

# Data Governance 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

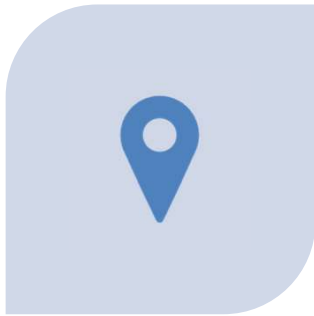


Renewed interest since 2016

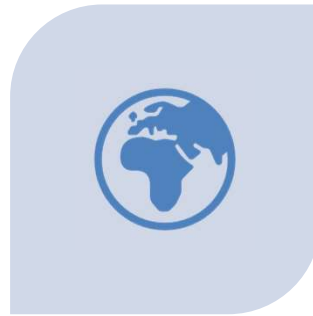


Launch of e-commerce talks in Davos in Jan 2019

# Three Digital Kingdoms



**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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