



**Asia-Pacific  
Economic Cooperation**

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**2021/CTI/SYM1/007**

Session: 1

## **Data Sovereignty and Trade Agreements: Nailing Jello to the Wall?**

Submitted by: Singapore Management University



**Symposium on APEC Supporting the WTO  
Negotiations on Trade Related Aspects of  
E-Commerce  
24-25 March 2021**

A hand holding a hammer is shown driving a nail into a piece of yellow Jello that is stuck to a wooden wall. The hammer is silver and black, and the Jello is bright yellow and translucent. The background is a light-colored wall with a wooden trim on the right side.

# Data Sovereignty and Trade Agreements: Nailing Jello to the Wall?

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Henry Gao

# Sovereignty

- Bodin: highest unified power
  - “*most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth*”.
- Vattel: incorporated independent authority
  - Externalisation: “*exclusivity of authority without*”.
- Schmitt: exception
  - “*Sovereign is he who decides on the exception*”.
- Lessig: control
  - “citizen-sovereignties”
  - “merchant-sovereignties”

# Data Sovereignty

- An oxymoron?
  - Data: normally transcends border
  - Sovereignty: normally confined to within borders
  - Example: Speaker from Singapore at conference hosted in HK via a US online meeting platform with servers in China.
- Difficult to define
  - Peterson:
    - “establishing data location at a granularity sufficient for placing it within the borders of a particular nation-state”.
  - But this is more of a technical definition
- But is our task really
  - trying to nail jello to the wall
  - or, merely deciding what happens when jello hits the wall?

# Data Sovereignty in the context of Trade Agreements

- The highest independent power over data trade, that can define rules and exceptions, especially regarding:
  - Border measure:
    - Cross-border transfer of data
  - Domestic regulation:
    - Data localisation

# Data Sovereignty and Trade Agreements

	Free flow of data	Prohibition on data localization	Data Sovereignty Regime
US	Yes	Yes	Firm Sovereignty
China	No	No	State Sovereignty
EU	Yes, but	No, but	Individual Sovereignty

# 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

# Global Phenomena:

Ferracane & Marel (2020)

Figure 1: World map showing the three data models for the cross-border (CB) data flows component (2019)¶

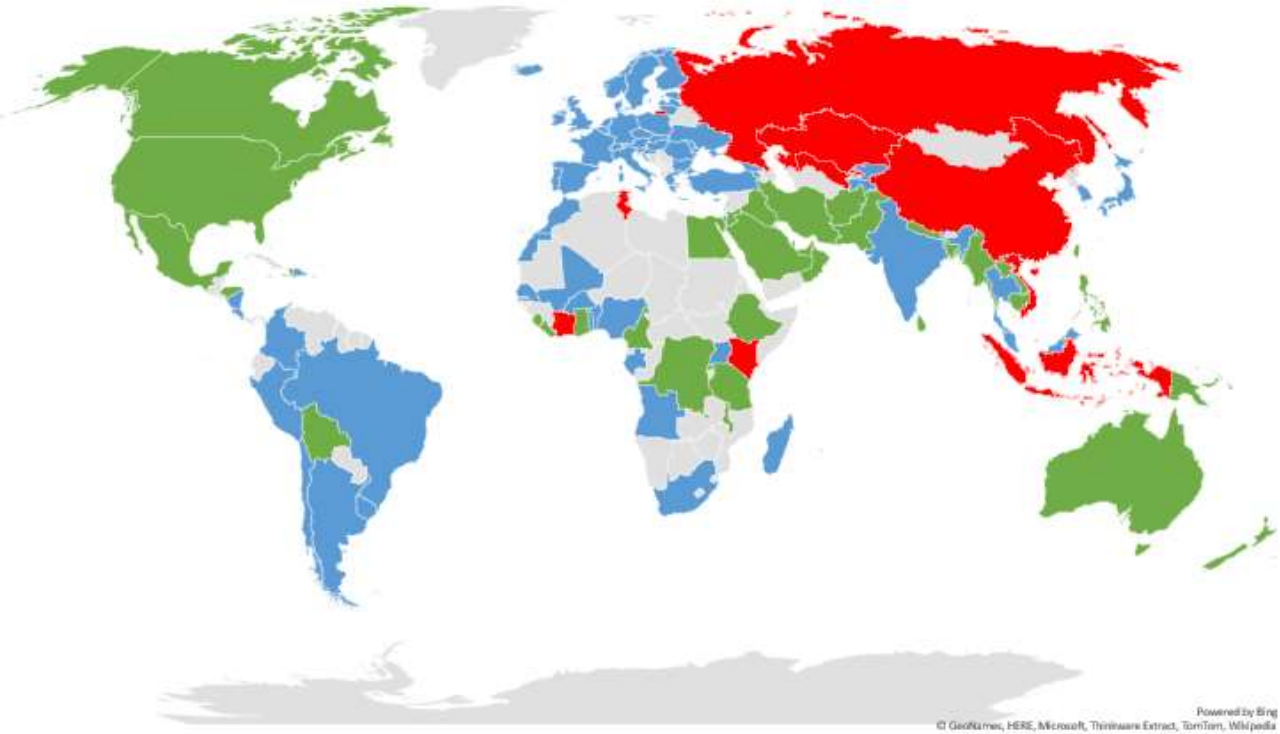
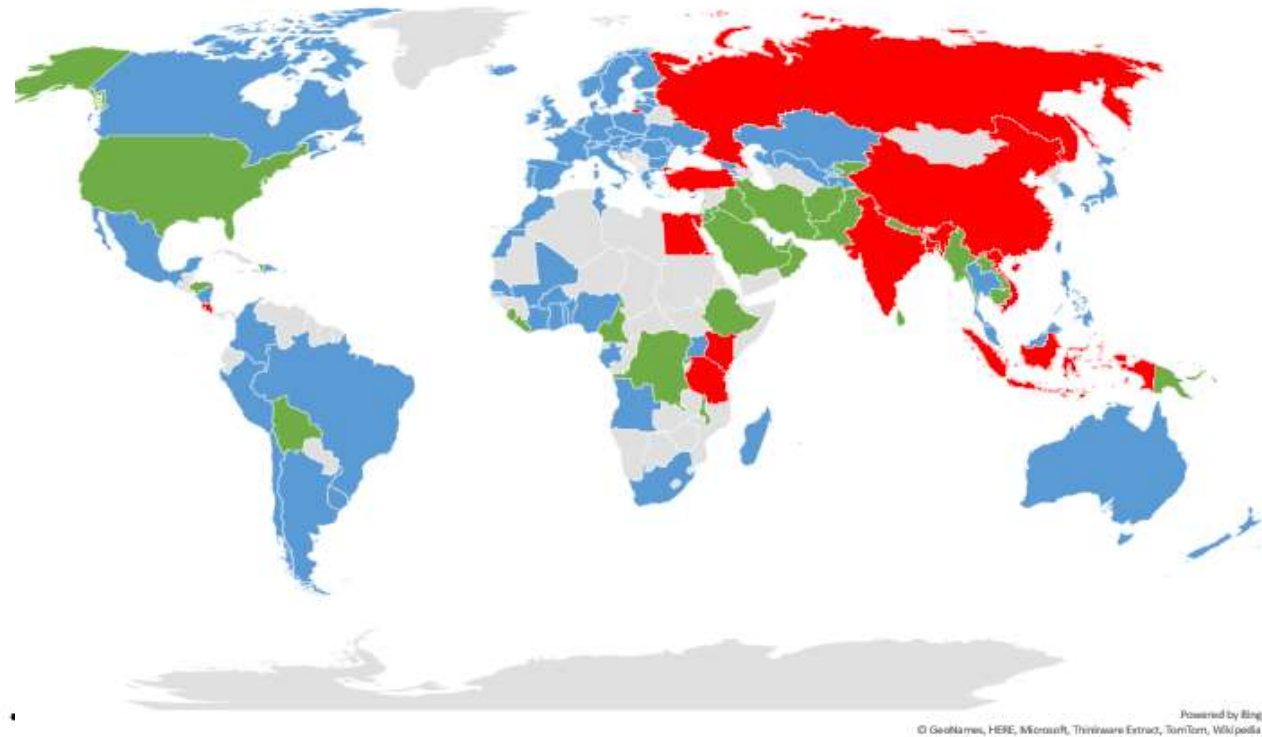


Figure 2: World map showing the three data models for the domestic data processing (DR) component (2019)¶





# Convergence of different regimes ?

- US: TikTok & WeChat
- EU: no adequacy decision or data flow & localization provisions in the Vietnam FTA
- China: RCEP & Hainan FTP



**Thank You!**

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