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

Submitted by: Singapore Management University
Data Sovereignty and Trade Agreements: Nailing Jello to the Wall?

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”

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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

<table>
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<th>Free flow of data</th>
<th>Prohibition on data localization</th>
<th>Data Sovereignty Regime</th>
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</thead>
<tbody>
<tr>
<td><strong>US</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Firm Sovereignty</td>
</tr>
<tr>
<td><strong>China</strong></td>
<td>No</td>
<td>No</td>
<td>State Sovereignty</td>
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<tr>
<td><strong>EU</strong></td>
<td>Yes, but</td>
<td>No, but</td>
<td>Individual Sovereignty</td>
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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

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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

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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

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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

<table>
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<tr>
<th>Key: Cyber sovereignty</th>
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<tbody>
<tr>
<td>Censorship: no free flow of info</td>
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<td>Privacy: no law until 2009, remains weak</td>
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<td>Data localization requirements: Cyber-security Law 2017</td>
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<tr>
<td>Trade agreements: KOR &amp; AUS</td>
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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 (DP) 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!