

# ***Dilemmas and Responses to China's Cross-border Digital Trade Rules under the Perspective of the Personal Information Protection Law of the People's Republic of China***

**Shujin Wang<sup>1,a,\*</sup>**

<sup>1</sup>*East China University of Political Science and Law, Shanghai, 201620, China*

*a. 202125010135@ecupl.edu.cn*

*\*corresponding author*

**Abstract:** The international community has not been able to reach agreement on digital trade rules due to the different choices of value positions and divergent economic interests. The chapter on "Rules on the cross-border provision of personal information" in the Personal Information Protection Law of the Republic of China provides the basic framework for restricting and regulating cross-border data flows in China. It reflects China's value orientation of attaching importance to digital sovereignty and security. The country's determination to further integrate into world trade and compete internationally for economic benefits and political status. However, the current rules in the Personal Information Protection Law still have unclear standards, excessive restrictions and conflicts with other laws and regulations. Due to the conservative values of China, there are many rules that are not compatible with the CPTPP rules. It is necessary to interpret Chapter 13 of the Personal Information Protection Law and the general rules, and complete the alignment of several laws and regulations based on the relationship between higher and lower laws and special and general laws. Meanwhile, it is also necessary to refine the specific standards for data flow in practice, so as to finally realize the alignment with the CPTPP.

**Keywords:** digital trade, personal information protection law, CPTPP

## **1. Introduction**

With the rapid growth of the internet, cross-border digital trade has developed rapidly due to its lower cost and faster flow. The Digital Economy Report 2019 released by the United Nations states that global exports of communication technology services and digitally deliverable services have grown much faster than overall services exports over the past decade, with the size of the digital economy estimated at between 4.5% and 15.5% of world gross domestic product [1]. For countries, facilitating the free flow of data can significantly improve the efficiency of cross-border trade and reduce its costs, thereby gain more financial benefits. Besides, information providers face the risk of privacy leakage and inappropriate use of information in the process of information flow, so countries in turn need to adopt international rules to restrict and regulate the cross-border flow of information in export trade.

However, there is no international consensus on cross-border digital trade rules today. Negotiations and practices on digital trade rules have been repeatedly frustrated by the wide divergence in

value choices among countries. For example, the US and the EU, as the mature players in the digital economy, have been unable to reach a common view on standards for cross-border data flows due to their different emphasis on the values of free flow of data and data security protection. On July 2020, EU court held that the US-EU Privacy Shield Agreement between the US and the EU could not prevent the US from freely accessing and misusing personal data. At the same time, it cannot prevent the investigations against non-US citizens from US intelligence agencies. The US-EU Privacy Shield Agreement between the EU and the US is therefore null and void. This is a reflection of the current divisions in the international community.

In this context, China's participation in international economic cooperation and competition, along with the development of its own digital trade and services requires a clear national position. On 1st November 2021, the Personal Information Protection Law of the People's Republic of China (hereinafter referred to as the Personal Information Protection Law) was promulgated and implemented, with a particular chapter dedicated to regulating the cross-border provision of personal information across borders, perfecting China's digital trade rules. However, in the interpretation and practice of the rules, there are still some parts that do not match with some international rules, especially the CPTPP rules, causing some difficulties in China's digital economy development. China has applied to join the CPTPP for its quest of further openness and economic exchanges. Thus, how to eliminate the contradictions between China's digital trade rules and international rules, how to achieve a balance between the free flow of data and data security protection requires the interpretation of the Personal Information Protection Law and other laws related to digital trade.

Before the introduction of the Personal Information Protection Law, scholars focused on the dilemma China faced in digital trade at the level of values rather than the setting of specific rules, and mainly explored the setting of cross-border digital trade rules in the EU countries and the US. Scholars have discussed the underlying values of digital trade rules more adequately, but compared with the EU and the US, there is no unified opinion among scholars on what kind of attitude China holds in this value choice. Some scholars believes that due to the vague definition of our privacy laws and insufficient legislation on cross-border digital flows, the cross-border flow of data in China is too free and has even reached a level that threatens national data sovereignty [2], while other scholars hold the opposite view. They argue that our legislative attitude is conservative and the excessive, focus too much on data localisation creating trade barriers, which is not conducive to our participation in international competition [3]. This inconformity has a direct impact on the interpretation of the relevant rules. At the same time, scholars have also pointed out the problems of many laws and regulations before the Personal Information Protection Law was introduced, and have proposed solutions based on the idea of legislative theory [4].

This article focuses on the chapter on rules for cross-border provision of personal information in the Personal Information Protection Law. Based on China's value choice in cross-border digital trade, this article will also discuss the differences between China's cross-border digital trade rule system and international trade rules, especially the CPTPP. The following of this article will mainly be involving three aspects of digital cross-border flow licensing standards, data content review scope and standards and data localization storage requirements. Furthermore, it will also point out the shortcoming of the Personal Information Protection Law, the Cybersecurity Law of the PRC and other laws and regulations regarding cross-border digital trade rules. Finally, this article's purpose is to solute and response to China's further improve, and to interpret and practice digital trade rules based on the need to interface with the CPTPP.

## 2. The Dilemma of China's Cross-border Digital Trade Rules

### 2.1. Inadequacy of the Digital Trade Regulation in the Personal Information Protection Law of People's Republic of China

The Personal Information Protection Law, as a basic law in regulating personal information processing and storage, provides more comprehensive regulations on cross-border digital trade. Meanwhile, rules on cross-border digital flows are also scattered in laws and regulations. However, there are some shortcomings in the relevant rules, which have hindered the practice of cross-border digital trade in China. Moreover, there are three perspectives of difficulties and shortcomings in law's application and interpretation due to partial conflict issues between various laws and regulations [5].

**Unclear standards and insufficient practicability.** In the area of cross-border digital trade, the standards of the cross-border provision of data in China's legislation are vague and ambiguous, and in practice there are instances where data flows are unduly restricted and trade barriers are raised. In details, according to Article 38 of the Personal Information Protection Law, personal information processors who need to provide personal information outside of China should pass a security assessment organized by the national cyberspace administration. However, the legislation does not go on to break down the standards for handling general information and important data. Moreover, in practice there is no unified conclusion on how to determine whether the processing and storage of personal information is legal. At the same time, there is no clearly definition of what data is sensitive and important and whether all of the data should be restricted from flowing [6]. While the Measure for Security Assessment of Personal Information Situation, which involves specific rules, is still at the stage of consultation draft, making the current rules for cross-border digital flow practically insufficient. Plus, current rules process varies from place to place, which will lead to undue restriction on digital flow, thus suppressing the incentive for enterprises to innovate and failing to meet the needs of the development of the digital economy.

**Too much restriction which increase trade costs.** According to Article 38 and Article 40 of the Personal Information Protection Law, personal information needs to be approved by or endorsed by the national cyberspace administration to leave the country, and must meet the requirements for localised storage. This rule would result in excessive restrictions on cross-border trade. Firstly, China does not have a hierarchy of data management. If the same "one by one" prior review is adopted to both general data and important data, it will significantly increase the cost of trade, which is not conducive to the development of the digital economy. Secondly, more and more new trade services have emerged in the area of big data and network information technology [7]. Under such circumstances, it is difficult for the national cyberspace administration to confirm the needs of many data flows one by one, coupled with the fact that it has not issued a standard contract stipulating the rights and obligations of the recipient outside the country, which will lead to low efficiency of its review and limit the development of cross-border trade [1]. Thirdly, China's regulations on localised data storage are crudely formulated and in practice may restrict the flow of data more than necessary of protecting national security and personal privacy. Finally, China's content review of cross-border digital products is relatively strict. According to Article 15 of Administrative Measure for Internet Information Services, the content of digital products that personal information service providers are not allowed to use and provide is relatively broad, and the interpretation of the underwriting clause is not sufficient. In practice, this may result in excessive restrictions on the inflow of digital information, leading to a reluctance to export advanced digital.

**Inability to interface with other laws and regulations.** The partial conflict between China's Personal Information Protection Law and other laws and regulations has also indirectly led to confusion in practice. For example, in terms of data exit criteria, personal information that meets the relevant requirements of Article 40 of the Personal Information Protection Law can be provided across borders without hindrance. However, the exit of some data is prohibited according to the regulatory requirements of special industry in laws and regulations such as the Chinese Copyright Law. These conflicting laws and regulations are not conducive to the cross-border trade with other countries.

## 2.2. Conflict between the Personal Information Protection Law of the People's Republic of China and CPTPP

In September 2021, China formally applied to join the CPTPP. However, China's stance choice is more conservative, while the CPTPP favours a position of free flow of data, there are many incompatibilities between the two, which also lead to many obstacles to China's accession to the CPTPP.

**Digital cross-border mobility licensing standards.** There are significant differences between our standards and those of the CPTPP in relation to the licensing of digital cross-border flows. According to Article 14.11(2) and (3) of the CPTPP, the CPTPP adopts a model of positive permission and exceptional restrictions. In details, each party may restrict the electronic transmission of information across borders only for the purpose of achieving legitimate public policy objectives without constituting arbitrary or unreasonable discrimination and trade restrictions. Plus, the means of restriction must comply with the principle of proportionality and must not exceed the limits necessary to achieve the objectives. In contrast, as mentioned above, China's Personal Information Protection Law adopts a model of exception permission. The cross-border flow of personal information is only permitted with the approval of the national cyberspace administration.

**Scope and standards of data content review.** In terms of the scope and standards of data content review, China also differs from the CPTPP rules. According to Article 14.4 of the CPTPP, parties are required to give non-discriminatory treatment to digital products provided by other parties, whereas under the Personal Information Protection Law, China requires the content of digital products to be reviewed before they can be displayed and disseminated.

## 3. Reason Analysis

### 3.1. Different Choice of Position in Cross-border Digital Trade Rules

As mentioned earlier, the inability of the international community to agree on the setting of rules for cross-border digital trade today stems from the dichotomy between two values is mainly reflected in the dichotomy between the US model and the European model of cross-border digital trade rules, with both economies vigorously promoting the positions and rules they support in the international community. Both models inevitably have certain shortcomings, and the choice of position made by China in this context has a direct impact on our digital trade norms, giving them corresponding advantages and disadvantages.

In today's international community, the United States has a more advanced and rapidly developing information industry, therefore prefers to reduce restrictions on digital trade flows in order to take advantage of its digital technology and further enhance its technological competitiveness. While Europe has traditionally attached importance to the protection of human rights, the right to personal information is fundamental human rights and requires comprehensive protection through law, which makes the EU pay particular attention to the protection of data security in cross-border digital flows [8].

The dilemma between the US and the EU in the choice of value of cross-border trade rules and their rules shows that "data protection", "free flow of data across borders" and "data protection autonomy of national governments" are not possible to achieve together [9]. The key to cross-border digital trade rules is balancing the two values as much as possible, while the constraining force of the trade rules themselves should be enhanced. Meanwhile, which value position our country has chosen directly affects the specific interpretation of our digital trade rules.

The article points out that from the perspective of the personal Information Protection Law, China has taken "data security" as its value orientation. For one thing, in accordance with Chapter 3 of China's Privacy Law, with regard to the flow of data, China lists the cross-border flow of data, it has been included in the security evaluation conducted by the national Internet information authority and verified by specialized agencies. Such a high level of regulation shows China's caution in the cross-border flow of information. Second, Article 40 of China's "PCT" stipulates that users must save their data locally, that is, users must keep their data in China. When they want to go to places outside China to obtain data, the security of their personal data should be their top priority when they go abroad, which also shows that China attaches great importance to the security of data [10]. For another, in bilateral and multilateral economic and trade consultations with other countries, China has repeatedly reiterated the security of personal information. For example, during the WTO talks on e-commerce, China took "information security" as a prerequisite and required the establishment of a network environment of "information security", "information reliability" and "information reliability". In addition, the China-Singapore Free Trade area Agreement and the China-Southeast Asian Association Free Trade area Agreement both mentioned that the parties concerned should formulate or maintain relevant provisions on the protection of users' privacy data, and should communicate on how to protect users' privacy data and data maintenance and related issues.

It is clear that in the area of cross-border digital trade, China's value position is more similar to that of the EU in that both place greater emphasis on data security protection. However, unlike the EU, China places more emphasis on data security and data sovereignty than on the protection of personal information and privacy.

In other words, China attaches greater importance to the public good than to private interests, which is also China's long-standing policy in domestic and abroad. This means that in the setting of specific rules, China is bound to give up some of the benefits of information flow for the sake of information security. This is an important factor in the dilemma of China's interface with the more liberal CPTPP.

### **3.2. Compared with Other Country, China Starts Digital Trade Technology Late**

Unlike European and American countries, China's Internet big data technology started late. Although foreign trade is at a rapid growth stage, it cannot be compared with countries with a long history of overseas trade, thus causing a shortage of existing rules.

Firstly, China's technology revolution started late and volume of digital enterprises is insufficient. This has led to a lack of participation in international digital trade and a weak voice in the field of digital trade rule-making, making it difficult for China to implement its own digital trade rules. 2022 data released by the Fortune 500 list of the world's top 500 companies shows that there are eight new companies on the list in China, and all eight of them are state-owned energy investment enterprises rather than new Internet companies. The profitability of these companies is low, less than half of that of US companies and far below the world average. In an international trade dominated by economic interests, China does not have an advantage, and in the field of digital trade, China lacks the ability to export its own rules to the outside world.

Secondly, the development of foreign trade in China started late and the relevant practices are insufficient to form detailed and perfect digital trade rules. Unlike Europe and the United States,

China did not join the WTO until 2000, and only applied to join the CPTPP last year, which shows that China's digital trade practice and rules negotiation experience is insufficient. According to the history of the formation of traditional international law, only with a large number of trade practices can the rules of conflict resolution be refined in practice. However, China has not participated in past trade practices, and can only draw on the rules of other countries to build the basic framework of China's trade rules. That situation also makes some of the rules too rough and vague, which cannot adapt to China's current needs and practices, and has also led to the problem of conflicting rules. At the same time, the lack of negotiation experience has also prevented China from promoting its ideas to the outside world, resulting in a lack of discourse in international rule-making.

Finally, due to its technological backwardness and lack of competitiveness in the digital economy, China is often attacked by other countries that are technologically advanced in the field of technology and trade. For one thing, other countries will use their advanced internet and AI technologies to steal our personal privacy and national security information, which seriously affects our digital sovereignty and security. For another, other countries will also take the opportunity to raise trade barriers to maintain their dominant position based on their trade surplus with China, which is detrimental to the development of our digital economy. Therefore, China has adopted stricter restrictive measures both to protect its national security and national privacy, and to counter discriminatory policies of other countries.

## 4. The Path to Improve China's Cross-border Digital Trade Rules

### 4.1. Domestic Level

**Implementing a data classification and grading regulatory system, detailing localized storage requirements.** The framework of a data grading system can be outlined by combining the Data Security Law and the Cybersecurity Law with the Personal Information Protection Law. Article 21 of the Data Security Law stipulates that all regions and departments should classify important data and general data according to different regions and industries. At the same time, it provides key protection for important data, while a stricter management system should be implemented for national core data related to national security, including political and economic security, as well as the safety and interest of people. Accordingly, it can be seen that China divides the data handled by data processors into general data, important data and core data, and has set different levels of regulatory measures for the three of them.

In combination with Article 38 of the Personal Information Protection Law, when handling general information, in principle, the data processors are not required to localized storage of data and only need to follow the general provisions covered in Chapter one, regarding the handling of personal information. In addition, in accordance with Article 40, it is clear that the requirements for core data and important data in terms of exit have always been that data processors should store data within China when handling important data, and those who really need to provide it outside China for business purposes should pass the security assessment [11]. This hierarchical management system has been promoted in practice. For example, the Administrative Measure for Data Security in the Field of Industry and Information Technology (for Trial Implementation), Articles 9, 10 and 11 set out the criteria for distinguishing between general data, important data and core data in the industrial sector in a refined manner. Article 21 specifically provides for localised storage requirements for important data and core data. This realises the interface with the CPTPP rules. Under the legitimate public policy objective of safeguarding national security, China restricts the exit and storage of some important data and core data. However, for general data it is only necessary to pass a security assessment, information processor can transfer information abroad freely by just passing professional certification or enter into a contract. At the same time, Article 41 of the Personal Information Protection Law also

provides that the competent authority. The Internet information department, may handle requests from foreign judicial or law enforcement agencies to provide personal information stored in the country based on their requests and the principle of equal reciprocity. This policy will not only block the long-arm jurisdiction exercised by foreign agencies over information processors and information providers in the country, but also completes the alignment with international treaties and agreements.

**Alignment of the Personal Information Protection Law with other relevant rules.** Improving China's digital trade rules should begin with a shift in value stance. The excessive focus on data security in the past has already led to shortcomings in the innovation of China's foreign trade and bring up the international dissatisfaction.

Based on the above-mentioned data hierarchy, it is also possible to explain the conflict between the Personal Information Protection Law and other rules. In accordance with the general jurisprudence principle that special laws take precedence over general laws, laws and regulations in specific areas which contain special restrictions on the cross-border flow of data, should be part of the refinement and special provisions of the content of the Personal Information Protection Law and should take precedence over the application of the Personal Information Protection Law

In the opinion of this article, this special restriction does not conflict with the CPTPP rules either, because map data and some industrial data may be core data or important data, which are closely related to national security and national economic development. Therefore, the restriction on their transfer outside the country is in line with the exceptions in Article 14.11(3) and 14.14(3) of the CPTPP. The CPTPP does not completely reject restrictions on cross-border digital transfers, as long as the measure is in line with the principle of proportionality. The requirement for localised storage and security assessment of core and important data is a necessary tool to achieve the objective.

## 4.2. International Level

**Aligning with international rules and limiting the application of basic security exceptions by the principle of proportionality.** While the CPTPP allows for restrictions on cross-border data flows based on legitimate security policy objectives, China should not overextend the application of this defense. According to Articles 5 and 6 of the Personal Information Protection Law, it is clear that information processors should follow the principles of lawfulness, propriety, necessity and good faith in processing personal information, and are required to comply with the principle of proportionality. Therefore, when information processing subjects outside of China handle general information, they should be allowed to freely transmit and store the information as long as the requirements of the above-mentioned principles are met. China should strictly limit the application of the basic security exception to important data and core data that are explicitly provided for in laws and regulations. Also, China should appropriately relax the storage requirements for important data in the future, so as to attract more high-tech digital enterprises to flow to China. This will improve China's digital industry chain and give play to its foreign trade advantages. Plus, China should restrict the application of basic security exceptions in international trade. For example, US has abused the basic security exceptions to implement discriminatory policies in order to restrict the development of Chinese enterprises in recent TikTok case. China should actively clarify its interpretation of international rules through international arbitration and promote its position on the rules in concrete cases and practice.

**Develop Bilateral and multilateral cooperation and active participation in the formulation of uniform rules.** China should actively promote its digital trade model in the international community, explaining the rationality and innovation of the system under the position that China attaches im-

portance to digital sovereignty and security. At the same time China can also participate in the formulation of unified rules, so as to have a greater voice in the international community and thus gain more and wider digital trade opportunities.

In addition to the application to join the CPTPP and DEPA, there are currently several other FTAs under negotiation and study in China. Under such circumstances, China should analyse the specific demands of bilateral and multilateral trade partners and formulate different negotiation plans [5]. When dealing with companies that have illegally obtained personal information from other countries, China should adhere to the bottom line of reviewing important data and core data out of the country, and appropriately give up some of its commercial interests. At the same time, China should make use of its own trade advantages, fight for comparative advantages and use the technological advantages of digital enterprises as a bargaining chip in order to win policy relaxation from other countries [12].

Finally, China should actively promote "Chinese solutions" for cross-border security flows in mechanisms led by China, such as the "One Belt, One Road", to lay the foundation for enhancing China's discourse in international rule-making [13]. At the same time, when negotiating with countries with which China's position is more divergent, attention should also be paid to building consensus and forming cooperation, so as to obtain more trading partners and trading opportunities and provide a practical basis for improving China's digital trade rules.

## 5. Conclusion

In the era of big data, information is power, and holding the right to speak in the formulation and promotion of rules for the digital economy in international trade is crucial to a country's development. Interpreting China's rules in the framework of the basic rules of the Personal Information Protection Law can reveal that China's rules can already achieve dovetailing with international rules such as the CPTPP, localised data storage and data content review can be harmonised through legal interpretation. However, how to enhance the strength of digital enterprises and fight for international discourse outside the law still needs further exploration. At the same time, China's Measures on the Security Assessment of Personal Information and Important Data Leaving the Country have been released for consultation and will be announced for implementation in the near future. They will provide clearer and more detailed rules on issues related to the standards and hierarchical review of digital cross-border flows and localised storage of data in China. These new rules are not sufficiently discussed in this paper, pending further discussion by scholars after the publication of the Measures. For the time being, China should focus on the practice and interpretation of the rules, promote the "going out" of China's digital trade. Plus, China should strive for more benefits in bilateral and multilateral trade agreements, while keeping the bottom line of national security and avoiding inappropriate data transmission and use. Only by this can China achieve a balance between data security and data freedom.

## References

- [1] Sun Nanxiang. *CPTPP Digital Trade Rules: Institutional Game, Normative Differences and China's Response*. *Academic Forum*, 45(05),44-53(2022). DOI:10.16524/j.45-1002.20220701.001.
- [2] Hu Yi. *The Value Orientation of Cross-border Data Flow Legislation and China's Choice[J]*. *Journal of Social Sciences* (04),95-102(2018). DOI: 10.13644/j.cnki.cn31-1112.2018.04.010.
- [3] Ma Qian, Li Zhiyi. *On the Legal Regulations of CPTPP Data Cross-border Flow and Person Information Protection*. *Journal of Jingdezhen University*37(05),64-70(2022).
- [4] Zhu Dan, *Research on Legal Regulations of Transborder Data Flow in Digital Trade*. *Gansu University of Political Science and Law* (2022). DOI: 10.27785/d.cnki.ggszf.2022.000206.
- [5] He Bo. *Challenges and Countermeasures for China's Participation in International Rules of the Cross-border Data Flows*. *Administrative Law Review* (04):89-103(2022).
- [6] Shi Yewei. *International Trade Rules in Cross-border Data Flow: Regulation, Compatibility and Development*. *Comparative Law Research*170(04),173-184(2020).



- [7] Wang Ze. *Research on legal Regulation of Cross-border Digital Data Flow under International Economic Law*. Shandong University (2021). DOI: 10.27272/d.cnki.gshdu.2021.006401
- [8] Jia Kai. *Global Governance of Cross-Border Data Flow: Power Conflict and Policy Cooperation—Taking the Evolution of Supervision System for Cross-Border Flow of Data in Europe and the United States as an Example*. *Journal of Shantou University (Humanities and Social Sciences Edition)* 33 (05),57-64(2017).
- [9] Huang Ning Li Yang. *The Evolutionary Trend of Trans-border Data Flows Regulation and Its Cause Analysis*. *Journal of Tsinghua University (Philosophy and Social Sciences)* 32(05),172-182+199(2017). DOI: 10.13613/j.cnki.qhdz.002634.
- [10] Zhang Yuzhi. *The balance of interests in the regulation of cross-border flow of personal data from the perspective of the principle of proportionality*. *Network Security and Data Governance* 42(01), 37-44+53(2023). DOI: 10.19358/j.issn .2097-1788.2023.01.005.
- [11] Tan Guanfu. *Regulation of Cross-Border Data Flows in Digital Trade through International Law*. *Journal of Comparative Law* (03),169-185(2022).
- [12] Han Jian, Cai Jiwei, Xu Yayun. *Digital Trade Negotiation and Rules Competition—A Study Based on the Quantification of Regional Trade Agreement Texts*. *China Industrial Economics*380(11), 117-135(2019). DOI:10.19581 /j.cnki. ciejournal.2019.11.007.
- [13] Xiong Hongru, Tian Jietang. *De-encirclement: The "China Scheme" for the Rules of Cross-border Flow Data*. *Frontiers (Z1)*, 54-62(2021). DOI: 10.16619/j.cnki.rmltxsqy.2021.1718.007.