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E-Commerce Norms in the Global Trading Regime – Current Status and Future

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E-COMMERCE NORMS IN THE GLOBAL TRADING REGIME

- CURRENT STATUS AND FUTURE

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Where We Stand





Images taken from google

Where We Stand

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

Eroding Leadership of WTO

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

Eroding Leadership of WTO - 2

- Many norms out of date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

Now Even the DSM is Faltering

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

Overall Challenges...

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

Overall Challenges...

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

Regional Trade Agreements

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

CPTPP Comes into Force



E-Commerce and Trade



E-Commerce Surging

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

WTO and E-Commerce

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

FTAs and E-Commerce

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

Importance of E-Commerce Norms



E-Commerce Norms Affect Entire Trade

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

Also Affect Sensitive Areas and Issues

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

LOCALIZATION BARRIERS TO TRADE

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

Limitations of Current Norms



Development of New Norms

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

E-Commerce: Remaining Challenges

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

E-Commerce?

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

E-Commerce Norms

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

Elements of Future Norms - Data Protection Issue



Data as Enormous Business Potentials

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

Data Protection as a Key Issue

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

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

Emerging rules on CBDF in major RTAs

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

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

Concluding Thought



Going Forward

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

Going Forward

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

Thank you

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