programs to help the exports of Korean SME products, and they do have platforms to support the cross-border trade in SMEs.

Session 4. E-commerce Issues in the FTA Negotiations

4-1 Development of Rules on E-Commerce in WTO & RTAs

Ms. Hyo-Young Lee, a professor in the Korea National Diplomatic Academy made a presentation on “Development of Rules on E-commerce in WTO & RTAs.” In her presentation, Dr. Lee dealt with existing WTO rules on E-commerce and their limitations, global efforts for advancing rules on E-commerce, current state of E-commerce rules in RTAs, and development and prospects for multilateral rules on E-commerce.

Currently, there is lack of multilateral rules on E-commerce, and WTO rules in GATT, GATS, TRIPs and rules in bilateral FTAs or mega-regionals are applied in a fragmented way. Due to limitations of existing WTO rules on E-commerce, there were efforts to establish multilateral rules on E-commerce by adopting “Work Program on E-commerce” and making “Declaration on Global E-commerce” at the second WTO Ministerial Conference, but all these efforts ended up with failure. More recently, efforts were made by adopting “Work Plan on Electronic Commerce” at the 11th WTO Ministerial Conference, and “Joint Declaration on Electronic Commerce” was made at Davos Forum in 2019, but still no visible results were drawn out.

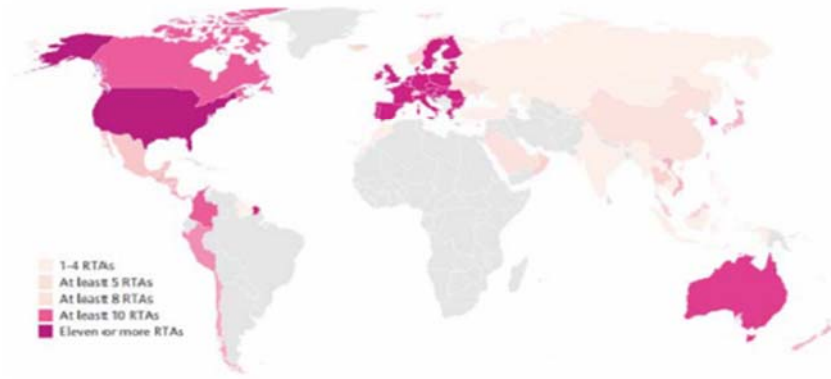
E-commerce rules are getting more specific as a form of E-commerce chapter in RTAs. Participants in recent mega FTAs such as CPTPP and USMCA especially put efforts on making even more detailed E-commerce rules. Dr. Lee introduced difference found in the above mentioned two RTAs by comparing the articles related to the issues of personal information protection, cross-border transfer of information, data localization, cybersecurity, and source code, which are the most important key issues that enable e-commerce.

Wrapping up her presentation, Dr. Lee pointed out that stark difference is existing among states with regard to key issues relating to digital trade. According to her analysis, there is difference in the positions between the US and the EU. Also, even more different positions are found by China and other less developed economies. Amid the time when less than one year is left until the next WTO Ministerial Conference, she emphasized that there should be positive developments on discussions on E-commerce so that we would be able to maintain multilateral trading system.

4-2 E-Commerce Issues in the FTA Negotiations

Mr. Kyu Yub Lee, a research fellow in the Korea Institute for International Economic Policy made a presentation on “E-Commerce Issues in the FTA Negotiations.” His presentation was focused on economic reasoning. Before moving on to the main issue, Mr. Lee talked about the term “digital trade” that is used in the context of FTA, unlike the WTO level where the term ‘electronic commerce’ is prevalent. However, both terms have similar meaning to his knowledge, so Mr. Lee revealed that he would use both terms interchangeably.

Current State of RTAs with E-Commerce-Related Provisions



Pointing out the issue of “welfare,” Mr. Lee compared the GDPR, on the one hand, and data localization, on the other. The GDPR is data regulation that is effective from last year and applies to all firms processing the personal data in the EU. When economies send and receive data while trading, as the data include personal information, the EU adopted the GDPR to protect EU citizens from privacy problem. Unlike many advanced ones, however, the developing economies enacted data localization regulation for their own public policy which is also to protect data security, privacy, etc.

Mr. Lee’s main question is why data regulation is needed, and he tries to tackle it as any other economists by relying on economic reasoning focused on welfare issue. In order to get to the point, he asks what the effect of GDPR and data localization. According to his analysis, as the trade partners need to comply with new data regulations, there occur regulation cost and compliance or implementation cost. This means that regulation cost rises. For example, new GDPR can impose up to 4% of global turnover or 20 million euros. For data localization measure, there occurs fixed exporting cost as well because some data localization requires building data center.

Analyzing these factors, Mr. Lee concludes that 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, but the EU’s achievements by the GDPR may come mainly at the cost of trading partners consisting of non-EU economies.

Q&A

Question 1)

(To Dr. Hyo-young Lee) “Please explain more about the comprehensive terms in CPTPP and USMCA.”

Dr. Hyo-young Lee confessed that she did not specify on the difference of the terminology between “E-commerce” and “digital trade.” Although USMCA does use “digital trade” for its chapter, it has not defined what digital trade means. But to her knowledge when we talk about E-Commerce, it gives us the concept that is more limited to traditional delivery of goods over the internet. However, when we talk about “digital trade,” it seems to imply a more data related concept. In the beginning, in the WTO, in 1990s when we started to talk about E-Commerce, they didn’t expect digital technologies that we have today. Now, 20 years from that time, there is discussion of fourth industrial revolution. And “data” being the most important element in the future industries, and though the digital trade seems to convey more comprehensive message, such as AI, big data, IoT, and other industries. But in the provisions, the definitions are not defined.

Question 2)

(To Dr. Gyu Yub Lee) “If you are showing there is negative welfare impacts to the trading partners with the EU when they implemented the GDPR, what are your recommendations?”

Dr. Gyu Yub Lee answered on how to lower negative effects to the trading partners. He emphasized that if the trading partner governments and firms try to reduce regulation cost, then the negative welfare effect will fall in the long run. According to some US surveys, only 20-40% of the firms are willing to comply with GDPR, and according to his explanation, this tells the short term case in which not many companies are willing to spend money. In the long run, however, the cost looks smaller so more firms will comply and the regulation cost will decrease. Then the negative welfare effect will fall. However, Dr. Lee pointed out that the ultimate answer will be that the data treatment level should be that of the WTO model. To his knowledge, if all the members have one guideline, the regulation cost will decrease.

Question 3)

(To Dr. Hyo-young Lee) “What is the scope of legitimate public policy objectives?”

According to Dr. Hyo-young Lee, we may refer to the general exceptions clause in the WTO, GATT Article XX. She explained that, for example, protection of public moral, complying with the laws that are in compliance with the WTO, protection of life and health of animals, humans, plants, and these could be policy objectives and since they can be recognized based on the norm. However, she confessed that she is not sure if this comes under the umbrella of e-commerce and this is an area where future discussions should be made. Dr. Lee added there might be a hint to what the US is trying achieve in provisions of USMCA and TPP but this is an area that needs a lot of discussion and we cannot be sure what it is for right now.

Session 5. Future Development of E-commerce Norms

5-1 E-commerce Norms in the Global Trading Regime: Current Status and Future

Mr. Jaemin Lee, a professor in Seoul National University made a presentation on “E-commerce Norms in the Global Trading Regime” by focusing on the current status and future prospect. He started the presentation after providing his conclusion first, that is, we are at a crossroad where E-commerce is really a big problem with which we realize challenges but still feel difficulty in looking for the right direction. We are trying to do something new at the WTO but it is going very slowly and we see the gap between norm and reality get wider, deeper and faster. Experiments are being conducted under the FTA regime, but they are superficial and do not touch the core issues that we have to overcome. Also, as FTA has fundamental limitations in dealing with E-commerce issues, what the professor thinks right is to find a solution in a multilateral way.

According to Professor Lee, we are feeling the problems of protectionism and difficulty in dealing with the WTO agreements. Different economies have different views, and different interests. But legally speaking, or in terms of the trade agreements, one of the fundamental problems that we are facing now is the mismatch of the norm on the one hand and the reality on the other hand. The norms today that we have now were developed during the Uruguay round almost 30 years ago, but during the last 30 years, there have been drastic changes and there are many issues that we have not thought about 30 years ago. This is why we now see a gap between reality and the norm on the other hand.

WTO negotiations at present aim to harvest only low-hanging fruits such as fisheries subsidies, RTAs, etc. in particular, mega-FTAs are contributing to fill the gap and ensure trade, but challenges still remain as core problem of norm-reality mismatch remains and widens.

As to the concept of E-Commerce, Professor Lee explained that it is not only ordering something online, but it is a new concept of using information or a data or a real time of business information, and personal information for trade purposes. It touches upon goods trade, services trade, and it is also related to intellectual property rights and investment disputes as well. So this new type of business activities and government regulations will relate a newer situation of business activity. And to reflect those realities we have to consider how to find a new norm in this particular area, so that is the E-Commerce that we will have to aim at in the future at the multilateral regime. Professor Lee suggested, however, that we do some easy work first and then move to the hard work. As E-commerce is a high-hanging fruits, after we succeed in some area by picking some low-hanging fruits, we may get some confidence and some self-trust to go to those high-hanging fruits. So, now, we have to turn to more fundamental question that how we would survive and manage the interim.

According to Professor Lee, E-commerce is still in its early stage, and negotiations are going forward, but the outcome is still slow and modest, and unable to keep up with the drastic changes that we are seeing. What we need to do first is to establish consensus with respect to how to regulate data protection or data-processing. That is, remaining question is how we find some commonality between and among different states so that we can find some

common ground in regulating globally and multilaterally, the data-processing, data protection, etc. States can start discussing new norms that will address the changes that we are seeing in this front, and adapting new norms will help facilitate trade and transaction between economies and business entities as well. We can try to do many different ways, both binding manner and non-binding manner, and APEC can be an important platform to discuss this further. E-commerce is important for developing members as well because this is an issue where the digital divide can be visually seen among different groups of economies, so even in that respect, APEC seems to be a better forum to deal with these issues.

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

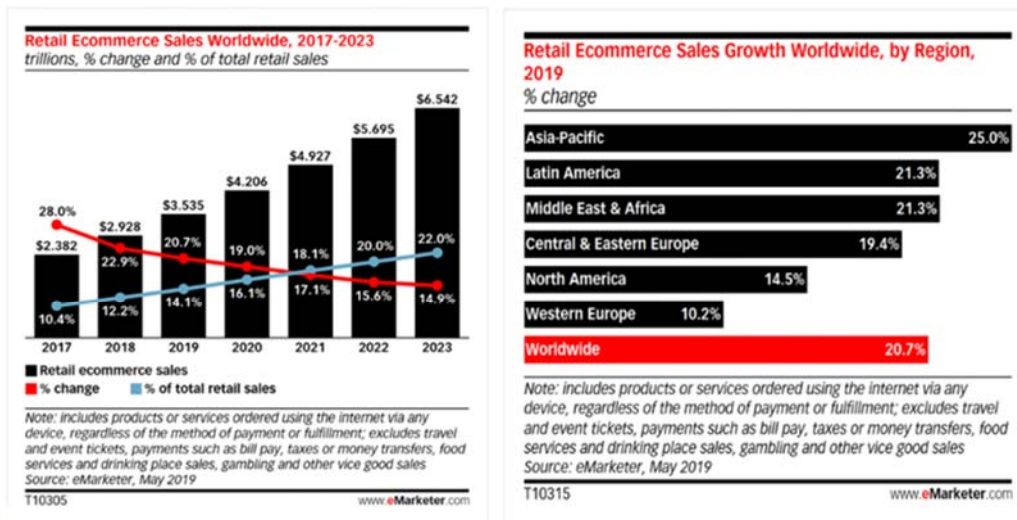
Source: Dr. Dongchul Kwak, *Digital Trade Liberalization in Analogue Trading Regime*, Ph.D. Thesis, SNU GSIS, August 2019

5-2 Future Development of E-commerce Norms

Mr. Charles Julien, a Counsel at White & Case LLP made a presentation on “Future Development of E-commerce Norms.” Firstly, he introduced three issues to be dealt with and answered in the presentation: the growing importance of E-commerce norms, brief history of the development of E-commerce norms, and foreseeable developments of E-commerce norms.

Explaining the matters on growing importance of the E-Commerce, he presented two graphs which shows the increase in the retail commerce sales. According to his explanation, E-Commerce is growing rapidly, but the share of trade of E-Commerce is still relatively limited. If we look at it from the regional basis, the Asia pacific region is leading the trend as 25% already of retail sales are due to E-Commerce. It is much less in Europe, just above 10%, but that growth is expected to continue. Asian pacific region represents over 60% of global E-Commerce spending, so because of that growth, E-Commerce is becoming an increasingly important focus of the international trade.

The growing importance of E-commerce norms



Next, he briefly introduced history of the development of E-commerce norms. The WTO Work Program on E-commerce and moratorium on customs duties was adopted in 1998, and since 2000 to today, E-commerce norms in domestic regimes and FTAs have been expanded. It is noteworthy that 76 WTO members commenced WTO negotiations on trade-related aspects of E-commerce early this year in Davos. These negotiations started in order to achieve high standard outcome that builds on existing WTO Agreements and frameworks with participation of many WTO members as possible.

Finally, raising a question of where we go, Mr. Julien firstly focused on the plurilateral discussions on E-commerce. Major economies including the US, China, Japan, EU, and Russia are participating negotiations on the baseline and norms for global E-commerce trade. He mentioned that such negotiations would be able to influence and shape the contour of the future norms that will certainly apply to all, and the presence of both China and the US in the negotiations is a very positive sign, as these two are the leading players in the E-Commerce field. Also, a wide range of developing economies and LDCs are participating in the negotiations.

To conclude, he emphasized the importance of the institutionalization of the E-Commerce. We see that very diverse issues have been dealt with in FTAs, RTAs, in very different ways. We have seen that the negotiations have started in many other ways. However, in reaching successful negotiations, the key matter is to define clear objectives. Unaddressed key objectives such as establishment of key definition and key issues in the field of E-commerce should be defined first in order to succeed in institutionalizing E-commerce norms.

Q&A

Question 1)

“What are the key objectives that need to be considered?”

Acknowledging that it is a very difficult question, **Professor Jaemin Lee** answered that defining the scope, and clarifying the objective is the first step. He said simply saying E-Commerce is important or should be addressed in the FTA is a good start, but a more practical way is to define achievable objective and then implement the negotiating tool to achieve that objective.

Mr. Charles Julien answered that he thinks one of the first steps is defining issues that can be addressed within the WTO negotiations and issues that cannot be addressed in the WTO negotiations. In particular, he does not think that the WTO is the best place to address data protection and data transfer. We need to focus on trade related aspects of the E-Commerce and those issues cannot be addressed by existing WTO agreements.

Also, as there is no agreed definition of what is actually traded, one option we can take is to classify E-Commerce and to consider how to define E-Commerce. It would be good to have a typology of E-Commerce, then a certain type of transaction can be classified as trade in services, and others would be trade in goods associated with trade in services. In this regard, he asked the audience to refer to the list in his last slide.

Question 2)

(To Mr. Charles Julien) “Some of the economies lack domestic regulation on E-Commerce. We do have a regulation, but it is not yet clear. Especially, regarding cross-border trade, do you have any suggestions us to prevent some data from going abroad so that things be done better for us and also for our partner?”

Acknowledging that it is a difficult question, Mr. Charles Julien answered with an example of the EU which distinguishes between the rules on E-Commerce, data protection, and data transfer. Mr. Julien said it might be best to separate the two things, the cross-border data flows and data privacy, as in the EU. Also, with regard to data localization, it should be kept in mind that it is a sovereign right for governments to adopt. Some economies like the US oppose data localization rule but nothing prevents the other government from adopting such rules. This would be at the center of the negotiations that will take place.

Question 3)

“Both presenters said that we should focus on agreement that has a relatively low bar and then go to more complex issues later on. In your opinion, is there any existing agreement that we could look at as the starting point?”

According to **Mr. Jaemin Lee**, as CPTPP is the most recent one and reflects the different views between developed and developing economies in the pacific region, it would be a good starting point for the expansion of the norm whether it be this way or that way. Of course, other provisions or FTAs such as USMCA have resemblance with CPTPP, but the difference is that only CPTPP has gone into effect, and we are not clear about the fate of USMCA.

Agreeing with Mr. Lee, **Mr. Charles Julien** referred to his presentation which dealt with the treatment of E-Commerce in recent FTAs and RTAs. There are commonalities in them, but CPTPP is the most comprehensive, in terms of substance and the coverage.

III. Discussions

Session 6. General Discussions on the Future Development of E-Commerce Norms

Three experts, Professor Jaemin Lee, Mr. Mamdouh, and Mr. Julien, were invited to come up to the podium and discussions were conducted on major issues in relation to the E-commerce.

1. Possible definition and scope of the E-commerce

Reminding that, currently, a clear definition on E-commerce or data trade is lacking and the fact that during the workshop, we heard two different conceptual definitions, “placing and receiving orders in electronic means” provided by the OECD on the one hand, and, on the other, “production, distribution, marketing, sale or delivery of goods and services by electronic means” that is presented by Mr. Mamdouh, the moderator, Mr. Sungbum Lee, asked the experts to share their ideas on the definition or scope of the E-commerce.

Pointing out that the question is raised in a trade context, Mr. Mamdouh suggested that the definition be “conducting trade through digital means,” which is found in the WTO work program on E-commerce adopted in 1998. Also, issues that would fall out of the trade’s sphere should not be ventured into the realm of setting standards as they are different tasks, no matter how important those are.

Emphasizing the importance of definition and scope in discussing E-commerce and the current situation where those are lacking, Professor Jaemin Lee argued that online searching, ordering, payments and delivery of goods and services should be included in the scope of discussion on E-commerce. Also, ICT services which enable services and digital products should be included as well. As cross-border data flow is important, it should be defined at least as an element of E-commerce, if not definition. According to Professor Lee, whatever we may say in the E-Commerce Chapter, what actually happens is mainly about dispute on data flow. In conclusion, He suggested the definition as “the conventional E-Commerce definition plus ICT services, ICT enabler services and digital products, and new digital products.” He said this should be the starting point of the definition discussion.

Agreeing with Mr. Mamdouh and Professor Lee on the point that the definition must be focused on trade, Mr. Julien expressed that we need to concentrate in trade aspects of E-Commerce. Supporting Mr. Mamdouh’s definition, he said it would be important to have a pragmatic approach to ensure that all negotiators understand well the scope of the negotiations, as the definition presented is relatively broad and problems with the absence of definition should be prevented from occurring.

At the end, Mr. Mamdouh added some points with regard to cross-border data flows. He explained that allowing data flows is dealt with within the services agreement. As the agreement deals with the enabling structure that deals with the supplier's needs, whether it is access to telecommunications, infrastructure, excess to general infrastructure, the rules of the agreement, apply to day to day operations. One important thing to remember is that what is dealt with is not all data flows but data flows for the purpose of conducting trade, and this is closely related to the scope of E-commerce discussion.

2. Protection of confidentiality of personal information and Prohibition on the requirement of transfer of source code

Assuming that the concerns of the member states to have interests in discussing E-commerce issues seem to be closely related to protecting confidentiality of personal information, the moderator asked the experts what the concerns are and what drives the discussions on E-commerce. He also asked why we need to prohibit the requirement of transfer of source codes despite that the requirement of transferring a technological knowledge has already been prohibited in most of the FTAs.

Starting with the protection of data and privacy issue, Mr. Julien argued that it should not be addressed within trade negotiation. Trade negotiation should focus on trade and other issues, such as data protection or data privacy would be better addressed in other fora. It is not the role of the WTO to manage data protection in global level or address privacy, and to discipline the way governments address these issues. With regard to the second issue, transfer of technology or source codes, he said economies have different views on the mandatory or non-mandatory transfer of technology and source code. Emphasizing the importance of pragmatic approach in the negotiations, he revealed that he is not so sure these issues have more fundamental issues to be linked with within a broader context, and they should not be placed at the top of the lists.

Mostly agreeing with Mr. Julien, Professor Jaemin Lee focused on the importance of considering exceptions when negotiating on E-commerce. According to Professor Lee, perhaps we could just let General Exceptions and National Security Exception apply to E-Commerce just like any other trade, or there will be some specific concerns that some state can harbor. Also, at least in the discussion stage, there should be a discussion of how to align competing obligations of states in the formulation of new trade agreements.

Pointing out that there is a rule making mechanism or framework within the GATS, the Article 18 on additional commitments, Mr. Mamdouh expressed his opinion that issues like source code which are not dealt with in the GATS would be able to be covered within the framework of the WTO.

3. Formality of instruments to take

Appreciating a common understanding that the WTO should deal with issues related to trade, the moderator asked how the issues unrelated to trade be dealt with and what an appropriate fora for the WTO to have a discussion on such issues. To be more specific, supposing that

agreement was made among the member states to conclude instruments to cover such issues, the moderator asked what kind of contents should be included and what formality the instruments should take. He provided an annex to the existing agreement or a stand-alone agreement as options as well.

Professor Lee expressed that specific forms of instrument is a very open question as both ways have its own benefits; a stand-alone agreement will provide a more leeway in formulating norms, independent of existing norms, which is good way to proceed; adding an annex to the existing norms of service trade and good trade in the WTO would be another option. However, one thing to take note of is that once treaty's concluded, it is very difficult to amend it afterwards. On the one hand, we need a short-term achievement, but on the other hand, we have to look at the future as well, so we should consider such difficulty when conducting negotiation.

Mr. Mamdouh emphasized that the most important function that needs to be repaired in the WTO system is negotiating function. The breakdown in the negotiating function is the root of the crisis that we are facing today. Again, referring to Article 18 of the GATS and Article 6.4 on domestic regulation, he underlined the importance of negotiating mechanism built in and designed to continuously update the rule book. He denied the possibility to predict what we are going to need by way of rules or disciplines 10 years down the road. According to him, we can decide only on the basis of what we see today but keep the possibility open for updates at much more frequent intervals.

Mr. Julien argued that there is no one preferable option, but the choice of the form will depend on the rules that we are negotiating. So after we set the objectives, we can then think about the form or type of disciplines that we want. He emphasized that the order should be as follows: first, defining certain key issues, then discussing and agreeing on objectives, and finally, deciding on what kind of agreement or what type of rules are needed. What should be covered is a key issue and the answer will come after we have defined key terms and objectives.

IV. Conclusion

The moderator, closed the workshop with a satisfaction by saying that all the issues supposed to be dealt with were covered at each session including final session. Appreciating participants providing precious comments, he wrapped up the workshop.

Overall, through this workshop, the following 3 points were highlighted.

1) There are two kinds of conceptual definition on E-Commerce. One is the OECD definition which is "placing and receiving orders in electronic means" and the other is "production, distribution, marketing, sale or delivery of goods and services by electronic means." As we do not have one clear definition on E-Commerce, it is important to set a clear one.

2) With regard to the formality in making instrument on E-Commerce, both concluding a stand-alone agreement and putting an annex to the existing WTO agreement can be option. We have to think about the formality by thoroughly considering the pros and cons of each option.

3) Realizing E-Commerce as a core pillar of future trade norms, FTAs should explore new norms on E-Commerce in addition to market liberalization and facilitation. For the WTO, consensus building among WTO members and updates of existing norms are required. Also, APEC is the best form for the experiment on E-Commerce.

According to the survey results followed at the end of the workshop, the workshop provided a good opportunity for government officials of APEC member economies with useful discussions on E-commerce issues. Most participants expressed appreciation for the relevance of the topic to their daily works and revealed satisfaction to the result of the workshop. Korea will share the outcome of the workshop, *inter alia*, the desirable elements that were identified there, so that they can serve as references for APEC economies in negotiating future e-commerce chapter in FTAs/RTAs, with the understanding that they may form a part of the eventual FTAAP.

Appendix: Workshop Program

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

17-18 September 2019

Seoul, Korea

Day 1	Tuesday, September 17, 2019
09:00-09:30	<i>Registration</i>
09:30-10:00	<i>Opening Remarks</i>
10:00-11:00	<p><i>Session 1</i></p> <p>Recent Developments and Perspectives on E-Commerce in the Asia-Pacific Region</p> <ul style="list-style-type: none"> - Speaker: Mr. Jeong-Gon KIM, <i>Head of India and South Asia Team</i> (Korea Institute for International Economic Policy) <p>Questions & Answers with Participants</p>
11:00-11:20	<i>Break</i>
11:20-12:30	<p><i>Session 2</i></p> <p>Key Issues related to E-Commerce at the WTO</p> <ul style="list-style-type: none"> - Speaker: Mr. Hamid MAMDOUH, <i>Senior Counsel and former Director of Trade in Services and Investment Division of the WTO</i> (King & Spalding LLP) <p>Questions & Answers with Participants</p>
12:30-14:30	<i>Luncheon</i>
14:30-15:30	<p><i>Session 3</i></p> <p>Opportunities and Challenges of the E-Commerce Sector – From the Perspectives of Entrepreneurs</p> <ul style="list-style-type: none"> - Speaker : Mr. Jun-seon YUN, <i>Head of Next Commerce Lab</i> (Interpark) <p>Questions & Answers with Participants</p>
15:30-15:50	<i>Break</i>
15:50-17:30	<p><i>Session 4</i></p> <p>E-Commerce Issues in the FTA Negotiations</p> <ul style="list-style-type: none"> - Speaker 1: Ms. Hyo-young LEE, <i>Professor</i> (Korea National Diplomatic Academy) - Speaker 2: Mr. Kyu Yub LEE, <i>Research Fellow</i> (Korea Institute for International Economic Policy) <p>Questions & Answers with Participants</p>

Day 2	Wednesday, September 18, 2019
09:30-11:20	<p><i>Session 5</i></p> <p>Future Development of E-Commerce Norms</p> <ul style="list-style-type: none"> - Speaker 1: Mr. Jaemin LEE, <i>Professor</i> (Seoul National University) - Speaker 2: Mr. Charles JULIEN, <i>Counsel</i> (White & Case LLP) <p>General Discussions (Questions & Answers with Participants)</p>
11:20-11:40	<i>Break</i>
11:40-12:40	<p><i>Session 6</i></p> <p>General Discussions on the Future Development of E-Commerce Norms</p> <ul style="list-style-type: none"> - Panelist 1: Mr. Jaemin LEE, <i>Professor</i> (Seoul National University) - Panelist 2: Mr. Hamid MAMDOUH, <i>Senior Counsel and former Director of Trade in Services and Investment Division of the WTO</i> (King & Spalding LLP) - Panelist 3: Mr. Charles JULIEN, <i>Counsel</i> (White & Case LLP) <p>Questions & Answers with Participants</p>
12:40-13:00	<p><i>Session 7</i></p> <p>Wrapping Up and Evaluations</p>