

Data Regulation in Trade Agreements: Three Digital Kingdoms

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Data and trade agreements

- Main issues at stake:
 - Commercial interests:
 - Free flow of information
 - Data localization requirements
 - Personal rights:
 - Protection of personal data
 - Government power:
 - National security
 - Law enforcement
- Main platforms:
 - No rule in the WTO
 - Mainly under domestic law, FTAs & plurilateral initiatives (TiSA)

Regulation of Digital Trade in the WTO

- 1998 Declaration on Global Electronic Commerce: moratorium on customs
- Work Program: CTS, CTG, TRIPS, CTD, etc
- Renewed interest since 2016
- Launch of e-commerce talks in Davos in Jan 2019

Three Main Players

- US
- EU
- China

US

- Key: Free flow of information cross-border
- Prohibition of data localization requirements
- Privacy: No comprehensive privacy protection framework
 - Instead, a patchwork of sector-specific laws (credit reports, video rental)
 - + enforcement by the FTC
 - + self-regulation by firms
- Very active in including such language in trade agreements:
 - FTA (TPP), TiSA, & even WTO

US: TPP & USMCA

- Passive obligations: discriminations against foreign digital products; restrictions on cross-border transfer of information; forced localization requirements; and forced transfer of source codes.
- Enabling obligations: required to introduce or maintain regulatory frameworks which facilitate the development of e-commerce: electronic transactions; electronic signatures or electronic authentication methods
- Provisions to check corporate power:
 - denying access to infrastructures: freedom of access to and use of the internet for e-commerce
 - misuse of personal info: online consumer protection, personal information protection, and unsolicited commercial electronic message
- Carve-out for financial services, government procurement & information held or processed
- Exception: allow measures necessary to achieve a legitimate public policy objective so long as it is not
 - arbitrary or unjustifiable discrimination or a disguised restriction on trade
 - pass the necessity test

TISA

- E-commerce Specific Provisions
 - Free Movement of Information
 - Open networks
 - Local infrastructure
 - Electronic Authentication and Electronic Signatures
- Horizontal Provisions
 - localization requirements:
 - local commercial presence or residency
 - local content: advantages to local contents; requirement for foreign service supplier to buy or use local contents
 - local technology: forced technology transfer; requirement for foreign service supplier to buy or use local technology

EU

- Key issue: privacy (GDPR)
 - both a consumer right and human right
- Extraterritoriality: Adequacy decision
 - 11 countries (Argentina, Canada, Israel, NZ, Uruguay)
 - + US (Privacy Shield framework)
- But were unable to include provision in trade agreements until new compromise reached in Feb 18:
 - Horizontal clause on free flow of all data;
 - Ban on localization requirements;
 - Affirming EU's right to regulate, not subject to ISDS

EU - contd

- Soft positions in existing FTAs:
 - adopt your own laws for personal data protection to help maintain consumer trust and confidence in electronic commerce (CETA 16.4; Japan-EU EPA 8.78)
 - No rule on free flow of data until after 3 years (Japan-EU EPA 8.81) except financial services (CETA 13.15; Japan-EU EPA 8.63)
- Potentially intrusive rules in the GDPR

China

- Key: Cyber sovereignty
- Censorship: no free flow of info
- Privacy: no law until 2009, remains weak
 - Extensive exemptions for the government
- Data localization requirements: Cyber-security Law 2017
- Trade agreements: KOR & AUS
 - Mainly trade facilitation issues

EWTO & EWTP

- Platform to collectively forge rules governing e-commerce, exchange best practices, build future facilities and achieve inclusive trade
- Three components
 - Rules level: platform for stakeholders to discuss and incubate new rules and standards for the digital age: digital border, tariff policy, data flow, credit system and consumer protection
 - Commercial level: build the new infrastructure for the internet age: e-commerce platform, finance and payment, logistics and storage, trade-related services, marketing and education and training
 - technological level: technological framework based on the internet, big data and cloud computing, internet of things, and artificial intelligence.
- More specific examples:
 - tariff exemption for SMMEs < 1 million USD of annual exports
 - 24-hour customs clearance
 - expedition of customs procedures and logistics
- Started operation in Malaysia in Nov 17

RTA

- 2015 FTAs with Korea and Australia
- Main provisions:
 - Korea: moratorium on customs duties on electronic transmission; electronic authentication and electronic signature; protection of personal information in e-commerce; paperless trading; cooperation
 - Australia: transparency; domestic legal frameworks governing electronic transactions; equivalent level of protection
- But still weak with explicit rejection of the DS chapter

Why the differences?

- Different interests
 - US firms: digitized products
 - CN firms: physical goods
 - EU firms: no major player
- Different regulatory philosophy
 - US: self-regulation
 - CN: heavy government intervention
 - EU: strong human rights tradition

A fragmented future

- WTO: exploratory work toward future WTO negotiations on trade-related aspects of electronic commerce: most likely to reach trade-facilitation type agreements
- TiSA: provisions on free flow of information and ban on data localization requirements
- Domestic and bilateral initiatives (FTA): privacy protection

Thank You!

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