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A Soft Landing for Developing Countries and Non-Discrimination in Digital Trade: Possible Lessons from Asian Countries

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The article suggests the implementation of certain legal devices to enable developing countries to achieve policy flexibility to take advantage of the opportunities presented by the expansion of digital trade while balancing some of the risks which this may present to consumers in the sphere of privacy as well as threats to governments in the form of national security. These include a 'renegotiation clause' as well as the familiar classification of 'special and differential treatment' for developing or least-developed countries.

Keywords: Digital Trade, Non-discrimination, Renegotiation clause, Special and Differential Treatment, Developing or least developed countries, Korea, China and Japan, Post-Covid-19

1 INTRODUCTION

The Covid-19 pandemic crisis has accelerated the rapid digitalization of trade to a pace scarcely imaginable only a few short years ago.¹ Not only are health guidelines instructing us to avoid face-to-face interactions we are also witnessing severe restrictions on the movement of people across international borders, many of whom would have travelled internationally to produce or consume services. This important sphere of economic activity requires further consideration from the

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¹ CTAD, *The COVID-19 Crisis: Accentuating the Need to Bridge the Digital Divides*, 6 Apr. 2020, UNCTAD/DTL/INF/2020/1, at 3.

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perspective of the framework of international trade law which has undergone enlargement, notably in Asia. One area of international trade rules governing digital trade which is particularly underdeveloped is the principle of non-discrimination. The existing non-discrimination provisions contained in the digital trade provisions of Free Trade Agreements (FTAs) tend not to cover all types of traded objects in the digital economy. This omission is especially identifiable in relation to the nascent digital economies of various developing and emerging markets. The short article suggests the implementation of certain legal devices to enable developing countries to achieve policy flexibility to take advantage of the opportunities presented by the expansion of digital trade while balancing some of the risks which this may present to consumers in the sphere of privacy as well as threats to governments in the form of national security. These include a 'renegotiation clause' as well as the familiar classification of 'special and differential treatment' for developing or least-developed countries.

This article is structured as follows. The first section outlines the digital trade practices of three leading Asian economies: Korea, China and Japan with particular focus on the principle of non-discrimination. These countries have been selected because they have been active in implementing digital rules at the bilateral level, in many senses representing the forefront of developments in this area in the world. It is observed that China is still rather passive in this respect, while Japan and Korea are relatively more progressive in implementing digital rules, in part due to their varied approaches to market liberalization generally. Taking these three countries as examples, it would seem that Asian countries still prefer gradual market openings and require additional time for adaptation – a lesson which may be adapted to developing countries seeking to expand their coverage of FTAs.

The second section of the article briefly illustrates some of the features associated with the varied application non-discrimination digital trade rules by developing countries, drawing attention some general trends. It is suggested that the rules in many developing countries are still not satisfactory in terms of the potential level of market liberalization and market opening which will be expected in the coming years as the world adapts to new ways of doing business in the post-Covid era. This follows with a section which introduces the concept of a 'soft landing' – according flexibility in the application of non-discrimination obligations in the context of digital trade for those countries which are not fully ready to offer non-discriminatory treatment to digitally traded products crossing their borders. It suggests that cooperation clauses or renegotiation clause could be used to slow down the rule making process and allow developing nations to review their capacity and implement the rules that aim higher liberalization in this vital sphere of global commerce.

2 INTERNATIONAL LAW LAGGING BEHIND DEVELOPMENTS IN DIGITAL TRADE

Digital trade, represented as e-commerce including online shopping as well as technologies such as robotic deliveries, remote delivery of services such as medical appointments is likely to fill the gap left by missing human contact, at least in the commercial sphere, unfolding due to the Covid-19 pandemic of 2020. Many kinds of formal education have already shifted to on-line delivery and this may remain in place for years to come.² Likewise, there is a good chance that employees will grow accustomed to remote work and clients will tailor their expectations accordingly.³ It can be expected that many countries will announce new national policies not only to boost their digital industries but also to protect their domestic markets from foreign digital companies in the upcoming ‘non-contact’ economy,⁴ policies which were underway before the pandemic but which proceed at greater pace in its wake. Taken together, these developments may provide very critical momentum for the forth industrial revolution to accelerate the aspiration for greater long-distance trade, normally thought to be circumscribed by the so-called gravity model in which traders prefer to service consumers in close geographic proximity.⁵

Despite these rapid changes, the international community is far from reaching an agreement on uniform rules covering digital trade. Indeed there has been remarkably little progress since the adoption of the World Trade Organization (WTO) Declaration on Global Electronic Commerce at the Second Ministerial Conference in 1998.⁶ More recently the trade ministers from over seventy-five like-minded WTO members have announced the historical kick-off of WTO e-commerce negotiation,⁷ however there has been no measurable outcome so far. While the WTO may ultimately turn its attention to the area of digital trade in the coming years, perhaps under the leadership of a new Director General, the lack of progress in the multilateral context so far is in sharp contrast to the more sophisticated rules on digital trade which have been developed bilaterally. The Australia–

² UNCTAD, *The COVID-19 Crisis: Accentuating the Need to Bridge the Digital Divides*, 6 Apr. 2020, UNCTAD/DTL/INF/2020/1, at 4.

³ According to World Economic Forum, it points out ten technology trends beyond COVID-19 such as online shopping, contactless payment, telehealth, supply chain 4.0, 3D printing, etc., <https://www.weforum.org/agenda/2020/04/10-technology-trends-coronavirus-covid19-pandemic-robotics-telehealth/> (accessed 25 Apr. 2020).

⁴ Liz Truss launches future trade strategy for UK tech industry (United Kingdom, 9 June 2020), <https://www.gov.uk/government/news/liz-truss-launches-future-trade-strategy-for-uk-tech-industry>.

⁵ Ben Shepherd, *Gravity Model of International Trade: A User Guide*, The IDRC Digital Library (2013), <http://www.unescap.org/sites/default/files/tipub2645.pdf>.

⁶ Wto, ‘Declaration On Global Electronic Commerce Adopted on 20 May 1998’, WT/MIN(98)/DEC/2, 25 May 1998.

⁷ WTO, ‘Joint Statement on Electronic Commerce’, WT/L/1056 25 Jan. 2019.

Singapore Free Trade Agreement in 2004 was among the first FTAs to establish a separate chapter dedicated to e-commerce.⁸ In addition to the seventy-five FTAs that addressed e-commerce rules before April 2017,⁹ more than ten of the twenty-eight FTAs of which the WTO has been notified over the past three years have stand-alone e-commerce or digital trade chapters.¹⁰

Seven out of the twelve Regional Trade Agreements (RTAs) with e-commerce provisions notified to the WTO in the last three years have involved at least one Asian country. Indeed, Asian countries have played a leading role in promulgating rules on digital trade in the bilateral and regional context.¹¹ As large, advanced economies Korea, China, and Japan are most active players in concluding RTAs with e-commerce or digital trade chapters, although most of Association of South East Asian Nations (ASEAN) member countries still have never concluded such chapters in their RTAs. Generally speaking China has taken a more cautious approach in implementing the non-discrimination principle in its treatment of digital trade in its RTAs.¹² Reflecting its centrally controlled economy and resistance to unfettered markets, China appears to be rather more passive in making any revisions to their existing commitment to market openness for digitally traded goods and services.¹³ Japan and Korea, among the strongest champions of open markets in Asia, are willing to commit to comprehensive non-discrimination principle provisions with a view to harnessing the economic potential for digital trade. To get a sense of how the guarantee of non-discrimination in digital trade can be implemented in FTAs, the next section will examine some of the digital trade chapters of these three countries in more detail, specifically how they pertain to the non-discrimination provision. It will begin with a short discussion of the concept of non-discrimination itself.

⁸ WTO, *Provisions on Electronic Commerce in Regional Trade Agreement*, World Trade Organization Economic Research and Statistics Division 5 (2017).

⁹ *Ibid.*

¹⁰ WTO RTA Database, <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (accessed 25 Apr. 2020). As of 25 Apr. 2020, 303 RTAs are in force. Number of RTAs notified to WTO between May 2017 to Apr. 2020 is up to twenty-eight and ten of them have separate e-commerce chapter: EAEU-Vietnam, Canada-Ukraine, Canada-EU, China-Georgia, Singapore-Turkey, CPTPP, EU-Japan, Hong Kong China-Georgia, EU-Armenia, Hong Kong China-Australia, EU-Singapore FTAs.

¹¹ WTO RTA Database, <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (accessed 25 Apr. 2020), RTAs by Asian Countries notified to WTO between May 2017 to Apr. 2020 are: EAEU-Vietnam, India-Thailand, Chile-Thailand, Hong Kong China-Macao China, China-Georgia, EFTA-Philippines, CPTPP, EU-Japan, Hong Kong China-Georgia, Hong Kong China-Australia, Chile-Indonesia, EU-Singapore FTAs. India-Thailand, Chile-Thailand, Hong Kong China-Macao China, EFTA-Philippines, Chile-Indonesia RTAs have no separate e-commerce chapter.

¹² Henry S. Gao, *Digital or Trade? The Contrasting Approaches of China and U.S. to Digital Trade*, 21 J. Int'l Econ. L. 18 (2018).

¹³ *Ibid.*

3 NON-DISCRIMINATION PRINCIPLE IN RTAS OF THREE EAST ASIAN COUNTRIES

The non-discrimination principle has been recognized as the most fundamental doctrine in international trade law, as specified in the preamble of the Marrakesh Agreement establishing the WTO.¹⁴ This principle takes the form of the most-favoured-nation (MFN) and national treatment (NT) rules, which require first that WTO members not to discriminate amongst the products of other WTO members in trade, or secondly against the products of other WTO members in favour of domestic products.¹⁵ Generally speaking, the principle of non-discrimination ensures equivalent market access opportunities and level the playing field for suppliers from every WTO member, facilitating the most efficient products and services for global consumers.^{16,17} For digital trade non-discrimination mandates that imported digital products, essentially those comprising data, originating from different countries is not subject to a more onerous regulatory regime on the basis of its origin, meaning that it is not subject to higher tariffs or, ideally storage requirements in the form of data localization rules (that the devices holding the data must be contained within certain jurisdictions). With this rule in place, digitally traded products (such as e-books) and some cases services (such as on-line education) compete on an even footing in global markets.

Unfortunately, however, the non-discrimination principle is not well-established or implemented in the modern digital trade regime. Compared to the current trend in which over eighty-five FTAs have adopted e-commerce-related provisions only twenty-seven of those FTAs contain non-discrimination related provisions.¹⁸ The lack of coverage for non-discrimination is most acute in developing countries. Indeed, developing countries such as India and South Africa refuse to make use of non-discrimination rules in digital trade, additionally indicating that they would not join the multilateral rule-making process.¹⁹ This resistance

¹⁴ Third paragraph of Marrakesh Agreement refers to, 'Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'.

¹⁵ Found e.g., in GATT Arts I and III respectively.

¹⁶ William J Davey, *Non-Discrimination in the World Trade Organization: The Rules and Exceptions*, 55 Hague Academy Int'l L. (2012).

¹⁷ Javier Lopez Gonzalez & Janos Ferencz, *Digital Trade and Market Openness*, OECD Trade Policy Papers No.217 33 (2018), according to the paper, transparency, avoidance of trade restrictive effects, harmonization mutual recognition, competition as well as non-discrimination are the most significant factors for creating business-friendly market openness.

¹⁸ WTO, *Provisions on Electronic Commerce in Regional Trade Agreement*, World Trade Organization Economic Research and Statistics Division 25 (2017).

¹⁹ WT/GC/W/747, 12 July 2018, 'Work Programme on Electronic Commerce Moratorium on Customs Duties on Electronic Transmissions: Need For a Re-Think', according to India and South Africa, a moratorium on customs duties on electronic transmissions could in effect undermine the

likely reflects their fear of competing with global suppliers, supplanting an emerging domestic industry. It could equally represent fear for consumer safety with respect to issues such as privacy or even national security for critical infrastructure. Further discussion of these issues is beyond the scope of this article.

FTAs with non-discrimination provisions in their e-commerce or digital chapters have a narrow scope of application by applying these provisions exclusively to 'digital products', defined as 'computer programs, text, videos, 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'.^{20,21} Likewise, cutting-edge regional agreements, such as the Comprehensive Progressive Trans Pacific Partnership (CPTPP) and Digital Economy Partnership Agreement (DEPA), which some Asian countries have joined, have also defined digital products in a narrow sense. FTAs tend not to extend non-discrimination to services, facilitating discriminatory treatment against legal services delivered on-line, for example.

In this regard, the following analysis of how three East Asian Countries, Korea, China, and Japan have tailored their digital rulemaking, especially on the non-discrimination principle in RTAs, will illustrate some of the problems associated with the digital rulemaking and provide remedies to overcome those obstacles.

3.1 CHINA

China has actively implemented digital trade/e-commerce provisions in its RTAs since 2015. The China–Korea FTA, Australia–China FTA, and China–Georgia FTA include separate e-commerce chapters with more advanced rules such as customs duties, transparency, domestic regulatory framework, electronic authentication and digital certificates, online consumer protection, and online data protection. In upgrading its FTAs with Singapore and Chile,²² China also decided to articulate separate chapters dedicated to e-commerce.

existing schedule of tariff concessions of WTO Members. In addition, they argue that a moratorium on customs duties on electronic transmissions could significantly alter the negotiated balance of rights and obligations.

²⁰ Article 16.9 of Korea-US FTA.

²¹ Mira Burris, *New Legal Design for Digital Commerce in Free Trade Agreements*, (107) *Digiworld Econ. J.* 3d Q. 7 (2017), in this regards, e-commerce chapters in FTAs enable to introduce additional issues beyond WTO e-commerce Program like definition of digital products.

²² China signed for upgrading FTA with Singapore on 12 Nov. 2018 and made second phase of FTA with Chile enter into force on 1 Mar. 2019. Both FTAs established brand new Ch. 15 and 4 on electronic commerce respectively.

For the last five years, however, China has been reluctant to adopt rules on the location of computing facilities, cross-border transfer of information, and treatment of digital products. Like other developing nations, China does not want to renegotiate existing commitments under the current WTO regime. For example, in spite of the WTO's 1998 moratorium on customs duties on electronic transmission,²³ China still avoids legally binding obligations by refusing WTO-plus rules,²⁴ such as those which prohibit data localization. Compared to its formal FTAs with Australia, Korea, and Georgia, China even takes a step backward in the second phase of the China–Chile FTA by not inserting provisions on the e-commerce moratorium,²⁵ where it continues to adhere to the practice of merely not imposing customs duties on electronic transmissions between the parties.²⁶ By avoiding any legally binding obligations, China can maintain its digital sovereignty and further avoid the dispute settlement mechanism for any matter related to e-commerce under its FTAs.

Although China has promised a moratorium of customs duties in the second pillar of its four action items for a digital-friendly environment for developing countries submitted to the WTO e-commerce negotiation²⁷ – i.e., (1) clarification of the definition of e-commerce and the scope of its application, (2) a sound environment for electronic commerce transaction, (3) a safe and trustworthy environment for electronic commerce, and (4) inclusive development cooperation – it is highly likely that China wants to leave room for customs authorities to revert back to tariffication so as to protect its domestic market and possibly also to protect aspect of its culture from extensive outside influence, a goal which is by no means exclusive to China.

In addition, other matters, including free data flow and non-establishment of data storage, as well as treatment of digital products, have been side-lined.²⁸ Foreign companies are not allowed to provide internet services and content²⁹

²³ WTO, 'Declaration on Global Electronic Commerce', WT/MIN(98)/DEC/2 1998.

²⁴ For instance, Art. 3.3 of Digital Economy partnership Agreement, it stipulates 'No Party shall impose customs duties on electronic transmission, including content transmitted electronically, between a person of one party and a person of another party'.

²⁵ In newly created China-Chile FTA, Ch. 4 on electronic commerce was inserted without provisions on customs duties.

²⁶ For example, Australia-China FTA, Art. 12.3: Customs Duties

1. Each Party shall maintain its practice of not imposing customs duties on electronic transmissions between the Parties, consistent with para. 5 of the WTO Ministerial Decision of 7 Dec. 2013 in relation to the Work Program on Electronic Commerce (WT/MIN(13)/32-WT/L/907).

2. Each Party reserves the right to adjust its practice referred to in para. 1 in accordance with any further WTO Ministerial Decisions in relation to the Work Program on Electronic Commerce.

²⁷ WTO, 'Joint Statement on Electronic Commerce Communication from China', 24 Apr. 2019, INF/ECOM/19.

²⁸ *Ibid.*, para. 4.2.

²⁹ Congressional Research Service, 'Internet Regimes and WTO E-Commerce Negotiations' (28 Jan. 2020), <https://fas.org/sgp/crs/misc/R46198.pdf> (accessed 25 Apr. 2020).

in China, and thus China's OECD Digital Services Trade Restrictiveness Index (DSTRI) has been constantly increasing from 2014 to 2018.³⁰ China's policies restricting the online supply of foreign digital software through measures affecting both content and distribution platforms are always listed as non-tariff barriers by other countries.³¹

3.2 JAPAN

Japan announced new type of standalone agreement, the so-called Digital Trade Agreement formally signed with the US on 7 October 2019. As pointed out by the US trade representative, in its specific negotiating objectives,³² the US sought a trade deal with Japan covering duty-free measures on digital goods. Moreover, the US requested that Japan provide its digital products non-discriminatory treatment under its primary negotiating objectives, and these request lists were accepted. Since the CPTTP, where Japan played a leading role, Japan has inserted the clear obligation of an e-commerce moratorium and non-discriminatory treatment of digital products.³³ The US-Japan Digital Trade Agreement contains an extensive non-discrimination provision for digital products.³⁴

Japan took a conservative position at the first stage of its Economic Partnership Agreements (EPAs), for instance, in the under Japan-Switzerland EPA, which entered into force in 2009. Pursuant to Article 76 of Japan-Switzerland EPA,³⁵ Japan did not want to be directly bound by a zero-duty obligation on electronic transmission. Instead, Japan chose to insert cooperation provisions for legally binding rule-making in multilateral fora like WTO. Interestingly, Japan previously preferred duty free 'practice' to imperative

³⁰ J. Ferencz, *The OECD Digital Services Trade Restrictiveness Index*, OECD Trade Policy Papers, No. 221 (OECD Publishing, Paris 2019, <https://doi.org/10.1787/16ed2d78-en> and https://stats.oecd.org/Index.aspx?DataSetCode=STRI_DIGITAL# (accessed 25 Apr. 2020).

³¹ USTR, *2020 National Trade Estimate Report on Foreign Trade Barriers*, P.121, https://ustr.gov/sites/default/files/2020_National_Trade_Estimate_Report.pdf (accessed 25 Apr. 2020).

³² USTR, *USJTA Negotiations-Summary of Specific Negotiating Objectives* (Dec. 2018), https://ustr.gov/sites/default/files/2018.12.21_Summary_of_US-Japan_Negotiating_Objectives.pdf (accessed 25 Apr. 2020).

³³ Articles 14.3 (Customs Duties) and 14.1 (Non-Discriminatory Treatment of Digital Products) of CPTPP.

³⁴ Article 8. Art. 8.1 reads: Neither Party shall accord less favourable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of the other Party, than it accords to other like digital products.

³⁵ Article 76 Recognizing the importance of maintaining the current practice of not imposing customs duties on electronic transmissions, the Parties shall cooperate to make this practice binding within the framework of the World Trade Organization, with a view to considering its incorporation into this Agreement.

provisions and it continuously insisted on its position under Australia-Japan³⁶ and Japan-Mongolia³⁷ EPAs. In CPTPP, Japan changed its stance and finally replaced it with clear binding obligation³⁸ and so did in Japan-US Digital Trade Agreement. In a sense this practice reflects an evolving acceptance of digital trade in line with the gradual establishment of this sphere of commerce.

Japan has inserted provisions on non-discriminatory treatment of digital products into its several EPAs since 2009. But Article 74 of the Japan-Switzerland EPA³⁹ is very unique in a way that it requires Japan and Switzerland to guarantee non-discrimination treatment of the supply of 'services' as well. Although this Article is not in effect with regard to real MFN or NT to digital services, it shows Japan's attempt to cover services in its non-discrimination rules of e-commerce chapter beyond the scope of trade in goods. Moreover, the Japan-Switzerland EPA introduced the 'good faith principle' in implementing non-discriminatory treatment of digital products. Unlike typical preferential rules of origin in RTAs, rules of origin are difficult to provide for digital products because it is still controversial whether they should be classified as goods or services.⁴⁰ In this regard, Japan came up with the idea of the good faith principle in determining the origin of a certain digital product. These provisions also allow a certain communication channel to discuss the decision on the origin of digital products. The Japan-European Union EPA did not contain a chapter on digital trade, incorporating e-commerce rules with trade in services. The chapter does not contain a non-discrimination commitment on digitally traded goods. Rather it states merely that the parties 'shall reassess within three years of the date of entry into force of this Agreement the need for inclusion of provisions on the free flow of data into this Agreement'.⁴¹ This chapter notably established a committee for the further liberalization of this area of trade, suggesting that there will likely be additional commitments made between these parties on digital trade at some point.

Japan seems to be willing to move towards a more concrete non-discrimination principle in the near future. Japan lists 'development of rules for the digital market' in the forefront of its national policy, Follow-up of Japan's Growth

³⁶ Article 13.3 of Japan-Australia EPA.

³⁷ Article 9.3 of Japan-Mongolia EPA.

³⁸ Article 14.3 of CPTPP.

³⁹ Non-Discriminatory Treatment of Services Each party shall ensure that its measures governing electronic commerce do not discriminate the supply of services transmitted electronically against the supply of like services by other means.

⁴⁰ According to Art. 83 (Exceptions), it simply refers to 'for the purposes of this Chapter, Articles 22, 55 and 56 shall apply *mutatis mutandis*'. But in CPTPP where Japan joined as a leading Party, the footnote 2 in Art. 29.1 (Exceptions) is inserted to clarify that this is without prejudice to whether a digital product should be classified as a good or service.

⁴¹ Article 8.81.

Strategy,⁴² published in 2019. Furthermore, Japan proposed improvement of existing market access and national treatment commitments in Information Communication Technology (ICT)-service industries under the WTO e-commerce negotiation.⁴³ That is, Japan wants further market openness in digital trade and will propose the adoption of the non-discrimination principle in the WTO e-commerce negotiations.

3.3 KOREA

Korea has been interested in exploring new foreign markets by expanding its FTA network since the Chile–Korea FTA in the early 2000s.⁴⁴ Except for its five FTAs with Chile, the European Free Trade Association (EFTA), ASEAN, India, and New Zealand, Korea's remaining eleven FTAs⁴⁵ include standalone e-commerce chapters. Korea's second concluded FTA, with Singapore, introduced provisions on digital products for the first time, and these provisions are similar to those of Korea's recent FTAs. With regards to the e-commerce moratorium, ten FTAs – Korea–Singapore,⁴⁶ EU–Korea, Korea–Peru,⁴⁷ Korea–US,⁴⁸ Australia–Korea,⁴⁹ Canada–Korea,⁵⁰ China–Korea,⁵¹ Korea–Vietnam,⁵² Colombia–Korea,⁵³ and Central America–Korea – include duty-free-related rules. In detail, among the above, the China–Korea and EU–Korea FTAs contain duty-free-related rules without legally binding force. Regarding the non-discrimination principle, the Korea–Singapore,⁵⁴ Korea–US,⁵⁵ and Central America–Korea⁵⁶ FTAs have specific provisions of non-discrimination treatment.

Although Korea's proposal to the WTO e-commerce negotiation is not publicly available, we can predict that Korea is willing to open up its digital market and adopt a high-level non-discrimination principle, such as that of the US–Japan

⁴² MOFA, *Follow-up on the Growth Strategy* (21 June 2019), <https://www.kantei.go.jp/jp/singi/keizaisai/sei/pdf/fu2019en.pdf> (accessed 25 Apr. 2020).

⁴³ WTO, 'Joint Statement on Electronic Commerce Communication from Japan', 25 Mar. 2019, INF/ECOM/4, para. 3.12.

⁴⁴ Chile–Korea FTA is the first RTA that Korea has concluded and it entered into force on 1 Jan. 2004.

⁴⁵ As of Jan. 1 2020, sixteen FTAs entered into force and three FTAs such as Korea–U.K. FTA, Korea–Israel FTA, Korea–Indonesia CEPA have been concluded by Korea.

⁴⁶ Article 14.4 of Korea–Singapore FTA.

⁴⁷ Article 14.4 of Korea–Peru FTA.

⁴⁸ Article 15.3 of Korea–US FTA.

⁴⁹ Article 15.3 of Australia–Korea FTA.

⁵⁰ Article 13.3 of Canada–Korea FTA.

⁵¹ Article 13.3 of China–Korea FTA.

⁵² Article 10.2 of Korea–Viet Nam FTA.

⁵³ Article 12.2 of Columbia–Korea FTA.

⁵⁴ Article 14.4 of Korea–Singapore FTA.

⁵⁵ Article of Korea–US FTA.

⁵⁶ Article 14.3 of Central America–Korea FTA.

Digital Trade Agreement. The Korean government recently decided to prepare for a better and more rapid digital transformation after the COVID-19 crisis.⁵⁷ Moreover, Korea decided to strongly support its domestic enterprise to develop inroads into overseas markets, because high-tech-based new business are rushing into a digital economy that cannot be regulated by the existing regime.

4 PROBLEMS WITH NON-DISCRIMINATION PROVISIONS IN DIGITAL TRADE AGREEMENTS

So far, three major East Asian countries have shown significant improvements in implementing digital trade provisions in their FTAs commensurate with transformations in the global economy. In terms of implementing the non-discrimination principle, however, China prefers steady and gradual liberalization, while Korea and Japan are pursuing relatively rapid liberalization in digital trade. However, there are some problems associated with the non-discrimination provisions in many RTAs, including the RTAs of the three East Asian countries above. These are in addition to the lack of inclusion of non-discrimination provisions in FTAs, such as the Japan-EU EPA, in favour of more conventional e-commerce style obligations controlling spam and permitting digital signatures on contracts.

First, the existing non-discrimination provisions on digital trade among these three countries do not cover all types of products or services within the digital economy. Unlike the broad scope of non-discrimination principles on the ‘chapter of goods’,⁵⁸ and the ‘chapter of services’,⁵⁹ or on ‘all categories [of] property covered in [the] intellectual property (IP) chapter’,⁶⁰ the non-discrimination rules in e-commerce chapters are only subject to ‘digital products’, which are precisely defined in the agreement as a ‘computer program, text, video, image, sound recording, or other product that is digitally encoded and transmitted electronically’.⁶¹ Although a footnote on the digital products explains what constitutes a digital product, it does not answer, for instance, whether they should be categorized as goods or services. Moreover, the current way of defining digital

⁵⁷ Press release by the Ministry of Trade, Industry and Energy on ‘strong support with digital trade for non-face-to-face economy after covid-19’, http://www.motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs_seq_n=162864&bbs_cd_n=81¤tPage=1&search_key_n=title_v&cate_n=&dept_v=&search_val_v=디지털 (in Korean, accessed 25 Apr. 2020).

⁵⁸ For instance, According to Art. 2.3 (National Treatment) of CPTPP, each party should accord NT to goods of the other parties.

⁵⁹ For instance, According to Art. 10.3 (National Treatment) of CPTPP, each Party should accord NT to service and service suppliers and there is not limitation or definition to restrict the scope of ‘services’.

⁶⁰ For instance, According to Art. 18.8 (National Treatment) of CPTPP, each Party should accord NT to all categories of intellectual property covered in IP chapter.

⁶¹ For instance, Art. 14.1 (Definitions) of CPTPP.

products implies that all types of objects in trade can be divided into three categories – goods, services, and digital products – and they do not overlap with each other, without any grey areas beyond their scopes. While it is beyond the scope of this article, the provision of services across international borders (Mode 1 of General Agreement on Trade in Services (GATS)) is poorly liberalized under FTAs, precluding many kinds of digital trade in services, notably legal advice.⁶²

The narrow scope of applicability of the non-discrimination principle is problematic because there are many newly created objects that cannot be easily categorized as either goods or services. As suggested earlier, the breadth of digital trade is expanding to cover everything from tangible goods under the harmonized system (HS code) or services under the customs procedure codes (CPC) code^{63,64} to digitalized information, digital content, and digitally deliverable services. Moreover, ‘data’ can be also included within the territory of digital trade in a wide sense. 3D printing is a good example of new incoming objects that cannot be easily categorized as either goods or digital products. 3D printing is a process of making a physical object from a three-dimensional digital model, typically by laying down many successive thin layers of a material. 3D printing has components of both goods and digital products because it brings a digital object into its physical form by adding materials layer by layer. Considering the ordinary meaning of ‘digital products’ under Article 31 of the Vienna Convention on the Law of Treaties, it is difficult to distinguish among goods, tradable data with high commercial value, and cutting-edge digital services.

Second, the most serious problem with regards to the non-discrimination principle in digital trade lies in the act of rule-making without discussing market access commitments regarding the abovementioned new type of digital trade. In other words, the agreement on the definition and classification of a digital product is not the end of the story. Suppose the parties regard a certain product as a service instead of a good and take a positive list approach in the services chapter. In this case they should further discuss the market access commitment regarding such products, or else the product won’t be able to be traded at all because the market access commitment is an indicator of market opening and liberalization in the respective services sector.

⁶² See D Collins, *The (Non)Liberalization of Trade in Legal Services in the EU Under the WTO GATS and FTAs*, 1 Int’l Trade L. & Reg. 56–70 (2020).

⁶³ CPC code refers to a comprehensive classification of all products, including goods and services by Office of the United Nations. The most useful reference by FTA negotiators is Statistical Papers, Series M, N° 77, CPC prov, 1991 under which WTO Member States establish and announce each other’s schedule of trade in services.

⁶⁴ Henry S. Gao, *Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulations to Digital Regulation*, 45(1) Legal Issues Econ. Integration 47–70 (2019). P.7, according to the article, CPC classification is not able to support e-commerce activities because it is outdated to be a reference.

There are some practical reasons for the lack of discussions on commitment to market access. First, we still do not know how to completely classify digital products in order to regulate them effectively through international treaties. As noted, for instance, classification of digital products into goods or services is still in question,⁶⁵ and furthermore, 3D printing, which seems to be beyond the definition of digital products, is regarded as a somewhat new and intermediate form that cannot be categorized as a good or a service. Second, existing commitments under the WTO are fundamental to most developing countries, many of which are reluctant to embrace further commitments, with India being a good example. Developing countries, many of which have been prepared to use FTAs to open up their markets in other areas beyond commitments contained in the WTO agreements, appear to be taking a passive approach to clarifying their commitment to market access for digital trade. This may be due to fears that granting non-discrimination could expose them to too much foreign competition in a sector for which they do not have sufficient technological expertise or robust domestic market participants to survive or that it could undermine efforts to promote national culture or security. India, for example, has failed to pursue a digital trade liberalization agenda in its FTAs despite its considerable expertise in technology.

It is important to note that both the non-discrimination principle (MFN and NT) and market access commitments for services are indispensable as a way of liberalizing digital trade. This is because whereas the market access commitment is a prerequisite for newly defined digital products to be traded in the market, the non-discrimination principle provides fair market access opportunity in the newly opened market, precluding practical barriers such as requalification for providers in the case of services. Thus, it is critical to stipulate a non-discriminatory principle that verifies additional market access commitments for newly created tradable objects or new types of digital services.⁶⁶

Thus far we have found two problems associated with the non-discrimination principle stipulated in FTAs in general. Although the parties recognize the significance of these problems, countries' disparate industrial development levels and differences in opinion present an obstacle to rule-making on digital trade, including non-discrimination principles. Only a small minority of countries, such as the US, Singapore, Japan, and Korea, so far underline the significance of the non-discrimination principle in digital trade. In fact, the US is the only country among

⁶⁵ Sam Fleuter, *The Role of Digital Products Under the WTO: A New Framework for GATT and GATS Classification*, Chi. J. Int'l L. 158 (2016), this paper deals with classification of E-product. According to the paper, original concept on E-commerce exclusively covered contents-based products that are delivered in physical form. However, E-product covers downloadable MP3 sound recordings file, e-book, films.

⁶⁶ Sanja Franc, *Digital Trade as an Impetus for New Regulatory Initiatives*, Econview 223 (2019), according to the paper, in order to regulate better digital trade, trade agreements should cover and include innovative services which were newly created.

approximately thirty negotiating members that clearly includes non-discrimination rules for digital products in its proposal to the WTO e-commerce negotiation that began in May 2019. On the other hand, the EU has never stipulated this principle directly in e-commerce-related provisions in the whole history of its RTAs, while Singapore and Japan are active supporters of the US position. Each country may resist the inclusion of non-discrimination rules in digital trade for its own idiosyncratic reasons. In the case of the EU this has largely been connected to its focus on the privacy of individuals, as embodied by its stringent General Data Protection Regulation (GDPR).⁶⁷

5 SOLUTIONS FOR DEVELOPING COUNTRIES

Developing nations and even least-developed countries recently decided to agree upon very practical way to deal with digital trade rules. The African Continental Free Trade Area (AfCFTA) Agreement among fifty-two African Union Member States came into effect on 30 May 2019. Although there are no e-commerce-related provisions engraved in its original text, AfCFTA has been evaluated as the first ‘born-digital’ agreement in the world.⁶⁸ After 30 May 2019, AfCFTA entered its operational phase during the twelfth Extraordinary Session of the Assembly on the AfCFTA in Niamey in July 2019.⁶⁹ In accordance with the TRALAC (Trade Law Center for South Africa), the AfCFTA will be implemented by five operational instruments, that is, ‘the Rules of Origin; the online negotiating forum; the monitoring and elimination of non-tariff barriers; a digital payments system and the African Trade Observatory’.⁷⁰

Likewise, ASEAN, which was traditionally reluctant to insert e-commerce rules into its RTAs, recently announced its Plan of Action to Implement the ASEAN–Australia Strategic Partnership (2020–2024), which is ‘the joint initiative to promote digital trade and support inclusive economic growth’ with Australia.⁷¹ The development of the ASEAN–Australia Digital Trade Standards Initiative can be regarded as a good starting point for soft rule-making. If developing nations and least-developed countries strongly prefer gradual market opening with certain

⁶⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 2016.

⁶⁸ WEF, *Algorithms Could Give the World Its First ‘Born Digital’ Free Trade Agreement in Africa* (24 July 2019), <https://www.weforum.org/agenda/2019/07/algorithms-could-give-the-world-its-first-born-digital-free-trade-agreement-in-africa-16a8d3d463> (accessed 25 Apr. 2020).

⁶⁹ Tralac(Trade Law Center for South Africa) website on African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents, <https://www.tralac.org/resources/by-region/cfta.html#legal-texts> (accessed 25 Apr. 2020).

⁷⁰ *Ibid.*

⁷¹ Australian Government Department of Foreign Affairs and Trade, *Australia and ASEAN Driving Digital Trade* (16 Mar. 2018), <https://www.dfat.gov.au/news/news/Pages/australia-and-asean-driving-digital-trade> (accessed 25 Apr. 2020).

carve-outs in their regulatory power over the digital products market, the parties can help these countries by offering a gradual approach such as the following.

First, if the countries are reluctant to commit to legally binding rules preventing discrimination in the form of localization rules for digital imports, for example, inserting a capacity-building or cooperation clause can help them to strengthen their fundamentals on digital trade. AfCFTA is a good example that fully utilizes digital technology in the implementation stage without concrete rule-setting. From the dashboard of the AU Trade Observatory and the AfCFTA Trade in Goods Password Protected Dashboard to the Pan-African Payments and Settlements System and the Continental Online Mechanism for Monitoring, Reporting and Elimination of Non-Tariff Barriers, various kinds of operating tools for supporting implementation of the AfCFTA are expressed in the decision of the session after entry into force.⁷² This will provide the essential grounding that enables the next step of setting relevant rules in future RTAs.

Secondly, 'renegotiation' or 'built-in clauses' can help these countries to adopt a gradual approach. For instance, China was extremely passive in adopting the WTO-plus rules of trade in services in its RTAs and ultimately introduced so-called 'built-in clauses' for subsequent negotiations in the China–Korea FTA.⁷³ In order to achieve high-level liberalization of trade in services and investment, China–Korea FTA set provisions of general principles, the timeframe, and guidelines for subsequent negotiation, and they launched the second round of FTA negotiations in March 2018. Likewise, Article 18 of the protocol on trade in services in the AfCFTA also indicates progressive liberalization of trade in services, like the above built-in clauses of the China–Korea FTA. By postponing the negotiation, a country is able to analyse the non-discrimination principle and the readiness of its digital economy and come up with concrete rules that could actually be agreed upon. This kind of approach can be seen in the EU–Japan EPA chapter on e-commerce, noted earlier, which establishes a committee to facilitate discussions on an ongoing basis. These kinds of dialogue-based processes are practical ways of inviting developing countries into the digital trade era at their own pace.

Lastly, the WTO concept of special and differential treatment,⁷⁴ allowing developing countries long phase-in periods for obligations and precluding the

⁷² Decisions and Declarations, Assembly of the African Union Twelfth Extraordinary Session 7 July 2019 Niamey, NIGER, <https://www.tralac.org/documents/resources/african-union/2958-12th-extraordinary-session-of-the-assembly-on-the-afcfta-decisions-and-declaration-july-2019/file.html> (accessed 25 Apr. 2020).

⁷³ Annex 22-A (Guidelines for Subsequent Negotiation) in Ch. 22 (Final Provisions) of China–Korea FTA.

⁷⁴ Protocol of ACFTA, Art. 7 Special and Differential Treatment

expectation of reciprocity in liberalization could help encourage developing countries to pursue non-discrimination commitments in digital trade. These could take the form of unilateral preferential arrangements issued by developed countries, becoming reciprocal over time commensurate with the advancement of the developing country partner. Another approach would be to establish wide exceptions applicable to the digital trade chapters of FTAs, along the lines of GATS Article XIV.⁷⁵ This would allow the imposition of restrictions which are in the interests of such things as privacy, culture and national security. Article 3 of the US-Japan Digital Trade Agreement incorporates the General Exceptions of the GATS and Article 4 contains an essential security exception. The EU-Mexico FTA adopted 'right to regulate' provisions⁷⁶ with an exception clause which applies to all aspects of the treaty.

6 CONCLUSION

It is highly likely that the recent Covid-19 pandemic will accelerate the digital transformation international trade. Today a large number of countries are beginning to examine the protection of online consumers, investigating such matters the protection of data, privacy and more broadly the safeguarding of states against national security threats present in a digital environment. There is a risk that some of these measures will discriminate against foreign products, perhaps illegitimately so, hampering the development of this important sphere of global commerce.

Although there are practical hurdles in reaching a multilateral consensus on the best framework for non-discrimination in digital trade, in part because

In order to ensure increased and beneficial participation in trade in services by all parties, State Parties shall:

(a) provide special consideration to the progressive liberalization of service sectors commitments and modes of supply which will promote critical sectors of growth, social and sustainable economic development;

(b) take into account the challenges that may be encountered by State Parties and may grant flexibilities such as transitional periods, within the framework of action plans, on a case by case basis, to accommodate special economic situations and development, trade and financial needs in implementing this Protocol for the establishment of an integrated and liberalized single market for trade in services; and

(c) accord special consideration to the provision of technical assistance and capacity-building through continental support programmes.

⁷⁵ Article 8 Right to Regulate Each State Party may regulate and introduce new regulations on services and services suppliers within its territory in order to meet national policy objectives, in so far as such regulations do not impair any rights and obligations arising under this Protocol.

⁷⁶ Article 1 scope 2. The Parties affirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity.

countries different levels of economic development and differing national priorities with regards to technology, it is the right time to consider flexible solutions to rule-making with a view to liberalization digital trade as much as is feasible given the above concerns. Both developing and developed countries have been cautious to adopt non-discrimination in the context of their digital trade commitments in FTAs, with the experience in Asia a reasonably good snapshot of the varied response across the globe. China, Japan and Korea each recognizes the importance of market opening for digital trade in goods and services. At the same time some countries are simply not ready to adopt a highly liberalized stance towards digital trade in the manner of Japan, Korea or even China. This is especially the case for developing countries which may struggle to adapt to the pressures of competition in the digital arena or which, much like developed countries, have concerns about privacy, culture and issue of national security.

A 'soft landing' approach to non-discrimination in digital trade is required for such countries. This is one in which policies for market liberalization are sufficiently flexible for developing countries to balance their need to safeguard their domestic interests, including the safety of consumers, while taking advantage of market liberalization both as suppliers and consumers in the global digital marketplace. The advantage of FTAs is, of course, that parties are free to choose the extent to which they wish to open their markets – the only limitation is the extent to which reticence in this regard will undermine the consent of a treaty partner. This article has very briefly drawn attention to three such measures which may pave the way for a more incremental approach to liberalization which acknowledges developing countries' special economic circumstances while encouraging them to take advantage of changes rapidly unfolding in the global economy.

