



A Tension Between Free Flows of Data and Protection of Privacy in Digital Trade

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Abstract: While the free flows of data across borders are a pre-condition for free international digital trade, restrictions are still allowed to be imposed on the movements of data out of various concerns such as the most used, privacy protection. This article clarifies current rules in the multilateral system (the World Trade Organisation) regarding to dealing with these two goals, and evaluates its functions.

Keywords: Data flow; Privacy protection; WTO; RTAs

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1 Introduction

As digital trade develops and contributes ever more to the global economy, its importance increases^[1]. Since it constitutes a new form of trade delivered via electronic means that differ from the traditional ways in which goods and services are traded, it is still to be evaluated whether the existing rules can sufficiently regulate digital trade^[2]. Digital trade poses great challenges to current economic rules both at the international level and at the domestic level. The liberalisation of digital trade is a goal of the WTO (World Trade Organisation)^[3]. But this cannot be achieved without free cross-border flow, as the free flow of data is a pre-condition for digital trade^[4]. However, since there are certain concerns relating to cross-border data flow, some states hold different views regarding its free flow and have implemented restrictive regulations^[5]. Data privacy protection is the major concern^[6]. As states have different data

protection standards, some have moved to increase the requirements of cross-border data flow and even blocked it, thereby preventing the achievement of free-flowing digital trade^[7]. In this sense, there is an internal tension between the free flow of data across borders and data privacy protection^[8].

We will discuss the tension between the two rationales, and respectively inspect the current rules regarding the two concerns under the WTO regime, Regional Trade Agreements (RTAs) to evaluate how effective these approaches are for coordinating this tension.

2 The importance of free flow of data in digital trade

It is not an overstatement to say that the free flow of data is a pre-condition of cross-border digital trade since the degree of digital trade liberalisation depends on the level of freedom that data flows are permitted to cross borders^[9]. The free flow of data is not only of theoretical importance, but also has greatly economic impacts. The movements of data across of states is of growing importance to international trade^[10]. This is evidenced by the increasing share of international trade accounted for by data flows, and his is a trend that is certain to continue into the future^[11].

Nevertheless, data restrictions are still allowed to be imposed basing on some reasonable and legal reasons, this will be discussed in the next part.

3 Protection of Privacy and Regulatory Autonomy

3.1 Privacy protection as a reason for regulatory autonomy

Domestic regulatory autonomy is part of the

conception of national sovereignty, which is multifaceted and can be interpreted in a number of ways^[12]. Given that states have the right of regulatory autonomy, they may need to regulate the cross-border flows of data via digital trade for several reasons^[13]. Scholars have identified that these reasons include but are not limited to privacy protection, cybersecurity, and consumer rights^[14]. Of these, the most common rationale for data flow restriction measures is privacy protection or personal information protection^[15].

From a domestic perspective, personal data, or information privacy, needs to be protected by governments^[16]. As discussed above, we are currently in an era when digital trade is contributing more and more to the international economy. With the large amount of data generated by digital trade, individuals are becoming more concerned about the ways by which their personal information is being used^[17]. In the traditional trade forms, one of the parties to the trade usually obtains personal information from individuals with their consent^[18]. In the era of digital trade, most individuals are not informed about how the other party in the trade uses their online personal information. In most cases, these individuals do not understand that “free services” are not free, and that they actually use the service in exchange for providing data that the other party can use^[19]. Some scholars have argued that personal information is a form of property that should be controlled by its owner^[20]. Therefore, the use of this information with no consent by a party to a trade creates a new challenge for domestic civil rights. In this scenario, states are obligated to take measures to protect civil rights. In this scenario, the states have the obligation to take measures to protect civil rights^[21]. The regulation of personal information was originally designed to protect the right of information privacy and prevent the improper use of personal information^[22]. This is based on the regulatory autonomy of states and can be considered to be reasonable and legitimate because a democratic government is responsible for the welfare of its citizens^[23]. But, it cannot be ignored that data restriction measures are still existed based some legal reasons that will be discussed in next part.

3.2 Privacy protection measures and the restrictions on data flow

On the one hand, as discussed above, according to the rationale of regulatory autonomy, states both have

the right to and are required to decide on privacy protection regulations for personal information protection in the digital trade. On the other hand, there is an internal tension between the trade liberalization and domestic regulation.

Based on feedback from entities in international digital trade, privacy protection was becoming a kind of barriers to digital trade^[24]. The ways in which privacy protection blocks the free flow of data are complex. As some scholars have pointed out, approximately 58% of countries have taken or are in the process of taking measures to establishing data protection laws^[25], although many developing countries still do not have relevant data protection or privacy protection laws in place^[26]. Hence, different countries have different levels of data protection regulations.

However, higher standards for privacy protection do not necessarily create barriers to the flow of data. What actually hinders data flow is different privacy protection standards in different countries^[27]. The problem lies in incompatible regulatory approaches. The reason for regulating data flow for privacy protection, and methods of achieving the goal can be influenced by their ‘culture, legal evolution, and especially constitutional norms’^[28]. In addition, differing concepts of privacy or personal data can affect the methods used^[29]. If there are differences in personal data protection regulations, the cost of international digital trade will increase since each party in digital trade has to adjust their actions and standards to stay in line with other countries’ regulations^[30].

‘Divergent approaches to data privacy’, including those that are strict and those that are not strict enough, objectively disrupt the free flow of data and digital trade^[31]. In addition to the situation where standard differences in privacy protection regulations naturally obstruct the free flow of data, there are also disguised measures for protecting domestic digital trade based on the excuse of privacy protection, which are actually data restrictions. The latter is particularly harmful to the liberalisation of digital trade^[32].

3.3 WTO rules for privacy protection in digital trade

Proposals circulated by members of the WTO reflect their concerns about regulatory issues^[33] in E-Commerce^[34]. Some WTO members^[35] have

insisted on adopting an ‘interventionist approach’ regarding data flows to safeguard the public interests. By contrast, the US and Japan only support ‘transparent and effective’ measures that ensure a secure environment for commercial activities to protect consumers from ‘fraudulent and deceptive commercial practices’^[36].

Although WTO members have acted on the contentious issue of privacy protection, the WTO's actual rules lag behind. The existing WTO rules that can be interpreted as protecting privacy are the exception rule in GATS^[37]. The GATS exceptions do not prevent members from adopting special standards for privacy protection. Instead, they allow members to deviate from GATS obligations when there is a need to adopt measures to achieve compliance with domestic privacy protection laws^[38]. However, the GATS rules do not support the states’ rights to regulatory autonomy without any qualification. It is crucial that the “necessity” requirement is met in order to use this article. The general requirements of Article XIV should be examined, the importance of the objective pursued and its contribution to achieving the objectives pursued should also be assessed^[39]. Based on this point, it is clear that the WTO recognizes and acknowledges the importance of national regulation for privacy protection.

As described above, a robust privacy protection regime provides a healthy environment for the development of digital trade. However, the WTO cannot ensure that each of its members this kind of robust legal regime; instead, it merely acknowledges the right of regulatory autonomy to implement data restrictions that violate the basic principles of the GATS to ensure privacy protection^[40]. Since the WTO cannot provide detailed standards for its members to implement privacy protection, whether a country’s privacy protection measures satisfy the original purpose of the exception rule in Article XIV(c) (ii) is basically dependent on the country's actions, hence the effectiveness of Article XIV(c) (ii) is limited. Furthermore, in the exception rules of GATT and the TBT Agreement, there is no clear expression of nor connection to privacy protection in digital trade, and interpretations using exception rules for privacy protection may be very confusing.

As digital trade has rapidly emerged and developed around the world, problems relating to regulating international digital trade have also emerged. The

liberalization of international digital trade is the end goal of a multilateral system. This goal cannot be achieved without the free flow of data across borders. Restrictions on flow of data arise from some concerns include data privacy protection. Data privacy protection is from states’ regulatory autonomy and from this perspective, it is reasonable to put restrictions on it. However, it also objectively blocks or restricts the flow of data, especially when data privacy protection is used as an excuse to protect domestic industries. Unfortunately, while different states have different regulations for data privacy protection, WTO exception rules and related rules have failed to provide a reasonable standard for privacy protection in international digital trade.

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