



E-Commerce Provisions in RTAs

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Outline of presentation

- Why we need to understand the evolving e-commerce provisions in RTAs
- E-commerce provisions in past RTAs
- EU- and US-inspired RTAs: similarities and differences
- Implications for negotiations and capacity building



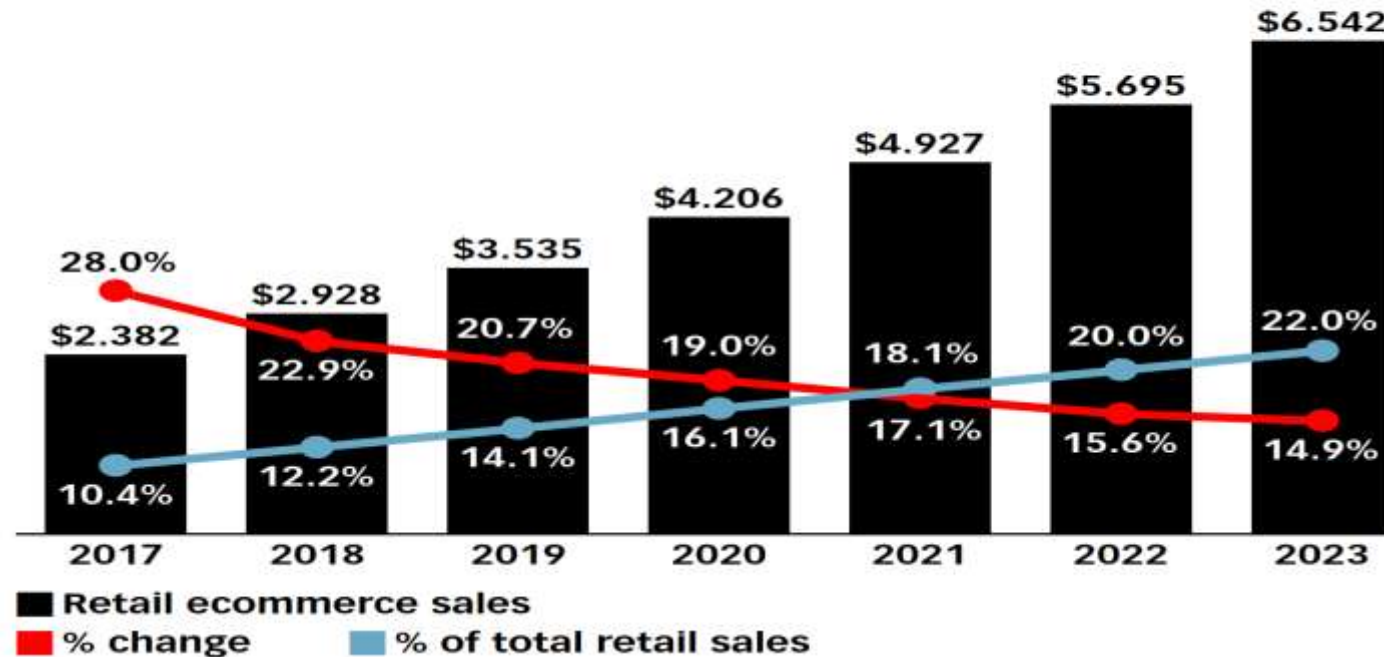
Why this discussion is important

- ❖ E-commerce is important for both developed and developing countries
- ❖ Provisions on e-commerce in RTAs have developed over the years
- ❖ RTAs are 'laboratories' for multilateral provisions;
 - ❖ More RTAs will likely adopt the evolving e-commerce provisions
- ❖ Need to understand what these provisions are and how to engage and prepare for negotiations and compliance and implementation.



E-commerce (electronic commerce) is the buying and selling of **goods and services**, or the transmitting of funds or data, over an **electronic** network, primarily the internet. These business transactions occur either as business-to-business (B2B), business-to-consumer (B2C), consumer-to-consumer or consumer-to-business

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



Retail e-commerce is roughly only 1/5 of global retail sales, but its share is growing

Excluded in data: services e.g. restaurant delivery ordered online; travel sales; event ticket sales; payments, such as bill pay, taxes or money transfers; gambling and other vice good sales. As well as professional services online



How e-commerce provisions relate to trade and growth

- Market access

- ❖ Aim is to facilitate and develop e-commerce trade.
- ❖ Market access
 - ❖ E-commerce in services (e.g. professional services, telecom) usually governed under trade in services chapters; (mode 1 (/2) trade in services
 - ❖ Non-discrimination for electronically transmitted products
 - ❖ Tariff concessions
 - ❖ De-minimis threshold value



De-minimis threshold value for duty exemption (in local currency)

Australia	1,000
Indonesia	40
Japan	10,000
Korea, Rep. of	150,000
Malaysia	500
New Zealand	250
Philippines	10
Singapore	400
Thailand	1,000
USA	800



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 - ❖ De-minimis threshold value
 - ❖ Moratorium on electronic transmission
 - ❖ Reduced tariffs for digital/technology products (zero for listed products in Information Technology Agreement)
 - ❖ Application of direct and indirect taxes



Question: True or False

➤ If a country introduces a tariff classification for digital products (previously there is none) but still abides by the WTO moratorium on tariff (i.e. zero tariff) on digital products, no actual revenue change takes place. (True or False)?



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 - ❖ Application of direct and indirect taxes
- ❖ Problem of definition of digital products
 - ❖ Digitally encoded – whether fixed on a carrier medium or transmitted electronically
 - ❖ Carrier media (computer, iphones... are these carrier media?)



Example : Software and duties

	Software is operating system	Software is application
Hardware value	USD 100,000	USD 100,000
Software value	20,000	20,000
Duty	5%	5%
Customs value	? 120,000	? 100,000
Customs duty	? 6,000	? 5,000



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 - ❖ Carrier media (computer, iphones... are these carrier media?)
 - ❖ RTAs and multilateral trade: how to determine origin of digital content?



Benefits and costs of removing customs duty on e-commerce

- ❖ (+) Growth of e-commerce and consequent development effect especially on SMEs
- ❖ (-) Reduced revenues
- ❖ (-) Unequal treatment for local importers or local manufacturers?
 - ❖ Leading to a re-look at de-minimis values for B2C
- ❖ OECD: should not be singular focus on lost revenues but overall consumer welfare and export competitiveness and productivity vis-à-vis loss in revenue.



How e-commerce provisions relate to trade and growth

- Enablers of e-commerce

- ❖ Enablers of e-commerce: facilitate trust and security, thus demand for e-commerce
 - ❖ Interoperability facilitate cross-border e-commerce
- ❖ E-signatures and e-authentication:
 - ❖ Functional equivalence to paper-based docs; problem of varying national standards e.g. what constitutes an e-signature (see: UNCITRAL Model Law on E-commerce)
 - ❖ Enforceability in domestic courts or elsewhere of contracts exchanged electronically (see: UN Convention on the Use of Electronic Communications in International Contracts)
 - ❖ RTAs stipulate legal validity of e-signature; other RTAs – (not only e-signature but to allow Parties to prove its compliance with legal requirements)



How e-commerce provisions relate to trade and growth

- Enablers of e-commerce

- ❖ Enablers of e-commerce: facilitate trust and security, thus demand for e-commerce
- ❖ E-signatures and e-authentication:
- ❖ Protection from unsolicited messages (SPAM)
- ❖ Consumer protection – e.g. vs fraud or fake merchandise. Help increase confidence of consumers to do online business
 - ❖ Adopt consumer protection laws equivalent to other forms of commerce (non-online). Cooperation
 - ❖ Self-regulation, codes of conduct for businesses using platforms; trust marks/ customer review – signalling reputations
- ❖ Privacy and data protection and vs cybersecurity



How e-commerce provisions relate to trade and growth

-data flows, IPR, intermediary liability, etc

- ❖ Recent RTAs include provisions on disciplines on data localisation and restrictions on cross-border data flows
 - ❖ Localisation: require data stored in the territory; or not transmitted outside its jurisdiction
 - ❖ Increase compliance cost; reduces efficiency especially for businesses that operate in different countries including micro-multinationals
- ❖ IPR: source codes
 - ❖ Discipline on forced transfer of source codes as condition for market access (commercial software vs SW for critical infrastructure)
- ❖ 3rd party liability (of ISPs)
 - ❖ Recent RTAs: 3rd party – not liable for illegal content under certain conditions e.g. no role in content creation, but may be required to terminate or prevent an infringement (by domestic authorities); No obligation to actively ‘police’ illegal activity



E-commerce related provisions -EU-Japan vs. USMCA

- ❖ EU and US have substantially similar approach (provisions) with respect to enablers of e-commerce e.g. on e-signature, consumer protection, spam messages, e-authentication, cybersecurity, source codes.
- ❖ No provisions on data localisation, 3rd party liability in EU FTA but there is no known disagreements between EU and US positions
- ❖ Major difference is in cross-border data flows.
- ❖ EU – e-commerce usually not stand alone chapter but part of chapter on services, investment and e-commerce; US – dedicated chapter on digital trade



E-commerce related provisions

-EU-Japan vs. USMCA

- focus on data flows

- ❖ USMCA definition of digital product: “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 agree on personal data protection; to take account of international guidelines eg APEC or OECD privacy guidelines; not to apply as disguised restrictions on trade
- ❖ Diverge on cross-border transfer of info by electronic means.
 - ❖ EU-Japan: no mention of cross-border data transfer but will revisit after 3 years of entry into force. EU concession – to deal with data transfer outside of trade agreement;
 - ❖ EU Adequacy Ruling for Japan (whether parties have regulations and procedures that satisfy the requirements of their own domestic laws)



E-commerce related provisions

-EU-Japan vs. USMCA

- focus on data flows

- ❖ Diverge on cross-border transfer of info by electronic means.
 - ❖ EU-Japan: no mention of cross-border data transfer but will revisit after 3 years of entry into force. EU concession – to deal with data transfer outside of trade agreement;
 - ❖ USMCA: obligation not to prohibit or restrict cross-border transfer of info for the ‘conduct of business of covered person’
 - ❖ Financial services – specifies meaning of ‘for the conduct of business’
 - ❖ Imposes necessity test for restrictions on cross-border transfer of information
 - ❖ Footnote clarifies: “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.



Implications for negotiations and capacity building

- ❖ Need to understand the scope and implications of zero tariff on digital products; internet taxation. Market access may be broader depending on the definition of digital product they agree to. E.g. Digital Product include digital designs encoded on a carrier media?
- ❖ Since cooperation/ capacity buildings are usually part of agreement on e-commerce- think carefully of targeted capacity building activities e.g. on e-commerce taxation, on development of consumer protection laws, e-commerce laws etc.
- ❖ Capacity building should include both hard and soft digital infrastructure support. ICT, power and payment infrastructure development is critical.
- ❖ Soft infrastructure: begin with gap analysis of the status of current regulatory infrastructure vis-à-vis possible commitments that can be required in future RTAs or MTA



Implications for negotiations and capacity building

- ❖ Soft infrastructure (example to check)
 - ❖ Consumer Protection Laws – applicable to online transactions?
 - ❖ Data and Privacy Protection – consistent with international guidelines and principles?
 - ❖ E-commerce laws – have provisions on e-signature, e-authentication? Variance with international standards? Is its e-authentication interoperable
- ❖ Training for IPR enforcement in the digital world (especially judges)
- ❖ Conduct SWOT analysis of export potentials in e-commerce
- ❖ Important to keep in mind: changing/updating domestic laws should be for the benefit of the country; not merely for compliance with future agreements. Doing what is good for their economies and also increasing their attractiveness as FTA partners.

