

WTO E-commerce Negotiations: A Path to the Multilateral Digital Trade Rules

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Abstract: A sustainable digital market hinges on digital trade rules. Yet, these rules, currently dispersed across various Regional Trade Agreements, and the conventional trade agreements of the WTO can barely align with the rapid growth of digital trade. In 2019, the WTO Plurilateral negotiation on E-commerce opened a new avenue for a multilateral digital trade agreement. This study compares three typical templates of digital trade rule within RTAs and analyzes proposals from developed and developing economies in WTO e-commerce negotiation. It seeks to reveal and resolve critical challenges in forming multilateral digital trade agreements, including concept confusion, the digital divide, and differences in regulatory requirements of data. With the opportunities presented by the WTO's E-commerce negotiations, each party shall focus on defining related concepts of digital trade to ensure clarity, incorporate discussions on technical assistance for LDCs to guarantee digital equality, engage proactively in plurilateral negotiations on data flow security and personal information protection, to formulate digital trade rules that address the regulatory concerns of all parties.

Keywords: Digital Trade Rules, WTO E-Commerce, WTO Plurilateral Negotiation, Cross Border Data flow, Data Localization

1. Introduction

According to the *G20 Digital Economic Development and Cooperation Initiative*, information and communication technology is an essential prerequisite for digital trade, digital trade relies on digitized information to produce, and uses information and communication technology as efficient transactional mediums [1]. Data stands as the crucial component of digital trade, and the sustainable digital market hinges on digital trade rules.

However, there exists a huge divide between developed economies and developing economies. Without a global digital trade agreement within the WTO legal framework, digital trade rules manifest a “scattered nature” [2] within RTAs. Furthermore, member states lack a consensus on “digital trade”, and WTO-law struggle to effectively regulate it. The WTO Plurilateral Negotiation on E-Commerce initiated in 2019 appeared to shed new light on achieving consensus on digital trade rules. Nevertheless, member states hold different positions on data flow, data localization, and data privacy. There is still a long way to go in establishing a global digital economy and trade framework.

This study aims to conduct a comparative analysis to examine the three typical templates of digital trade rules, along with the proposals from both developed and developing countries in the WTO E-

Commerce Negotiation. It shows the primary challenges in data regulation and explores how to establish a framework of digital economy and trade rules within the WTO.

2. Digital Trade Rules in RTAs

Given the slow progress of the WTO E-Commerce Work Program, RTAs have emerged as a new platform for digital trade rules. Countries are gradually shifting their focus to formulating RTAs to meet their requirements [3]. Based on different interests in digital trade, Aaronson and Leblond categorize today's digital trade rules into three realms: the American realm, the European Union realm, and the Chinese realm [4]. However, because China and other developing countries signed the Regional Comprehensive Economic Partnership (RCEP) showing similar attitudes toward digital trade, they expressed their inclination to regulate cross-border data flows and set data localization through domestic law. Therefore, these can be defined as templates for developing countries.

2.1. American Templates

Due to Americans' significant advantages in information technology and the digital industry [5], the pursuit of high-level, comprehensive data flow plays an immeasurable role in its digital market [6]. Therefore, the American template uses the "principles + exceptions" [7], advocating data transfer freely, opposing mandatory data localization as principles, and setting limited exception clauses.

In 2007, the United States signed the U.S.-Korea Free Trade Agreement (KORUS), introducing the principle of highlighting the significance of enabling the data free flow. It also set requirements for protecting personal information and prohibiting the imposition of unnecessary barriers to data flows [8]. In 2015, the United States signed the Trans-Pacific Agreement (TPP), which served as the cornerstone for subsequent American digital trade templates. In Chapter 14, the United States outlines precise principles of ensuring data free flow and opposes mandatory data localization. It also defines legitimate regulatory requirements and public policy objectives as exemptions based on the premise that domestic regulators should not unjustifiably discriminate, or apply unnecessary restrictions [9]. In terms of personal information protection, TPP, compared to KORUS FTA, presents more detailed obligations for all parties.

The United States-Mexico-Canada Agreement (USMCA) hues closely to the E-commerce provisions of TPP and strengthens the principle of cross-border data transfer freely [10]. In Chapter 19, the USMCA eliminates exceptions for data free flow and data localization. Additionally, it provides more specific provisions regarding personal information protection, mandating that each party establish a set of rules for safeguarding the confidentiality of private data under the principles of the APEC Privacy Frameworks and OECD privacy guidelines [11].

2.2. EU Templates

According to the three RTAs that the EU signed with Korea (KORUS), Canada (CETA), and Japan (EPA), the EU's concept of digital trade advocates for the free flow of data while emphasizing the protection of data privacy [12]. KOREU stipulates a comprehensive domestic legal framework shall be established for the protection of personal data [13]. Both CETA and the EPA mention that ensuring the privacy of individuals in the context of processing and sharing personal data shall not constitute an obstacle to hinder the adoption or enforcement of cross-border data free flow [14, 15].

2.3. Developing Countries' Templates

China's domestic laws reflect a highly conservative stance on data flow and digital trade. The Cybersecurity Law stipulates the review of critical data for cross-border transfer and introduces data

localization. However, considering its own need for digital trade, China signed the RCEP in 2020. Within the RCEP, there are other Asian developing countries with similarly cautious attitudes in digital trade. RCEP effectively accommodates differences in digital economic and regulatory requirements among its parties [16]. The RCEP advocates for the free flow of data while establishing legitimate public policy objectives and essential security interests as exemptions. Regarding the location of computing facilities, the RCEP grants each party discretionary power to determine the localization of computing facilities based on regulatory requirements for national security [17].

3. WTO's Progress in a Multilateral Digital Trade Agreement

WTO's first attempt to establish a global legal framework for digital trade dates back to 1998 with the launch of the WTO Work Program on E-Commerce. However, compared to the progress of RTAs, WTO has been notably slow due to the stagnation of the Doha Round. In 2017, WTO members issued a Joint Statement Initiative on Electronic Commerce (JSI), expressing their intention to establish digital trade rules through plurilateral negotiations [18]. The negotiations formally commenced in 2019. Differences in member states' interests led to significant disagreements concerning data flow and data localization issues. The proposals submitted by countries align with their interests as reflected in the RTAs they signed.

The United States, in its proposal, reaffirmed its commitment to developing new rules for digital trade. It argued that the definition of "electronic commerce" is too narrow and advocated the term "digital trade" instead. It stressed that there should be no restrictions on data flow for business purposes and no additional measures for data localization. However, it also introduced the public policy objective as an exemption at the same time [19]. The European Union also encouraged the transborder data flow without barriers and expressed disapproval of data localization and the requirement for domestic computing facilities as a condition for data flow. Moreover, it specified that members may adopt suitable measures to protect data privacy [20].

Among the group of developing countries, China's proposal emphasized clarifying the definitions of "e-commerce" and "digital trade". Due to its emphasis on cyber security and data sovereignty, China believed that data flow and data localization need careful consideration [21]. India, Indonesia, and South Africa resisted digital trade, believing that the liberalization of digital trade would have a detrimental impact on their national economies [22]. India and South Africa did not join the multilateral negotiations and were absent from the Joint Statement. Nevertheless, they jointly submitted a proposal to restate their disapproval of establishing a general framework for digital trade [23].

4. Challenges for Establishing a Multilateral Digital Trade Agreement

The objective of plurilateral negotiation is to establish universal legal frameworks for global digital trade, providing a basis for addressing disputes. However, this is not an overnight achievement. In the face of worldwide disparities in digital economics, plurilateral negotiations inevitably face a long and challenging path. Based on the analysis of the three templates of digital trade and a review of proposals, the primary challenges in establishing multilateral digital trade rules become evident.

4.1. Conceptual Ambiguity in "Digital Trade"

The first challenge pertains to the concept of "digital trade" for which there remains no consensus. The United States, in KORUS and TPP, picks the term "electronic commerce" to denote the digitized exchange of goods or services. However, in USMCA it opts for the term "digital trade". In its proposals for WTO plurilateral negotiations, it suggested replacing "electronic commerce" with "digital trade". On the other hand, the European Union consistently uses "electronic commerce" in

KOREU, EPA, and CETA. Similarly, in RCEP, the term used is “electronic commerce”. In WTO plurilateral negotiations on E-Commerce, both “electronic commerce” and “digital trade” are used interchangeably, as there is no clear distinction between these two terms. To ensure clarity in the rules, the next phase of WTO negotiations should focus on defining “digital trade”, “trade-related electronic commerce”, and other related concepts, while determining the applicability of digital trade rules.

4.2. Digital Divide

According to the Digital Economy Report 2021, data flows are primarily concentrated between North America and Europe, as well as North America and Asia, which means a significant digital divide prevalent in most developing countries [24]. Whether the Digital Economy Report or the proposals of the WTO Plurilateral Negotiation on E-Commerce, it becomes evident that many least developed countries (LDCs) are yet to develop a digital economy. In fact, only three LDCs were participating in the WTO E-commerce negotiations, Chad was the only representative among all the LDCs to submit a joint proposal [25]. On one hand, the digital divide reflects digital inequality, where LDCs and other developing countries have limited access to the digital market due to economic and infrastructure constraints. On the other hand, the digital divide hinders the sustainable development of the global digital market. According to the Digital Economy Report 2021, while the ASEAN countries may lag behind in terms of the digital economy, they possess significant potential. Thanks to their vast user base, the ASEAN countries are expected to experience the fastest growth in global internet users, this also presents an opportunity for the ASEAN countries to experience a substantial surge in the volume of digital trade. Therefore, it is beneficial to bridge the digital divide through infrastructure and technical assistance, helping LDCs and developing countries, and expanding consumer participation in the global digital market. In the course of multilateral negotiations, the WTO should consider incorporating discussions on technical assistance for LDCs and other developing countries and should prioritize the sustainable development of the digital economy.

4.3. Differences in Data Regulatory Requirements

Because the landscape of digital economics varies from country to country, their interests and objectives in digital trade also differ. The United States, with its comparative advantages in digitalized service industries [26], places significant importance on the free flow of data, which is crucial for many sectors of its economy. However, developing countries must weigh the impacts on their domestic market, and the concerns about national security and personal privacy arising from data flows. These different interests have led to the proliferation of RTAs, serving as platforms for countries to promote their specific interests in digital trade markets. However, the scattered nature of RTAs can potentially exacerbate the digital divide between developed and developing economies, leaving member states frustrated with the slow progress of WTO plurilateral negotiations.

A multilateral agreement under the WTO framework could adopt a “principles + exceptions” model, similar to the TPP and the RCEP. This model allows for exceptions based on national security and the protection of personal information. It does not mandate data localization as the essential precondition for data flow but allows countries to implement appropriate measures for data localization based on public policy objectives. This approach would provide member states with flexibility to align with their situations and specific interests.

5. Conclusion

This study reveals the primary challenges in establishing multilateral digital trade framework and proposed corresponding measures. The global economic disparities, diverse interests among countries in digital trade, and the slow progress of WTO Plurilateral Negotiations led to the proliferation of

RTAs tailored to each country's interests. Consequently, this situation results in the fragmentation of digital trade rules and exacerbates the digital divide. Moreover, member states' different stances in the WTO plurilateral negotiation increase the complexity of establishing a multilateral digital trade agreement. In light of these circumstances, WTO members should actively participate in multilateral negotiations aimed at clarifying definitions related to digital trade, permitting justifiable exemptions for national security and personal information protection concerning data flow and digital localization. Furthermore, WTO E-commerce negotiations should encompass discussions for infrastructure and technical assistance to support the growth of developing economies.

Due to limitations in length, this research primarily focuses on data regulation and governance, leaving other topics within the scope of E-commerce negotiation, such as source code and algorithm regulation, digital taxation, and internet access, unexplored. Thus, future work can be conducted on the remaining topics. Additionally, the WTO E-Commerce Work Program is still ongoing, it is expected that WTO's efforts may delve into how to establish a multilateral digital trade agreement. Therefore, future research should align with the work program, focusing on the measure to establish a multilateral digital trade agreement, and comparative studies should be conducted between this agreement and the three traditional WTO trade agreements.

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