



Briefing Paper

E-Commerce: What have small developing countries prioritised in Trade Agreements?

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Summary

In recent years, e-commerce has been firmly introduced on the agenda of trade policy makers from developing countries, including through regional and other trade agreements. Even small, non-emerging developing countries have adopted e-commerce provisions in over thirty RTAs. This briefing paper identifies the approaches smaller developing countries have taken in negotiating such agreements, as well as the potential implications at the policy and regulatory levels for them. It summarises the main findings from a recent study by Loly A. Gaitan G., titled “E-Commerce Provisions in Trade Agreements: Experience of Small Developing Countries”. The objective of both the study and the briefing paper is to inform the African policy makers and negotiators as they prepare to launch the negotiations for e-commerce Protocol under AfCFTA later this year.

Introduction

In recent years, the connection between the technical aspects of e-commerce and trade policy has seen increased interest. While still at an initial stage in WTO plurilateral negotiations, e-commerce has been firmly introduced on the agenda of trade policy makers, including from many developing countries, through Regional Trade Agreements (RTAs).

E-commerce is growing fast globally with online retail sales expected to reach US\$4 trillion this year. Developing countries should put themselves in a position to harness the many opportunities it offers for economic growth, poverty reduction and development. Already, 74 RTAs with e-commerce provisions have so far been signed by developing countries, particularly emerging markets. Smaller, non-emerging developing countries participated in 32 of these RTAs.

This short paper identifies the approaches taken by small developing countries specifically in negotiating e-commerce provisions in RTAs, as well as their potential implications at the policy and regulatory levels. Analysis focuses on a sample of 32 RTAs with e-commerce provisions adopted by these countries. Their experience can provide useful lessons particularly for African countries in the context of the African Continental Free Trade Area (AfCFTA) negotiations.

Developing countries and RTAs with e-commerce provisions

The principles, rules and standards emerging from RTAs will play a decisive role in shaping digital policies in small developing countries, e.g. by fostering policy harmonization with trading partners or helping tap into their experience, but also possibly limiting their available policy space for digital industrialisation.

Some developing regions have been more forthcoming than others in adopting RTAs with e-commerce provisions. In particular, interest has been high in Latin America and the Caribbean,

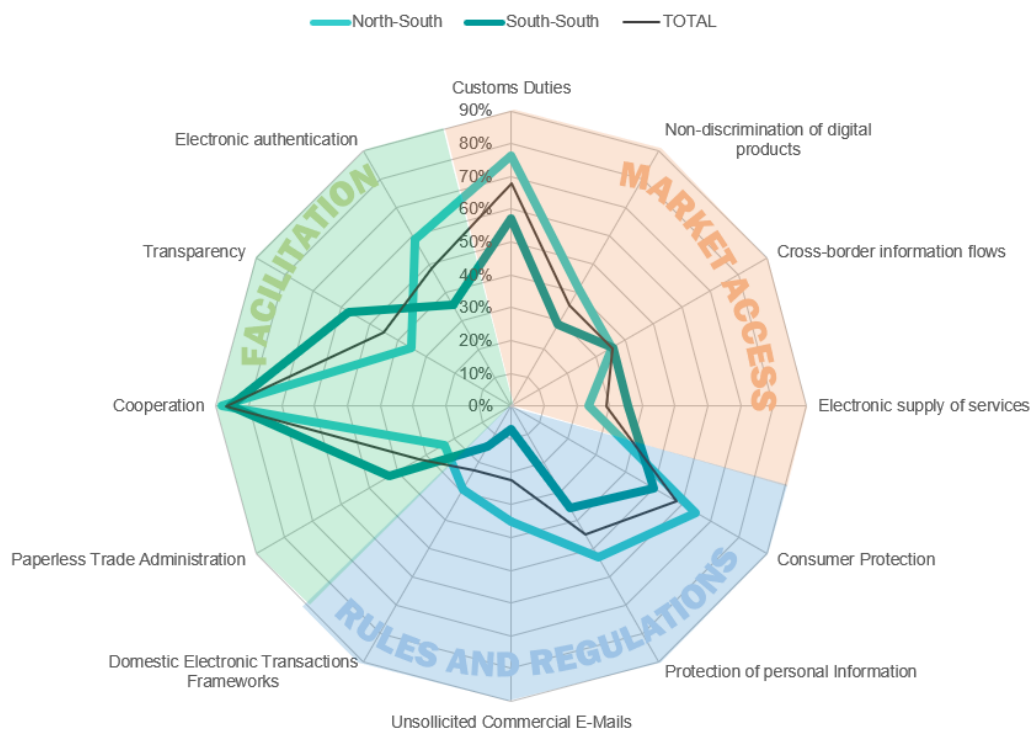
where regional digital integration is fast concretising with the recent adoption of the Single ICT Space as the digital layer of the Caribbean Single Market and Economy (CSME). Similarly, 25% of our sampled RTAs were signed by countries from Asia, where e-commerce has been a long-standing issue on the ASEAN agenda. Viet Nam stands out as particularly active, and signed what is arguably the most ambitious RTA covering e-commerce to date: the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

Bringing up the rear, Africa is the least-represented region with only 6 countries having adopted three related RTAs. While two of them make only broad reference to e-commerce, US-Morocco is more ambitious and contains a detailed article committing parties to non-discriminatory treatment of digital products.

In terms of scope, the most commonly found e-commerce issues in the sampled RTAs pertain to facilitation, regulation and market access. In particular, analysis in the coming sections will focus on 12 key issues falling under these categories: (i) market access: customs duties, treatment of digital products, cross-border information flows, electronic supply of services; (ii) rules and regulations: consumer protection, protection of personal information, unsolicited commercial e-mails, domestic electronic transactions frameworks; and (iii) facilitation: paperless trade administration, cooperation, transparency, and electronic authentication.

Figure 1 below provides an overview of the extent to which each of these 12 issues and 3 categories have been included, as a share of the total RTA sample. This provides an indication of the areas small developing countries have tended to prioritise. As a further indication, the figure also shows variations in issue inclusion between North-South and South-South RTAs, as an issue may have been deemed of greater relevance by the parties based on their different or similar development levels.

Figure 1: Share of sampled RTAs containing e-commerce provisions, by topic



Source: Gaitan, 2020

As evident from Figure 1 above, small developing countries have shown a clear preference for facilitation provisions such as cooperation. There, small developing countries have tended to include paperless trade and transparency more often in their South-South RTAs, where electronic authentication is less prioritised. The next most-included category relates to rules and regulations such as consumer protection, followed by market access provisions dominated by the non-imposition of customs duties on digital products or electronic transmissions.

In terms of specific issues, small developing countries have primarily adopted provisions related to cooperation (87%), customs duties (68%) and consumer protection (58%) respectively. Interest for the latter has however been stronger when signing North-South RTAs, and is outranked by transparency provisions in South-South RTAs. Conversely, least consideration has been given to provisions related to electronic supply of services (29%), unsolicited commercial e-mails, and domestic electronic transactions frameworks (23%). More

details on the nature and policy implications of key provisions are provided below.

Facilitation

Cross-border online transactions are simultaneously subject to various regulations, whose level of interconnection are creating unprecedented complexities for market players and policymakers alike. There is consensus globally on the need to take coordinated measures for simplifying and facilitating such transactions, and speeding up the movement of goods and services across borders.

In this regard, trade agreements can play an important role and have helped countries coordinate on relevant trade facilitation measures related to e-commerce, e.g. in areas such as cooperation, paperless trading, electronic authentication and electronic signatures.

Cooperation

Cooperation is by far the type of facilitation

provisions on e-commerce that has been most considered by small developing countries in signing RTAs (87%). This is however largely due to the fact that cooperation is not only a substantive topic *per se*, but also a preferred means for addressing other areas of e-commerce in soft, non-binding language.

The most common form of cooperation pertains to maintaining dialogue and exchange of experience and information on specific regulatory issues relevant to e-commerce. These may include data privacy, consumer confidence, cyber-security, electronic signatures etc.

It is noteworthy that specific consideration is also given to development cooperation and assistance on digital matters in a few North-South agreements (e.g. with EU, New Zealand, Australia), where envisioned activities include capacity building, training and technical cooperation in areas such as ICT infrastructure, regulatory and standards compliance, promotion of paperless trade administration etc.

Electronic Authentication and Signatures

Transactions concluded online generally entail that contracts are concluded and signed electronically. The legal value of such contracts requires that electronic signatures be granted equal treatment to signatures done on paper, and be admissible as evidence in legal proceedings.

In our sample, 48% of agreements include provisions on electronic authentication and signatures, with a more notable presence in North-South RTAs. There, parties often seek to work towards the mutual recognition of digital certificates and electronic signatures, and most often entail a commitment from parties to maintain or adopt (or endeavour to adopt) measures or legislation for electronic authentication.

The need for the above to be in line with internationally-accepted standards is also frequently referred to. In this regard, the main

principles can be found in the UNCITRAL Model Law on Electronic Commerce, which already underpins existing regulations in many developing countries. Although this should ease implementation of this provision, countries where legislation is not yet at par with UNCITRAL principles would benefit from updating their framework ahead of negotiating RTA provisions.

Transparency

As in other areas of trade, transparency of relevant legal frameworks is a necessary precondition for securing certainty for businesses and consumers. Close to half (45%) of our sampled RTAs contained standard transparency measures, requiring parties to publish or make publicly available laws, regulations, procedures and other administrative rulings of general application that affect electronic commerce.

Most such provisions are fairly standard and uncontentious, as countries are already subject to transparency requirements in multiple trade-related areas.

Paperless Trading

The digitisation of trade administration documents can significantly improve the efficiency of commercial procedures by reducing the cost and time associated with their submission, processing and approval. In RTAs, trading partners agreeing to paperless trading provisions grant equal treatment and recognition to electronic documents and paper versions. This is however the least included facilitation provision (32%), although higher interest for them is seen in South-South RTAs.

As a partial explanation to its limited inclusion, small developing countries may anticipate some implementation challenges in the short term given their capacity constraints, low digital uptake and lacking soft infrastructure. In order to mitigate these while harnessing the trade benefits of paperless trading, they could be advised to consider subjecting their commitment to the

provision of technical assistance, on the model of the WTO Trade Facilitation Agreement (TFA).

Rules and Regulations

The second category of issues most-included in RTAs relates to rules and regulations, as domestic frameworks and regulations put in place by governments may improve or curtail the ability of firms and consumers to engage in online transactions with counterparts abroad. For instance, the jurisdiction in which a consumer is based may require that not only local but also foreign providers comply with its domestic data privacy requirements.

In the wake of the digital economy, many governments have put in place laws and regulations governing online transactions (e.g. electronic authentication, data privacy, consumer protection), which parties have increasingly included in their RTAs. Consumer protection stands out as the most included, followed by protection of personal information. It can also be observed that regulatory provisions tend to be more often included in North-South RTAs than in the South-South.

Consumer Protection

Ensuring consumer's confidence is the cornerstone of e-commerce, and many countries have sought to protect online consumers as effectively as offline ones. Regulations related to online consumer protection have been increasingly referred to in RTAs - although with varying scope, depth and breadth - in order to improve consumers' trust in their cross-border e-commerce transactions.

Consumer protection is the second type of provisions most commonly adopted by small developing countries in our sampled RTAs (58%). While half of them have favoured soft language focused on cooperation in this area, 42% commit members to provide online consumers with a level of protection at least equivalent to that afforded by offline consumers in any existing domestic laws, regulations and policies.

Protection of Personal Data

At a time when internet user data has become the "new oil" of the digital economy, the protection of personal data has been under growing scrutiny, at the crossroads of consumer protection and cross-border data flows debates.

In recent years, many national regulations have been updated to better protect privacy and personal data collected from internet users (e.g. EU GDPR). Data privacy has become a glaring modern example of the old debate over balancing trade liberalisation and the pursuance of legitimate public policy objectives, as proponents of free data flows have sometimes deemed data privacy regulations as overly restrictive for their digital firms.

Among the RTAs selected for analysis, almost half (45%) addressed the protection of personal information of e-commerce users. The most common type of provision relates to soft commitments ("shall endeavour") to adopt or maintain measures aimed at the protection of private data of electronic commerce users.

The only agreement through which a small developing country, namely Viet Nam, adopted a binding commitment in this area is the CPTPP. Viet Nam already had a national law on data protection and privacy since 2010, prior to negotiating related RTAs since 2016.

Domestic Electronic Transactions Frameworks

Legal frameworks allowing for the conclusion of contracts online are an essential element of the digital economy, ensuring policy certainty for the parties involved. Complementing other more specific regulation-related provisions, 23% of our sampled RTAs include provisions related to: (i) adopting or maintaining domestic laws and regulations governing electronic transactions; (ii) the need to avoid unnecessary regulatory burden on electronic transactions; or (iii) facilitating the participation of interested stakeholders in the

development of their respective legal frameworks.

While commitments requiring to adopt or maintain such regulatory frameworks tend to start with firm “shall” language, most then soften the provision with qualifiers such as “endeavour to”. It is worth noting that almost all agreements refer to the need for domestic frameworks to take into account the UNCITRAL Model Law principles.

According to UNCITRAL, many developing countries have already incorporated at least part of these principles in their legal frameworks.¹ This could make the implementation of the provision relatively unproblematic for them. Nevertheless, ahead of committing in RTAs full consistency of the country’s legislation with UNCITRAL principles would need to be ascertained, and experience acquired in their implementation.

Spam

Finally, seven North-South RTAs have addressed the issue of unsolicited commercial communications by e-mail (i.e. spam) which has long been a concern for undermining the necessary consumer trust in e-commerce. This provision has however not been included in any of the studied South-South RTAs. While this issue tends to be mentioned primarily as one of many areas for cooperation, two agreements have adopted a dedicated article to the adoption of appropriate measures against spam. In particular, the CPTPP binds parties to adopt or maintain specifically-identified measures in this area, as well as “provide recourse against suppliers” of such messages.

Market Access

With the rise of electronic commerce as a key driver of global trade, data has become of strategic importance for many economies which have started regulating its flow in order to address

concerns related to data privacy, cybersecurity or the promotion local digital industries.

In this context, some countries have raised concerns that increased government interventionism in the digital sphere may be used as “data protectionism”, creating barriers to trade and hindering market access for their firms. Possibly relevant measures in this regard are many, and may pertain to *inter alia* customs duties, data localization requirements, geo-blocking and web filtering etc.²

While being the least-included category of provisions, a number of RTAs have sought to address such market access barriers by disciplining the use of several types of measures. Customs duties are by far the most common provision (68%), followed by data-related issues of cross-border information flows and non-discrimination of digital products (35%) where appetite seems more pronounced in North-South RTAs.

Customs Duties and Treatment of Digital Products

Ever since they adopted a moratorium prohibiting the imposition of customs duties on electronic transmissions, WTO members have been debating whether the prohibition also extends to the digital content being transmitted (i.e. digital product). While the technical difficulties of levying customs duties online were long preventing it, clarity is increasingly needed as some countries have started to introduce tariff lines for levying customs duties on certain digitally transmitted digital products. Case examples include Australia, New Zealand, EU, Indonesia and India.

Many RTAs include dedicated articles addressing the issue of digital products. For instance, 35% of our sampled agreements provide for the non-discrimination of digital products, mainly referring

¹ https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce/status

² http://diposit.ub.edu/dspace/bitstream/2445/123738/1/TFM-MOI_Metschel_2018.pdf

to the national treatment principle. These commit parties in relatively firm terms to grant no less favourable treatment to digital products originating from abroad to that granted to their own like digital products.

The issue of customs duties on digital products and/or electronic transmissions are one of the most-commonly addressed e-commerce topics in trade agreements, and are found in 68% of our sampled RTAs. In the majority of RTAs, parties agree not to impose customs duties, fees, or other charges on or in connection with the importation or exportation of *digital products by electronic transmission*. This implies that digital content should be duty-free, including when sold on a physical “carrier medium” (e.g. a CD), in which case tariffs may be levied only on the value of the carrier medium.

Only a few agreements from our sample refer to customs duties on electronic transmissions rather than on digital products, hence potentially subjecting content to customs duties.

Various studies have analysed the revenue implications of the WTO moratorium on customs duties. However, estimates of the revenue implications of the moratorium vary widely across studies, ranging from USD 280 million to USD 8.2 billion depending on the methodology adopted. At the higher end of the range, UNCTAD estimated that tariff revenue loss on physical imports of digitizable products for developing countries is 30 times higher than that for developed countries.³

Data Flows

Control over data is a growing priority for many countries, which are increasingly regulating their cross-border transfer through measures such as data localization, requiring that data be stored or processed locally. In countries with established digital sectors, such measures have sometimes been criticised for creating barriers to digital trade

and making it harder for their firms which may become disadvantaged.

Only two RTAs from our sample have disciplined restrictions to free data flows, requiring that such measures cannot be used as a condition to conduct business. In particular, the CPTPP uses strong “shall” language committing parties to allow the cross-border transfer of information by electronic means (including personal data) in the context of business transactions, while allowing some level of flexibility for pursuing legitimate policy objectives.

Interestingly, Viet Nam signed on the above despite having data localization policies in place, which e.g. require social networks or online game providers to have at least one server on its territory by securing a peace clause (i.e. excluding existing data flow restrictions from the purview of the dispute settlement) in the CPTPP for two to five years.

Electronic Supply of Services

E-commerce has made it more difficult to distinguish between different modes of services delivery, i.e. electronic delivery and consumption abroad. To clarify applicable rules, 29% of the agreements specify that the services and other chapters of the agreement are applicable to services delivered electronically. Parties often also clarify that nothing in the e-commerce chapter should be interpreted as an obligation to allow the electronic supply of a service.

Conclusion and Way Forward

When adopting e-commerce provisions in RTAs, small developing countries have tended to favour the inclusion of facilitation provisions. This is a relative “zone of comfort” for many of them, possibly due to their experience with the WTO TFA. Rules and regulations (e.g. consumer protection) are the second most-included category, where the

³ https://unctad.org/en/PublicationsLibrary/ser-rp-2019d1_en.pdf

prior existence of regulations seems to have made adoption in RTAs easier. With the exception of commitments on not imposing customs duties on digital products or electronic transmissions, small developing countries have shown less appetite for market access provisions.

The experience of small developing countries suggests that prior policy experience in a given area can facilitate the adoption of related RTA provisions, while securing domestic interests. This can be an important lesson for African countries as in the context of AfCFTA negotiations.



CUTS International, Geneva

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