

# DIGITAL TRADE AGREEMENTS AND SERVICES TRADE: THE CASE OF THE REPUBLIC OF KOREA

*Minjung Kim*

## 7.1 Introduction

E-commerce is gaining a deep foothold as an issue in regional trade agreements, making progress despite some sluggishness in the World Trade Organization (WTO) program as e-commerce provisions are gradually introduced and rules and principles solidified to govern digital trade. A few landmark plurilateral agreements have recently made significant contributions to the development of the regional digital trade framework in Asia and the Pacific. The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) Agreement and the Digital Economy Partnership Agreement (DEPA) are among the most noteworthy. In scope and detail on digital trade, both are steps ahead of other foreign trade agreements (FTAs).

Over the years, the Republic of Korea (ROK) has pursued regional trade agreements (RTAs) to increase trade and investment. As of June 2022, it has concluded 23 agreements, including the Korea–Singapore Digital Partnership Agreement (DPA) signed in December 2021, and 18 had entered into force to liberalize bilateral trade with more than 50 partners all over the world. Most deal with a broad range of issues, covering even new trade issues like environmental protection, labor standards, and digital trade. As the digital economy evolves and the spectrum of e-commerce expands, the ROK has therefore forged a rules-based bilateral system to maintain better e-commerce relations with its trading partners.

The Regional Comprehensive Economic Partnership (RCEP), which entered into force in February 2022, was the ROK's 18th RTA and its first plurilateral agreement.<sup>1</sup> RCEP's provisions bring the ROK the broadest binding rules on e-commerce to date. The framework covers the most diverse set of issues than any other trade agreement the ROK has joined. That said, having taken the

---

<sup>1</sup> The RCEP agreement was concluded in October 2019 and signed on 15 November 2020. Its 15 members comprise the 10 Association of Southeast Asian Nations (ASEAN) economies, along with Australia, the People's Republic of China (PRC), Japan, the Republic of Korea (ROK), and New Zealand.

initiative to engage in global efforts to form a new digital trade order, the ROK is likely to confront and should be dealing with even more diverse and complicated issues in the coming years.

The ROK's DPA with Singapore is expected to enter into force soon. It will be the first DPA devoted exclusively to regulating digital trade issues. This pact aims to prevent and dismantle digital trade barriers and promote cooperation over high-technology and emerging regulatory issues. Above all, it is expected to renew the ROK's digital trade relations with Singapore. The ROK can continue to amend its FTAs one by one in a similar way as it did with Singapore—and, in fact, has done so in deciding to join the CPTPP and the DEPA. As the ROK pitches in digital trade negotiations with global trade partners, its bilateral digital trade relations will significantly improve and uncover new opportunities.

Nevertheless, tremendous challenges lie ahead for the ROK as it adopts agreements with an increasing number of partners. For example, in joining the CPTPP and the DEPA, the ROK will be placed under increased pressure to keep its domestic system consistent with the new agreements. Also, because domestic laws, regulations, and systems continue to reform in order to tackle socioeconomic issues arising from digital transformation, it may not be an easy task to ensure consistency all the time. As the ROK integrates deeper with other digital economies, as yet unknown monumental challenges may indeed emerge.

Building on the case of the ROK, this chapter explores major digital trade rules and developments in bilateral e-commerce negotiations. Section 7.2 explores recent advances in global digital trade rules and discusses fundamental regulatory issues, including an issue on the blurred boundary. Section 7.3 focuses on the ROK's FTAs and explains evolution of digital trade rules and challenges for future negotiations. Section 7.4 concludes.

## 7.2 Recent Advances in Digital Trade Rules

### 7.2.1 Regional Trends: From Free Trade Agreements to Digital Economy Agreements

Rules on electronic commerce in RTAs have progressively extended and so helped form a basic framework for digital trade. According to a WTO study, e-commerce chapters appear in more than 180 RTAs. Provisions that feature most frequently concern customs duties on electronic transmission, personal information, consumer protection, paperless trading, e-authentication, and e-signature. The RTA provisions largely stipulate similar rules and procedures from agreement to agreement and over time have forged what can be considered principles and norms to regulate each digital trade issue.

The CPTPP and the United States (US)–Mexico–Canada Agreement (USMCA) notably extended the regulatory scope by adding a wide range of new issues. Both introduced detailed rules regarding cross-border data flow and privacy protection, consumer protections, and anticompetitive activities, which conventionally had not been included in e-commerce negotiations. While the USMCA “digital trade” chapter is significantly similar to the CPTPP “e-commerce” chapter, for many provisions, it carries stronger binding force.

Over the last few years, economies across Asia and the Pacific have negotiated new forms of digital trade agreements. The most representative examples are the DEPA between Singapore, New Zealand, and Chile (in force from January 2021), and the Singapore and Australia DEA (December 2020). As the terms “digital economy” in the titles of the agreements indicate, both cover extended issues, ranging from promoting e-business and paperless trading, to ensuring cross-border data flow and data protection, to fostering governance and cooperation in the areas of artificial intelligence, digital identity, and financial technology (fintech).

In particular, both agreements validate fundamental principles for digital trade that are already included in other FTAs. Dozens of provisions concern digital products and data. Most importantly, they prohibit the levy of customs duties on electronic data transmission, prevent domestic digital trade measures from being discriminatory or unnecessary, and prohibit location-based requirements to computing facilities.

Above all, they encourage wider cooperation across multiple levels of forum. The forms of cooperation typically suggested in the articles involve information exchange, sharing of best practices, and standards-setting. Bilateral or international regulatory cooperation and technical cooperation are also encouraged. Transparency is certainly among key obligations applied to reduce trade costs and barriers; notifications and dialogues are basic procedural requirements.

The content and main features of the frameworks in the DEPA and DEAs are summarized in Table 7.1. Although the DEPA and DEA provisions are not directly relevant to services, they may have some overreaching impact on services sectors and trade in digital services. The legal scope of the two agreements clearly excludes services trade, but the reality of digital transformation and digital economy is complicating the classification issue. This is discussed in section 7.2.2.

From a trade law perspective and long-term retrospective view, digital trade rulemaking has grown more comprehensive and intensified. Recurring provisions from agreement to agreement possibly reflect central issues in digital trade negotiations, and their changing details may generally indicate how regulations might evolve, even as the outcome of negotiations depends on numerous factors. Moreover, it became increasingly evident from the adoption of the DEPA and the

Table 7.1: Major Provisions for Digital Trade

Primary Objective	Subject Matter	Related Digital Trade Provisions	
<b>Data free flow and protection</b>	Digital products, information, or data	<ul style="list-style-type: none"> <li>• Customs duties on digital products</li> <li>• Nondiscriminatory treatment of digital products</li> <li>• Personal information protection</li> <li>• Cross-border transfer of information by electronic means</li> <li>• Location of computing facilities</li> </ul>	<ul style="list-style-type: none"> <li>• Location of computing facilities for financial services</li> <li>• Source code</li> <li>• ICT products that use cryptography (technical barrier to trade)</li> </ul>
<b>Business facilitation and promotion</b>	E-businesses, e-transactions, logistics	<ul style="list-style-type: none"> <li>• Paperless trading</li> <li>• Domestic electronic transaction framework</li> <li>• Electronic invoicing</li> <li>• Electronic payment</li> <li>• Electronic authentication and electronic signature</li> </ul>	<ul style="list-style-type: none"> <li>• Logistics</li> <li>• Express shipments (trade facilitation)</li> </ul>
<b>Connectivity and interoperability</b>	Infrastructure, cable connection	<ul style="list-style-type: none"> <li>• Internet interconnection charge sharing</li> <li>• Submarine telecommunications cable system (telecommunication services)</li> </ul>	<ul style="list-style-type: none"> <li>• Standards and conformity assessment for digital trade (technical barrier to trade)</li> </ul>
<b>Confident and safe environment</b>	Consumers' rights, spams, cybersecurity	<ul style="list-style-type: none"> <li>• Cybersecurity cooperation</li> <li>• Online safety and security (competition)</li> <li>• Unsolicited commercial electronic messages</li> </ul>	<ul style="list-style-type: none"> <li>• Online consumer protection</li> <li>• Principles on access to and use of the internet</li> </ul>
<b>Cooperation</b>	Emerging technology, governance issues	<ul style="list-style-type: none"> <li>• Digital identities</li> <li>• Financial technology cooperation</li> <li>• Artificial intelligence</li> </ul>	<ul style="list-style-type: none"> <li>• Public domain</li> <li>• Data innovation</li> <li>• Open government data</li> </ul>
	Inclusion development	<ul style="list-style-type: none"> <li>• Small and medium-sized enterprises</li> </ul>	<ul style="list-style-type: none"> <li>• Digital inclusion</li> </ul>

FTA = free trade agreement, ICT = information and communication technology.

Note: This table shows major provisions and is not comprehensive.

Source: Author's analysis based on official FTA text.

Singapore–Australia DEA, and affirmed by the Korea–Singapore DPA (not yet in force) and the United Kingdom–Singapore DEA (in force from 14 June 2022), that the regulatory development has moved toward establishing a self-contained system. This point is elaborated in section 7.2.3.

Last, a fundamental systemic problem is the blurred boundary of digital trade negotiations. This is a controversial issue in legal terms and is explained in section 7.2.4.

## 7.2.2 Digital Trade Negotiations and Digital Services

### *Digitalization and World Trade Organization Law*

Digital transformation has changed how international trade is conducted in many ways. Numerous studies show the substantial growth in digitally enabled trade in goods and services over the past decades (González and Ferencz 2018). While trade in advanced information and communication technology (ICT) products supports the cross-border movement of information and data, services based on data flows, in turn, help coordinate efficiently value chains and international trade (González and Jouanjean 2017; Miroudot and Cadestin 2017). Digital connectivity also makes logistics, telecommunications, and international business administration faster and more efficient, and helps significantly enlarge global production and trade networks (Choi 2010; González and Ferencz 2018).

Several WTO agreements are pertinent to digital trade. The plurilateral Information Technology Agreement has freed information technology (IT) products trade. The General Agreement on Trade in Services (GATS) is the basis for openness in services trade and is closely related with electronic transmissions. Under it, WTO members have made specific commitments, through which each has chosen services sectors and modes of supply to allow freer trade. Due to the flexibility of the GATS, committed sector openness varies markedly from one member to another. For example, the European Union (EU) has put little limitations on market access for computer services but far-reaching limitations on trade in audiovisual services.<sup>2</sup> In contrast, the US committed to very few barriers in both sectors.

In reality, digitally enabled services are prominent in telecommunications services, computer services, audiovisuals, and financial services.<sup>3</sup> To regulate trade in digitally enabled services, should the GATS specific commitments be applied

---

<sup>2</sup> Burri (2020a) explains that the EU's specific commitments for computer services include consultancy services related to the installation of computer hardware, software implementation services, data processing services, database services, maintenance and repair, and other related services.

<sup>3</sup> Burri (2020b) analyzes that a number of data-related provisions in preferential trade agreements deal with data flows in financial services and telecommunication services.

even if negotiations had been based on a framework created in the pre-internet era? One approach to this question is the principle of technology neutrality—i.e., the GATS schedules should remain neutral to technological progress and innovation. Although the principle has garnered a lot of support, the classification issue gets more complicated as the Fourth Industrial Revolution matures, and it is generally considered that operation of the GATS does not sufficiently cover and address trade issues on digital services.

### *Digital Services in Digital Trade Negotiations*

RTA negotiations on digital trade commonly exclude matters relating to services trade. Many FTA e-commerce chapters clearly mention that measures affecting services delivered or performed electronically are regulated by their relevant chapters on investment, cross-border supply of services, and financial services. Thus, e-commerce or digital trade provisions should not be interpreted as changing existing GATS and RTA commitments and exceptions.

Nevertheless, e-commerce or digital trade provisions in RTAs can indirectly and actually affect businesses in all sectors. In reality, the flow of data and information is essential for business administration in digital economy, and a large portion of RTAs' crosscutting provisions dealing with data flow and protection—customs moratorium, nondiscrimination, localization of commercial data, domestic privacy rules, as examples—are relevant to digital businesses such as electronic platforms, clouding services, and internet-based telecommunication services.

These rules generally go beyond WTO law. Rules that address data flow and privacy are new to the general trade law framework. Much of the literature notes that data flow is different from trade flow in many aspects, especially on how it connects global businesses and forms global value chains (Aaronson and Leblond 2018; Burri 2020b; Casalini and González 2019; Sen 2018).

In addition, most recently adopted digital economy (partnership) agreements include additional categories that were not typically included in e-commerce provisions of FTAs. Most aim at facilitating digitization of business and ensuring a confident and safe environment. These rules are fundamentally related to digital capacity and competitiveness, which create a need for cooperation and assistance.

The new trends are summarized in Table 7.1. To elaborate, scores of the provisions in the DEPA and DEAs can be classified into five broad categories according to their primary objectives: data free flow and protection, business facilitation, connectivity and interoperability, trust and safety, and cooperation. Each category and its major provisions are further explained in section 7.2.3.

## 7.2.3 Major Digital Trade Rules in Negotiation

### *Flow of Information and Data*

The first category of the RTA provisions, as shown in Table 7.1, aims to regulate cross-border flows of information. An early form of data-related obligations is found in the Korea–US FTA’s provision entitled “Cross-Border Information Flow.”<sup>4</sup> It requires the parties to eliminate unnecessary hindrance to the cross-border flow of electronic information. Along with this, the provision implies two principles: first, it recognizes that the free flow of information across borders facilitates trade and, second, it considers protection of personal information important to ensuring the free flow of information. In short, the provision suggests that commercial information needs to flow freely because it facilitates digital trade while personal information needs to be protected to ensure trust and security in the business environment.

Over time, an increasing number of RTAs have included similar but more elaborated provisions.<sup>5</sup> Articles on cross-border transfers of information generally require that “information, including personal information” be permitted to move between economies so long as they are pertinent to business activities. At the same time, they recognize a government’s discretion to regulate electronic transfers under legitimate public policy. In practice, it is difficult to clearly distinguish commercially purposed transfer of information from certain categories of information controlled or protected by the government for public safety and security. For example, it can be very hard to allow people’s health or financial information to be transferred internationally even if its purpose is to conduct business.

Those RTAs eventually came to introduce separate provisions on personal information.<sup>6</sup> They generally obligate a government to adopt or maintain a national framework that protects e-commerce users’ personal information. For the sake of e-business, protection of personal information is generally viewed as essential to strengthen consumer confidence in e-commerce. To avoid unnecessary trade barriers, the articles also require national systems to be nondiscriminatory and compatible with other systems.

International communities, including the Organisation for Economic Co-operation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC), have long sought to ensure personal information protection

---

<sup>4</sup> Korea–US FTA 15.8.

<sup>5</sup> For example, major RTA provisions addressing cross-border transfer of information include CPTPP 14.11, USMCA 19.11, US–Japan Digital Trade Agreement (USJDTA) 11, DEPA 4.3, and Australia–Singapore Digital Economy Agreement (ASDEA) 23.

<sup>6</sup> For example, major RTA provisions addressing protection of personal information include CPTPP 14.8, USMCA 19.8, USJDTA 15, DEPA 4.2, and ASDEA 17.

worldwide. Some RTAs, for example, the USMCA and the Singapore and Australia DEA, specifically link their provisions with the works of those international organizations, while other RTAs like the CPTPP and the DEPA generally require relevant international standards to be considered.

### *Facilitation and Promotion of E-business*

The second category of RTA e-commerce provisions concerns the agenda dealing with e-businesses facilitation, like e-authentication, e-signature, e-payment, e-invoicing, and digital identity, and is closely related to improving efficiency in business administration and transactions. This agenda will increase general benefits from new technology and the digitization of commercial activities.

The relevant provisions encourage parties to confirm the validity of e-authentication, e-signature, e-invoicing, and e-payments used in business transactions. They aim to ensure that technologies and domestic systems supporting electronic transactions remain interoperable and compatible with other economies.

In those RTAs, the United Nations Commission on International Trade Law (UNCITRAL) Model Law is a recommended specific standard for e-commerce business, while paperless customs procedures, express shipments, and more efficient logistics are largely promoted.

The agenda of e-payment, logistics, and express shipment is clearly about services. In case of e-payment, for example, the GATS would mainly deal with issues of market access and national treatment in the finance sector, while digital trade rules largely talk about making bilateral or even international trade interoperable, efficient, safe, and conducted through secure e-payment systems.

### *Reliable and Secure Digital Economy*

The third agenda deals with online consumer protection, cybersecurity, and principles on internet access and use. Relevant provisions tackle problems of anticompetition, market failures, and consumer protection. Their implementation will largely lead to an assurance that the online systems are reliable and secure and induce more participants to online markets and digital business activities.

To elaborate, most RTAs have provisions to protect consumers and consumer rights. Online consumer protection, along with personal information protection, are considered key to build a reliable and trusted digital economy.<sup>7</sup> Domestic systems to shield consumers from undesirable advertisements and spam messages need to be adopted and properly maintained.

<sup>7</sup> CPTPP 14.7, USMCA 19.7, USJDTA 14, DEPA 6.3, and ASDEA 15; CPTPP 14.4, USMCA 19.3, USJDTA 16, DEPA 6.2, and ASDEA 19.



Some RTAs apply principles on access to the internet and its use.<sup>8</sup> Those principles try to give consumers the right to choose services and applications available online, to choose end-use devices to connect to the network unless they are harmful, and to access information on the network management practices of internet service providers.

Another category of e-commerce provisions is devoted to the safety and security of the infrastructure. One of the most important issues in that regard is cybersecurity, and provisions demanding cybersecurity cooperation are being specified.<sup>9</sup> Several articles in the DEPA, for example, emphasize the importance of computer security incident responses, the mitigation of malicious intrusions and disseminations, and workforce development in cybersecurity. Still, many RTAs just mention cybersecurity as one of many areas for cooperation.<sup>10</sup>

### *New Issues and Cooperation*

Last, digital economy (partnership) agreements have introduced various new issues and digital technologies on which parties are expected to cooperate. They include digital identities, artificial intelligence governance, data innovation, public domain, fintech, inclusion of small and medium-sized companies, and digital inclusion.

In addition, to ensure connectivity and interoperability of the digital economy, these agreements encourage parties to cooperate on maintaining a safe and stable submarine telecommunication cable system and on developing digital and technology standards in regional and international forums.

## **7.2.4 An Issue of Regulatory Scope: E-Commerce and Digital Products**

In the digital economy, goods and services are increasingly convergent and varieties of products delivered both in electronic form and on a physical carrier are growing.<sup>11</sup> As González and Ferencz (2018) explain, digitalization is “pervasive” throughout goods and services sectors, and digital connectivity not only has increased trade in “more complex manufacturers and digitally deliverable services” but has also improved the bundling of goods and services in international trade. The author

---

<sup>8</sup> CPTPP 14.10, USMCA 19.10, DEPA 6.4, and ASDEA 20.

<sup>9</sup> CPTPP 14.16, USJDTA 19, DEPA 5.1, and ASDEA 34.

<sup>10</sup> The ROK’s FTAs belong to this category. Korea–Colombia FTA 12.6, Korea–Central America FTA 14.7, and RCEP 12.13.

<sup>11</sup> New forms of transactions in digital economy are well illustrated in González and Jouanjean (2017).

notes that digital trade in goods is increasingly supported by services like logistics and a rise of “new complementarities between goods and services.”

As a result, the boundary of what is e-commerce by the WTO definition is increasingly blurred. The WTO, at the outset of its e-commerce work programs, defined e-commerce as “production, distribution, marketing, sale or delivery of goods and services by electronic means” (WTO 1998). Although the meaning itself is not a legal definition, it is generally accepted in negotiations. Over time, e-commerce talks are apt to deepen the goods and services dichotomy, and crosscutting issues like data flow or privacy go beyond accepted definitions.

In fact, transactions that can involve both trade in goods and trade in services are difficult to classify.<sup>12</sup> For instance, are e-books goods or services? Are movie streaming services audiovisual services? If they are not services, are they part of e-commerce?

These questions are critical because the answers determine applicable trade rules and commitments undertaken in the multilateral and regional trade agreements. In other words, if electronically transmitted products are determined to be services, or in more accurate terms, cross-border delivery of services, their transactions must abide by the GATS commitments on sector-specific market access and national treatment commitments and horizontal obligations. If they are classified as goods, then most-favored-nation tariffs and dozens of the other WTO agreements are relevant.

In RTA negotiations, some e-commerce chapters have introduced the term “digital products,”<sup>13</sup> which is commonly defined as “computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically.”<sup>14</sup>

Accordingly, a digital product is a digitally encoded commercial product, and whether it is fixed on goods is irrelevant. Nevertheless, its meaning is not sufficiently clear. For example, there is an FTA that specifies “digital products” in terms of HS codes.<sup>15</sup> Other FTAs, in contrast, contain an array of exemplary digital services, including software, communication contents, or audiovisual contents. However, they explicitly exclude finance sectors from the scope of e-commerce, possibly in an attempt to avoid unintended trade liberalization as a result of

<sup>12</sup> The issue is prominent in audiovisual services sector (Peng 2016, 2020).

<sup>13</sup> In the ROK’s case, FTAs with Singapore, the US, Canada, Peru, and Central America include a definition for digital products. Also, many FTAs involving the US or influenced by its role in digital trade rule-making have included the definition (Burri 2020a).

<sup>14</sup> Korea–Singapore FTA 14.1, Korea–Peru FTA 14.10, Korea–US FTA 15.9, Korea–Canada FTA 13.9, Korea–Central America FTA 14.9.

<sup>15</sup> Annex 14–A to Korea–Central America FTA.

application.<sup>16</sup> Some FTAs even prevent parties from giving their views on the issue in a case where there is a conflict as to the application of the term, which may imply that the economies had expected inherent problems during negotiations.<sup>17</sup>

Another point of discussion concerns the difference an FTA makes if it does not define digital products in its text.<sup>18</sup> Most e-commerce chapters of FTAs suspend application of customs duties on cross-border electronic transmission of digital products, and some FTAs even require nondiscriminatory treatment for digital products. However, if the agreement has no definition in its text, the ambiguity problem becomes even more serious.

With the emergence of new business and the growing complexity in the forms of digital trade, however, the ambiguity of classification may become less relevant as the international trade system embraces other controversial and more substantive issues of the digital economy (Peng 2020).

## 7.3 Digital Trade Negotiations: The Case of the Republic of Korea

Backed by knowledge on the general trend of regional digital trade negotiations in section 7.2, this section discusses the main features of digital trade negotiations for the Republic of Korea (ROK). Major e-commerce rules are selected from the ROK's FTAs, as shown in Table 7.2, and their main features and relevant legal issues are explained in sections 7.3.1 through 7.3.4. Then, those FTA rules are compared with the DEPA rules in section 7.3.5, and future challenges for the ROK's digital trade negotiations are discussed.

### 7.3.1 The Scope

#### *Exclusion of Electronic Supply of Services*

The e-commerce chapters of the ROK's FTAs typically exclude “services delivered electronically” from their legal scope. Some clearly state that measures affecting the supply of a service delivered or performed electronically be subject to the

---

<sup>16</sup> Korea–Singapore FTA 14.1, Korea–Central America FTA 14.9.

<sup>17</sup> Korea–US FTA 15.9 and its footnote 4; Korea–China FTA 13.3 and its footnote 1.

<sup>18</sup> In fact, many FTAs do not define the term “digital products.” Among the FTAs in which the ROK participates, the e-commerce chapters in those with Australia, the PRC, Colombia, Türkiye, and Viet Nam FTAs, and inside RCEP, do not provide a relevant definition.

**Table 7.2: Issues Covered in E-Commerce Provisions of Free Trade Agreements Involving the Republic of Korea**

Objectives	Relevant Provisions	FTA Partners of the Republic of Korea											Total				
		Singapore	Chile	EFTA	ASEAN	EU	Peru	US	Türkiye	Australia	Canada	PRC		Viet Nam	Colombia	Central America	RCEP
<b>E-Commerce Chapter</b>																	12
Data flow	Suspension of customs duties										a	a				a	12
	Preclusion of fiscal authority																8
	Nondiscriminatory treatment of digital products																3
	Cross-border transfer of information by electronic means										b						3
	Location of computing facilities																1
Protection and trust	Personal information protection																10
	Online consumer protection																10
	Unsolicited commercial electronic messages																6
	Cybersecurity (cooperation)																3
	Principles on access to and use of the internet																1
Facilitation and cooperation	Paperless trading	c															12
	e-Authentication and e-Signature																8
	Domestic electronic transaction framework																3
	Cooperation (transparency)																8
<b>Total</b>		4	0	0	0	7	8	9	9	8	8	6	9	9	10	13	

ASEAN = Association of Southeast Asian Nations, EFTA = European Free Trade Association, EU = European Union, FTA = free trade agreement, PRC = People's Republic of China, RCEP = Regional Comprehensive Economic Partnership, US = United States.

Notes:

(i) The issues and provisions in the table are not exhaustive.

(ii) Legend: yellow = covered; red = not covered; green = the more categories covered, the darker the cell.

<sup>a</sup> The relevant provision requires implementation in conformity with the decision of the WTO E-Commerce Work Program.

<sup>b</sup> The relevant obligation is contained in the cooperation provisions.

<sup>c</sup> The relevant provision is contained in the trade facilitation chapter.

Source: Author's analysis based on official FTA text.

rules and obligations contained in the other chapters that regulate investment, cross-border trade in services, and financial services.<sup>19</sup>

Other FTAs recognize clearly that the problem of regulatory overlaps between the e-commerce issues and services trade issues exists and explicitly assures that e-commerce provisions would not apply if other provisions state not to. For example, the Korea–Canada FTA openly recognizes that “trade conducted by electronic means” is also covered by other relevant provisions such as those relating to national treatment and market access for goods, cross-border trade in services, financial services, telecommunications, and government procurement.<sup>20</sup> Then, this FTA makes it clear that the e-commerce provisions do not obligate “electronic delivery of digital products” unless other relevant chapters require so.<sup>21</sup>

Similarly, the Korea–China FTA and the Korea–Colombia FTA incorporate a relatively straightforward statement that, if any discrepancy between the e-commerce chapter and the other chapters becomes controversial, then the other chapters would prevail.<sup>22</sup> Those provisions probably shield against an excessively bold application of e-commerce rules and unintended changes to the commitments made under the other FTA chapters.

In the case of the Korea–EU FTA, e-commerce provisions belong to the chapter for “Trade in Services, Establishment and Electronic Commerce.” This may be largely reflecting the EU position that regulatory issues on e-commerce are closely related to services trade issues, and that it is not inappropriate to address e-commerce as part of a combined services trade chapter.<sup>23</sup> The EU generally takes the view that electronic supply of digital content and information is a new form of services supply.<sup>24</sup> This position is consistently maintained in the FTA.

In sum, the ROK’s FTAs generally show that the ROK has recognized that what is supplied or delivered is accounted for more importantly than how it is supplied or delivered. In principle, the e-commerce chapters are applied only to the extent they are not limited by the provisions of other FTA chapters.

---

<sup>19</sup> Korea–Singapore FTA 14.3, Korea–US FTA 15.2, Korea–Peru FTA 14.3, Korea–Türkiye FTA 2.3, Korea–Australia FTA 15.2, Korea–Central America FTA 14.2.

<sup>20</sup> Korea–Canada FTA 13.1.

<sup>21</sup> In the agreement, “digital product” means computer programs, text, video, images, sound recordings, or other products that are digitally encoded and produced for commercial sale or distribution.

<sup>22</sup> Korea–China FTA 13.2, Korea–Colombia FTA 12.7.

<sup>23</sup> Korea–EU FTA 7.48.

<sup>24</sup> For example, in the EU–Singapore FTA, Article 8.59 for electronic supply of services stipulates, “[f]or greater certainty, the Parties affirm that measure related to the supply of a service using electronic means falls within the scope of the obligations contained in services trade chapters.”

## 7.3.2 Customs Duties and Data Flow

### *Customs Duties*

All FTAs in which the ROK participates contain a bilateral commitment to eliminate customs duties on e-commerce. This implies the multilateral principle of duty-free electronic transmission that WTO members approved to apply temporarily in 1999 is permanent or otherwise extended, at least between the respective FTA partners.

However, there are a few exceptions and variations. First, in some FTAs, the duty-free obligation is systemically linked to the duration of the WTO E-commerce Work Program's decision on the moratorium.<sup>25</sup> For example, the Korea–China FTA affirms that the bilateral duty-free commitment will be effective as long as it is consistent with “the current WTO practice,” which is then expounded in a footnote explaining that the parties reserve the right to adjust in accordance with any changes made to the ministerial decision.<sup>26</sup> In any cases where the multilateral moratorium is abandoned, it is an FTA party's right to decide whether to continue the duty-free or not.

Second, most FTAs of the ROK do not include the term “between the parties” in the customs duty provisions of the e-commerce chapter, which likely indicates nonexclusive application of duty-free on electronic transmission. In other words, non-application of customs duties is possibly assured on a most-favored-nation basis. However, some FTAs have removed the customs duties “between the parties.” An example is the Korea–Australia FTA, which prohibits imposition of customs duties on electronic transmission “between the parties.”<sup>27</sup> As the phrase “between the parties” denotes a bilateral application, the non-imposition of customs duties is a preferential treatment. In this case, the issue of determining the origin is also substantially important and should be elaborated.

Suppose data transmission occurs in a transaction or business between the FTA parties, if the data is actually sent from a third economy where its center or cloud is located, the data's origin subject to preferential treatment under the FTA may not be clear. In the case where the present WTO Moratorium is suspended, and an FTA party intends to impose customs duties on electronic transmission free of multilateral obligations, the data's origin determination will be crucial for guaranteeing the exclusive FTA benefit between the parties. As digitization and digital value chains grow, the issue of origin will become even more complicated.

---

<sup>25</sup> Korea–China FTA 13.3, Vietnam–Korea FTA 10.2, RCEP 12.11.

<sup>26</sup> Korea–China FTA 13.3 and its footnotes 2 and 3.

<sup>27</sup> Korea–Australia FTA 15.3, Korea–Singapore FTA 14.4, Korea–Türkiye FTA 2.4, RCEP 12.11.

Third, what is subject to the removal of customs duty is another important regulatory issue. In general, the ROK's FTAs with other economies in Asia and the Pacific apply zero customs duty to "electronic transmission."<sup>28</sup> However, its FTAs with economies in the Americas generally apply them to "digital products."<sup>29</sup> For example, the FTA with Peru has freed importation and exportation of digital products, and the one with the US has liberalized digital products that are electronically transmitted. Besides their uncertain legal effects, textually different obligations between duty-free "electronic transmissions" and duty-free "digital products" would entail administrative costs for FTA operation in practice.

### *Internal Taxation*

Although e-commerce provisions in most FTAs of the ROK eliminate customs duties, they do not preclude a party's imposition of internal taxes or internal charges on cross-border electronic transmission in general.<sup>30</sup> A few do not have explicit textual basis for recognizing the parties' right to domestic taxes on e-commerce.<sup>31</sup> Even then, fiscal authority is not precluded.

Nevertheless, the relevant provisions require that internal taxes or charges be consistent with FTA rules. The problem is which FTA rules should domestic taxes or charges be consistent with are not specified. In particular, it is not clear if this requirement includes nondiscriminatory tax administration and if there are other FTA rules than nondiscrimination.

### *Nondiscriminatory Treatment of Digital Products*

E-commerce provisions of the ROK's FTAs with Singapore, the US, and Central American economies include obligations for nondiscrimination. They prevent a party from treating digital products less favorably than their like domestic digital products.<sup>32</sup> The gist of the rule is that the obligation is applied with respect to various stages of commercialization—i.e., creation, production, publishment, store, transmission, contracts, and commission—and based on the nationality of persons involved—i.e., the author, performer, producer, developer, or distributor. Above all,

---

<sup>28</sup> Korea-Türkiye FTA 2.4, Korea-Australia FTA 15.3, Korea-China FTA, Vietnam-Korea FTA, RCEP.

<sup>29</sup> Korea-Peru FTA, Korea-US FTA, Korea-Canada FTA, Korea-Central America. In contrast, the Korea-Colombia FTA refers to "importation and exportation of products by electronic means."

<sup>30</sup> Korea-Singapore FTA 14.4, Korea-Peru FTA 14.4, Korea-US FTA 15.3, Korea-Türkiye FTA 2.4, Korea-Canada FTA 13.3, Vietnam-Korea FTA 10.2, Korea-Colombia FTA 12.2, Korea-Central America FTA 14.3, RCEP 12.11.

<sup>31</sup> Korea-EU FTA, ROK-Australia FTA, Korea-China FTA.

<sup>32</sup> Korea-Singapore FTA 14.4, Korea-US FTA 15.3, Korea-Central America 14.3.

it is substantially difficult to legally determine the likeness between digital products from different origins and whether they should be treated less favorably.

Moreover, the Korea–US FTA requires that any favor given to nonparties’ digital products be extended to each other. Thus, nondiscrimination is applied based on a most-favored-nation basis between the parties.<sup>33</sup> The added elements regarding a nonparty would further complicate actual application of the nondiscrimination requirements.

### Cross-Border Data Flow

Before the RCEP, the ROK’s e-commerce provision concerning cross-border flow of information appears only in its FTA with the US.<sup>34</sup> As a rule, the provision prevents parties from restricting the cross-border flow of information.<sup>35</sup> However, the pursuit of seamless data flow to facilitate trade is legally weighed against recognition of personal information protection. Desirable as it might be and given the rising importance of privacy in the digital economy, this article is often cited as an early form of data-related provision in FTAs.

The RCEP contains more detailed rules to regulate cross-border data flow and data protection.<sup>36</sup> Its provisions recognize the parties’ discretion to judge on *necessary* restrictions to data flow and *legitimate* public policy objectives,<sup>37</sup> thereby essentially reserving the parties’ right to regulate digital trade to a greater extent than the data-related provisions in other digital economy agreements.

An overall assessment of the above-mentioned provisions shows that the ROK has generally supported the principle of data free flow but largely remained passive to accept elaborated data and privacy rules. With the start of the Korea–Singapore Digital Partnership negotiations, however, it became visibly more active to promote policies relating to data economy and accept data-related trade rules.

## 7.3.3 Protection of Personal Information and Consumers

### Personal Information Protection

Most FTAs involving the ROK include e-commerce articles protecting personal information and the online consumer. The data protection provisions generally require parties to adopt or maintain domestic measures to protect personal data

---

<sup>33</sup> Korea–US FTA 15.3.

<sup>34</sup> The Korea–Canada FTA also mentions cross-border flows of information as an essential element to foster vibrant e-commerce (Korea–Canada FTA 13.7).

<sup>35</sup> Korea–US FTA 15.8.

<sup>36</sup> RCEP 12.15.

<sup>37</sup> RCEP 12.15 and Annex 14-A to the Korea–Central America FTA.



of the users in e-commerce.<sup>38</sup> In addition to the general obligation, the FTA with Viet Nam recognizes the need of adequate safeguards for such protection.

By promoting international standards, guidelines, or recommendations, some FTAs aim to restrain domestic enactment of unnecessarily divergent privacy rules and encourage regulatory convergence or harmonization. However, the relevant provisions are different in terms of specific obligations. For example, the ROK's FTA with Türkiye requires full compatibility with international standards for data protection, whereas the FTA with Australia mentions just consideration of international standards and guidelines, and the recommendations of international organizations. In contrast, the Korea–China FTA and the RCEP are among others that do not mention international standards as reference.<sup>39</sup>

Therefore, even if the ROK's domestic system for data protection complies with an international standard, it is hypothetically possible that the other party's assessment on its appropriateness or adequacy may have different results because some FTAs do not recognize international standards as basic criteria.

### *Online Consumer Protection*

Online consumer protection is another key area that FTAs involving the ROK tend to promote. Most of them require parties to maintain transparent and effective measures to protect consumers from fraudulent and deceptive commercial practices.<sup>40</sup> Many call for cooperation between the national agencies to exchange information and share experiences. While the Korea–China FTA does not have relevant provisions, the RCEP now serves to fill the gap. Despite their soft law nature and insufficient legal details, the provisions for online consumer protection are essential to assure that the digital trade environment is trusted and safe, and they have evolved to be default rules in digital trade agreements.

---

<sup>38</sup> Korea–Peru FTA 14.7, Korea–Australia FTA 15.8, Korea–Canada FTA 13.4, Korea–China FTA 13.5, Vietnam–Korea FTA 10.6, Korea–Colombia FTA 12.3, Korea–Central America FTA 14.5.

<sup>39</sup> The Korea–Singapore FTA does not have provisions for personal information protection. This is partly because the agreement was concluded in the early 2000s when e-commerce chapters, including data protection, were not commonly discussed in FTA negotiations. In addition, the Korea–Peru FTA and the Korea–Central America FTA do not have provisions requiring consideration of international standards although they include provisions for personal information protection.

<sup>40</sup> Korea–US FTA 15.5, Korea–Peru FTA 14.5, Korea–Türkiye FTA 2.6, Korea–Australia FTA 15.6, Korea–Canada FTA 13.6, Vietnam–Korea FTA 10.5, Korea–Colombia FTA 12.5, Korea–Central America FTA 14.4.

## Spam and Cybersecurity

Other fundamental rules essential to creating a resilient and secure digital ecosystem are concerned with spam messages and cybersecurity. Only a handful of FTAs involving the ROK includes relevant provisions. In those FTAs, parties that are mandated to minimize unsolicited spams and telemarketing, have regulatory dialogues with other parties, and cooperate with each other by exchanging information on technical, educational, and policy approaches.<sup>41</sup>

## Principles on Access to and Use of the Internet

The ROK's FTA with the US applies principles on access to and use of the internet for e-commerce.<sup>42</sup> It basically protects consumers' right to use and choose the internet services and digital products, online applications, and services they run and the devices they connect to the Internet. It also aims to protect benefits of competition among networks, applications and services, and content providers. Until the Korea–Singapore DPA enters into force, this FTA remains the only agreement that includes such competition-related provisions.

### 7.3.4 Facilitation of E-Commerce and Digitalization

#### Paperless Trading

In general, paperless trading is a goal long and commonly pursued in the regional trading system.<sup>43</sup> The ROK's FTA e-commerce provisions or trade facilitation provisions require the parties to make best efforts to provide the public with electronic trade administration documents and recognize legally the equivalence of other parties' electronic documents.<sup>44</sup>

<sup>41</sup> Korea–EU FTA 7.49, Korea–Türkiye FTA 2.9, Korea–Australia FTA 15.9, Korea–Colombia FTA 12.6, Korea–Central America FTA 14.7.

<sup>42</sup> Korea–US FTA 15.7.

<sup>43</sup> Pasadilla (2020) notes that FTAs in general began to include provisions for paperless trading before they dealt with e-commerce issues. Monteiro and Teh (2017) explain that an article mentioning the concept was first adopted in New Zealand and Singapore in 2001, and many economies in Asia and the Pacific adopted the Framework Agreement on Facilitation of Cross-Border Paperless Trade in 2017.

<sup>44</sup> Korea–Singapore FTA 5.13, Korea–EU FTA 7.49 (mentioned as one of the cooperation areas), Korea–US FTA 15.6, Korea–Peru FTA 14.5, Korea–Türkiye FTA 2.8, Korea–Australia FTA 15.7, Korea–Canada FTA 13.5, Korea–China FTA 13.6, Vietnam–Korea FTA 10.7, Korea–Colombia FTA 12.4, Korea–Central America FTA 14.6, RCEP 12.5.

### *e-Authentication and e-Signature*

The e-commerce chapters of most FTAs cover e-authentication and e-signature. They require parties to adopt or maintain a domestic system in which firms can choose for themselves appropriate ways for e-authentication in business and should be given chances to show and verify legal validity of electronic transactions they used before the judicial or administrative authorities.<sup>45</sup> In addition, never should a party deny legal validity of an e-signature just because it is in electronic form.

The use of digital certificates and e-signature is encouraged. FTA rules for e-commerce between the ROK and the PRC, between the ROK and Viet Nam, and between RCEP economies mention mutual recognition as a mechanism to spread use of those electronic tools. The Vietnam–Korea FTA, for example, recommends mutual recognition if the digital certificates and e-signature are based on internationally accepted standards. It emphasizes roles of international standards in developing relevant technology and systems.

### *Domestic Electronic Transaction Framework*

To facilitate e-commerce, economies need to have domestic legal framework for electronic transactions. From a trade perspective, different laws, regulations, and systems between economies can create unnecessary barriers. Some FTAs mention specific international laws and model laws to be used as basis or reference for a party's domestic legal framework. The ROK's agreements with Australia, Viet Nam, and the RCEP all mention that the UNCITRAL Model Law on Electronic Commerce (1996) or the UN Convention on the Use of Electronic Communications in International Contracts (2005) or other applicable international conventions and model laws are to be considered when the parties try to minimize regulatory burdens on e-commerce and establish a business environment that is conducive to industry.<sup>46</sup> The ROK is a signatory of the 1996 UNCITRAL Model Law.<sup>47</sup>

---

<sup>45</sup> Korea–EU FTA 7.49 (mentioned as one of the cooperation areas), Korea–US FTA 15.4, Korea–Peru FTA 14.8, Korea–Türkiye FTA 2.5, Korea–Australia FTA 15.5, Korea–China FTA 13.4, Vietnam–Korea FTA 10.3, RCEP 12.6.

<sup>46</sup> Korea–Australia FTA 15.4, Vietnam–Korea FTA 10.4, RCEP 12.6.

<sup>47</sup> UNCITRAL. Overview of the Status of UNCITRAL Conventions and Model Laws. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table.pdf> (accessed July 2022).

## Cooperation and Transparency

Most of the ROK's FTAs indicate broad areas and various forms to cooperate.<sup>48</sup> Frequently mentioned areas include privacy, spam messages, cybersecurity, consumer protection, and small and medium-sized enterprises (SMEs).<sup>49</sup> Technical assistance, information exchange, and knowledge sharing for enactment and administration of e-commerce legal framework are among the main instruments. FTA parties also need to cooperate in regional and multilateral forums to promote e-commerce development and to help the e-commerce system become more inclusive to SMEs.<sup>50</sup>

### 7.3.5 Negotiations Ahead: Digital Economy Agreements

Digital trade provisions in the ROK's FTAs are generally geared toward increasing e-commerce and avoiding unnecessary barriers. The scope and content of e-commerce chapters or provisions vary across the FTAs. However, as discussed in this chapter, key obligations of most FTAs involving the ROK include the bilateral lifting of customs duties, along with personal information protection, online consumer protection, and paperless trading. In addition, the promotion of e-authentication and e-signature, the prevention of spam messages, cooperation for cybersecurity and SMEs, and transparency are increasingly prominent.

However, compared with recent digital economy agreements like the DEPA and Singapore–Australia DEA, the ROK's FTA and RCEP provisions concerning e-commerce are limited. They can be augmented across numerous issues. For example, typical digital trade barriers to data free flow are created by domestic regulations and standards on data location, cryptography, and source code, and they form emerging central issues in recent digital trade negotiations. However, FTAs involving the ROK do not address them and, even if RCEP provisions deal somewhat with data localization, the relevant rules are not as rigorous as those in the DEPA and DEAs. In addition, several new provisions in the DEPA center on state-of-the-art digital technologies such as artificial intelligence, digital identities, and cybersecurity, but the ROK's FTAs lack any corresponding e-commerce provisions.

Therefore, gaps can be analyzed between the ROK's current position based on its FTA rules and commitments and a comprehensive and up-to-date set of digital trade rules that generally are incorporated in the DEPA, DEAs, or the Korea–Singapore DPA. The analysis can be conducted in two dimensions: one to find the differences and identify new issues appearing in the DEPA and others, and the other to explore rules and obligations that are legally strengthened in the ROK's FTAs.

---

<sup>48</sup> Korea–US FTA and Korea–Australia FTA do not include a provision dealing exclusively with cooperation.

<sup>49</sup> Korea–Colombia FTA 12.6, Korea–Central America FTA 14.7.

<sup>50</sup> Vietnam–Korea FTA 10.8.

### *Digital Economy Partnership Agreement Provisions Dealing with New Issues*

Through FTAs, the ROK has consistently applied zero customs duties on electronic transmissions and supported protection of personal information and online consumers. However, the DEPA and other DEAs incorporate various provisions new to the ROK. The shaded items in Table 7.3 are not included in the ROK's FTA e-commerce chapters.

To be specific, in the data flow category in Table 7.3, items related to computing facilities, especially for financial services, cryptography of ICT products, and source code of software, for example, have not yet been included in the ROK's agreements and will likely be part of the future agenda. In the ROK's FTAs, data free flow provisions are limitedly stipulated, and nondiscrimination rules are adopted only in respect of the US and Canada, not even of the RCEP economies. Nevertheless, the CPTPP, USMCA, DEPA, and other DEAs commonly include these rules. If the ROK is to join the DEPA, it should ensure that its domestic system conforms. In the Korea–Singapore DEA negotiations, the ROK accepted those provisions for the first time and has to be ready to implement them.

Likewise, the ROK may consider many other items as part of the future digital trade agenda. Items related to online safety and security, and interactive computer services fall under the category of protection and trust, while items related to, for example, e-invoicing, e-payments, and digital identities in the category of e-business facilitation, must be addressed by the ROK in negotiations with the DEPA or other DEA members.

### *DEPA Provisions Imposing Stronger Obligations*

Comparing the ROK's FTAs with the DEPA, many provisions can be improved. From a regulatory perspective, provisions can serve better if they are made clearer, more specific, or legally stronger.

The article on personal information protection is one example. While the RCEP rules are longer and more comprehensive, the DEPA rules are even more detailed. The DEPA basically requires the parties to adopt or maintain a legal framework for privacy protection and then indicates specific criteria to use such as “principles and guidelines of relevant international bodies.” The Singapore–Australia DEA even mentions the APEC privacy rules or OECD guidelines for reference.<sup>51</sup> The DEPA and the DEA also specify key principles that a legal framework must include and require nondiscriminatory practices in administering

---

<sup>51</sup> Specifically, these are the APEC Cross-Border Privacy Rules System and the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.

the protection.<sup>52</sup> Those detailed provisions are not found in the ROK's FTAs, which implies that the ROK will have to prepare its domestic system to conform to them in case of its accession to the DEPA.

Another example is the article on paperless trade. The ROK's FTAs commonly encourage electronic submission of administration documents, but generally in the form of soft law. The relevant DEPA rules, however, provide for specific ways to promote a single window customs system and data exchange system. They are more of a guideline or a to-do list to achieve paperless trading. Though in best-endeavor provisions, use of machine-readable administration documents, legal validation of electronic documents, establishment of a single window in accordance with the WTO Trade Facilitation Agreement, and compatible and interoperable single windows that enable data exchange are all among the concrete obligations.

Last, the RCEP is so far the only agreement for the ROK that contains a provision regulating computing facilities. As shown in Table 7.3, while the DEPA and other agreements contain similar provisions, the Singapore–Australia DEA even adopts an article prohibiting financial services–related data localization, and the DEPA goes further to allow businesses the flexibility to choose a data location and data facility.

Therefore, the ROK should be able to embrace a number of such rules elaborated in the DEPA and other DEAs, and is also expected to cope with trading partners' growing demand for effective digital trade governance in future negotiations.

---

<sup>52</sup> The eight principles include limitation on collection, data quality, purpose specification, use limitation, security safeguards, transparency, individual participation, and accountability.

Table 7.3: Issues Covered in Digital Economy Agreements and the Republic of Korea's Free Trade Agreements

DEPA Classification (Module)	Provisions	Number of the ROK's FTAs									
		RCEP	CPTPP	USMCA	USJDTA	DEPA	ASDEA				
Digital product, information, data flow	Customs duties	✓	✓	✓	✓	✓	✓	12			
	Nondiscriminatory treatment of digital products	-	✓	✓	✓	✓	✓	3			
	Cross-border transfer of information by electronic means	✓	✓	✓	✓	✓	✓	3			
	Location of computing facilities	✓	-	✓	✓	✓	✓	1			
	Location of computing facilities for financial services	-	-	-	✓	-	✓	-			
	ICT products that use cryptography	-	a	✓	✓	✓	✓	-			
Protection and trust	Source code	-	✓	-	✓	-	✓	-			
	Personal information protection	✓	✓	✓	✓	✓	✓	10			
	Online consumer protection	✓	✓	✓	✓	✓	✓	10			
	Unsolicited commercial electronic messages	✓	✓	✓	✓	✓	✓	6			
	Cybersecurity cooperation	✓	✓	✓	✓	✓	✓	3			
	Principles on access to and use of the internet	-	✓	✓	✓	✓	✓	1			
	Online safety and security	-	-	-	-	✓	✓	-			
	Interactive computer services	-	-	-	-	-	-	b			
	Paperless trading	✓	✓	✓	✓	✓	✓	12			
	e-authentication and e-signature	✓	✓	✓	✓	✓	✓	8			
E-business facilitation	Domestic electronic transaction framework	✓	✓	✓	✓	✓	✓	3			
	Logistics	-	-	-	-	✓	-	-			
	e-invoicing	-	-	-	-	✓	-	-			
	Express shipments	-	-	-	-	✓	-	-			
	e-payments	-	-	-	-	✓	-	-			
	Digital identities	-	-	-	-	✓	-	-			
Infrastructure and interoperability	Internet connection charge sharing	-	✓	-	-	-	-	-			
	Submarine telecommunications cable systems	-	-	-	-	-	-	c			
	Standards and conformity assessment for digital trade	-	-	-	-	-	-	-			
		-	-	-	-	-	-	-			

continued on next page

Table 7.3 continued

DEPA Classification (Module)	Provisions	Number of the ROK's FTAs									
		RCEP	CPTPP	USMCA	USJDTA	DEPA	ASDEA				
New emerging technology and cooperation	Fintech and regtech	-	-	-	-	✓	✓				
	Artificial intelligence	-	-	-	-	✓	✓				
	Government procurement	-	-	-	-	✓	-				
	Competition policy	-	-	-	-	✓	✓				
	Public domain	-	-	-	-	✓	-				
	Data innovation	-	-	-	-	✓	✓				
	Open government data	-	-	-	✓	✓	✓				
	SMEs in digital economy	-	-	-	-	✓	✓				
	Stakeholder engagement	-	-	-	-	-	✓				
	Digital inclusion	-	-	-	-	✓	-				
	Capacity building	-	-	-	-	-	✓				
	Transparency	✓	-	-	-	-	✓				

- = no provision, ASDEA = Australia–Singapore Digital Economy Agreement, CPTPP = Comprehensive and Progressive Trans-Pacific Partnership, DEPA = Digital Economy Partnership Agreement, FTA = free trade agreement, ICT = information and communication technology, RCEP = Regional Comprehensive Economic Partnership, ROK = Republic of Korea, SMEs = small and medium-sized enterprises, USJDTA = United States–Japan Digital Trade Agreement, USMCA = United States–Mexico–Canada Agreement.

<sup>a</sup> Relevant provisions are contained in the Technical Barriers to Trade chapter of the respective agreements.

<sup>b</sup> Liability of intermediary service provider is included as a cooperation area in e-commerce provisions of the Korea–Turkey FTA.

<sup>c</sup> Relevant provisions are included in the telecommunication chapter of the Korea–United States FTA.

Note: The issues and provisions in the table are not comprehensive.

Source: Author's analysis.



## 7.4 Conclusion

Aside from the WTO e-commerce negotiations, a framework for digital trade governance emerged through regional trade negotiations. FTA provisions have solidified the basic rules and procedures to deal with e-commerce problems and, gradually, data flow and data protection form central issues in digital trade negotiations. Many other areas are not as fully tackled as the data issues and, therefore, more works on those remaining areas are expected to continue in the future.

The Republic of Korea (ROK), having formed an extensive FTA network with major trading partners around the world, is at a crossroads, uncertain of whether to join with enthusiasm the global discussions about a new digital trade order or respond passively to the demands for playing a certain role in rulemaking. Its recent decisions to join the CPTPP and the DEPA, as well as the conclusion of the DPA with Singapore, represent only part of these important policy considerations.

As examined in this chapter, there are many issues in the RTAs that digital trade negotiators must continue to work on. Among the main points, first is the potential problem from the systemic link between zero customs duty on electronic transmission and the WTO decision. Second, data governance rules encompassing data free flow and privacy protection need further elaboration. Third, for flourishing e-businesses, interoperability of technologies and systems is the key obligation, but needs to be accompanied by real and effective actions and cooperation. Also, while some DEPA and DEA provisions point to bold new areas such as artificial intelligence, digital identities, cybersecurity, and fintech, along with diverse ways to encourage digital transformation, they fall short of providing concrete rules.

Another challenge concerns enlargement of those digital trade agreements. As the case of the ROK shows, FTA e-commerce rules differ from one agreement to another. Formation of RTAs inevitably leads to a fragmented global system and incurs unnecessary costs. However, the breadth and intensity of obligations in an agreement is basically an outcome of various factors, including the parties' capacity and willingness to accept them. Therefore, any attempt to enlarge the DEA participation should be accompanied by far-reaching efforts in international communities to help increase economies' relevant capacity and cooperate to share information and regulatory experience.

The final point to make is that, even though sector-specific trade openness is largely regulated by existing commitments in the GATS and nonconforming FTA provisions, digital trade law will have increasing influence on the delivery of cross-border digital services. Digitalized areas like computer services, telecommunication services, or business services will increasingly benefit from freer cross-border data flows. Even financial services, which typically are explicitly

excluded from e-commerce negotiations, will need to ensure an environment with a freer but more secure and safer cross-border information flows.

As WTO and RTA negotiations on digital trade and trade-related aspects of the digital economy proceed, discussions need to focus more on changing markets and digital services. Digital trade rules need to be more responsive to real problems and practices in emerging areas and, at the same time, be coherent with development of other international rules and standards.

## Bibliography

- Aaronson, S. A., and P. Leblond. 2018. Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO. *Journal of International Economic Law*. 21. pp. 245–272.
- Andrenelli, A., and J. L. González. 2019. Electronic Transmissions and International Trade—Shedding New Light on the Moratorium Debate. *OECD Trade Policy Papers*. No. 233. Paris: Organisation for Economic Co-operation and Development (OECD).
- Burri, M. 2020a. Adapting Trade Rules for the Age of Big Data. In A. Taubman and J. Watal, eds. *Trade in Knowledge: Economic, Legal and Policy Aspects*. Cambridge: Cambridge University Press.
- . 2020b. Data Flows and Global Trade Law: Tracing Developments in Preferential Trade Agreements. In M. Burri, ed. *Big Data and Global Trade Law*. Cambridge: Cambridge University Press.
- Burri, M. and R. Polanco. 2020. Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset. *Journal of international Economic Law*. 23 (1). pp. 187–220.
- Casalini, F. and J. L. González. 2019. Trade and Cross-Border Data Flow. *OECD Trade Policy Papers*. No. 220. Paris: OECD.
- Choi, C. 2010. The Effect of the Internet on Services Trade. *Economic Letters*. 109. pp. 102–104.
- Duval, Y. and A. Kravchenko, eds. 2017. *Studies in Trade, Investment and Innovation No. 87: Digital Trade Facilitation in Asia and the Pacific*. Bangkok: United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP).
- Gao, H. 2011. Google's China Problem: A Case Study on Trade, Technology and Human Rights under the GATS. *Asian Journal of WTO and International Health Law and Policy*. 6. pp. 349–385.
- González, J. L. and M. A. Jouanjean. 2017. Digital Trade: Developing a Framework for Analysis. *OECD Trade Policy Papers*. No. 205. Paris: OECD.

- González, J. L., and J. Ferencz. 2018. Digital Trade and Market Openness. *OECD Trade Policy Papers*. No. 217. Paris: OECD.
- Jaller, L., S. Gaillard, and M. Molinuevo. 2020. *The Regulation of Digital Trade: Key Policies and International Trends*. Washington, DC: World Bank.
- Miroudot, S. and C. Cadestin. 2017. Services in Global Value Chains: From Inputs to Value-Creating Activities. *OECD Trade Policy Papers*. No. 197. Paris: OECD.
- Mitchell, A. D., and N. Mishra. 2020. Digital Trade Integration in Preferential Trade Agreements. *ARTNeT Working Paper Series*. No. 191. May. Bangkok: UNESCAP.
- Monteiro, J. A. and R. Teh. 2017. Provisions on Electronic Commerce in Regional Trade Agreements. *WTO Working Paper*. No. ERSD-2017-11. Geneva: World Trade Organization.
- Pasadilla, G. 2020. E-commerce Provisions in RTAs: Implications for Negotiations and Capacity Building. *ARTNeT Working Paper Series*. No. 192. June. Bangkok: UNESCAP.
- Pasadilla, G., Y. Duval, and W. Anukoonwattaka. 2020. Next Generation Nontariff Measures: Emerging Data Policies and Barriers to Digital Trade. *ARTNeT Working Paper Series*. No. 187. June. Bangkok: UNESCAP.
- Peng, S. Y. 2007. Trade in Telecommunications Services: Doha and Beyond. *Journal of World Trade*. 41 (3). pp. 289–310.
- . 2016. GATS and the Over-the-Top Services: A Legal Outlook. *Journal of World Trade*. 50 (1). pp. 21–46.
- . 2020. A New Trade Regime for the Servitization of Manufacturing: Rethinking the Goods–Services Dichotomy. *Journal of World Trade*. 54 (5). pp. 699–726.
- Sen, N. 2018. Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path? *Journal of International Economic Law*. 21 (2). pp. 323–348.
- Weber, R. and R. Baisch. 2013. Tensions between Developing and Traditional GATS Classifications in IT Markets. *Hong Kong Law Journal*. 43. pp. 77–110.
- Wolfe, R. 2019. Learning about Digital Trade: Privacy and E-commerce in CETA and TPP. *World Trade Review*. 18 (S1). pp. S63–S84.
- World Trade Organization (WTO). 1998. *The Work Programme on Electronic Commerce*. WT/L/274. Geneva.
- . 2001. *Dedicated Discussion on Electronic Commerce Under the Auspices of the General Council on 15 June 2001: Summary by the Secretariat of the Issues Raised*. WT/GC/W/436. Geneva.
- . 2018. *Work Programme on Electronic Commerce: The E-commerce Moratorium on Customs Duties and Electronic Transmissions: Need for a Re-think (Communication from India and South Africa)*. WT/GC/W/747. Geneva.

- . 2019. *Joint Statement on Electronic Commerce*. WT/L/1056. Geneva.
- . 2019. *Work Programme on Electronic Commerce: The E-commerce Moratorium and Implications for Developing Countries (Communication from India and South Africa)*. WT/GC/W/774. Geneva.
- Wu, T. 2006. The World Trade Law of Censorship and Internet Filtering. *Chicago Journal of International Law*. 7 (1). pp. 263–287.