



Analysis of the Legitimacy of China's Data Localization Measures under the WTO Framework

Channa Zhou*, Lin Jiang^a

Intellectual Property School of Guilin University of Electronic Technology, Guilin, China

*2030656588@qq.com; ^a52770288@qq.com

Abstract. Along with the booming development of data economy, the competition for data resources among countries has become increasingly white-hot. As a new business model, cross-border data flow has been widely used in various fields around the world; While bringing great economic benefits, it also draws the attention of countries to cybersecurity and data sovereignty protection. This paper takes the regulation of cross-border data flow in the WTO framework as an entry point, analyzes the legitimacy of China's data localization measures, and draws a strategic direction that China's data development should adhere to, so as to promote the safe and orderly flow of data in China while breaking the dominant position of the United States and Europe in data competition, and to provide China's solutions for international data governance.

Keywords: data localization, legitimacy, WTO provisions.

1 Introduction

1.1 Data Localization and Cross-Border Data Flows

Cross-border data flow is a complex topic covering multiple issues, ranging from cyberspace sovereignty, personal privacy protection, international trade to jurisdiction; it is precisely because of its important role in the economy that countries pay attention to the impact of cross-border data at the political and social levels. On the whole, countries have formed different digital regulation paths based on different regulatory concepts and interest considerations, thus dividing them to a certain extent into two camps that support the free flow of data and place more emphasis on data security. Developed countries, led by the United States, explicitly oppose the control of data transmission based on their control of data, and define the regulation of data in some countries as "data localization", and incorporate ideological and value factors into consideration, labeling it as "data nationalism" or even "digital authoritarianism". [1] Data localization is not the same as an absolute ban on data flow, i.e., the extent to which data are allowed to flow freely.

1.2 Problems that may Arise from China's Data Localization Measures

As a latecomer to the development of the data economy, China has adopted a relatively conservative attitude in the field of data flow regulation. Data localization measures are a direct example of our techno-nationalist perception in the field of data flows, i.e., "technology is fundamental to a country's economic prosperity, a country's development policy must have a clear strategic underpinning, and technology must be localized at all costs and diffused throughout the system.[2] The competitiveness of the data industry varies from country to country, depending on the stage of data development. Users in countries with less competitive data industries are the main providers of data, while companies in countries with more competitive data industries are the main providers of equipment and services, and data will naturally converge within the geographic boundaries of a few countries without restriction.[3] Given the conflicting interests of development and security needs, national policies are bound to make trade-offs, so China's regulation in the field of data flow also shows an overall defensive tendency.

Influenced by the Snowden incident, China's regulation of cross-border data flow takes national security and cybersecurity as its starting point. [4] Excessive attention to data security risks in China's legislation may lead to the generalization of risks and affect China's subsequent application to join economic and trade agreements such as the CPTPP, and internationally China has already been accused of being in a strong regulatory mode. [5] From 2016 to the present, a legislative framework for the localization of data, based on the Cybersecurity Law, the Data Security Law, and the Law on the Protection of Personal Information, and supplemented by regulations for various other industries, has been established. China's cybersecurity law provides for two types of objects for data localization, namely, important data and personal data collected in the course of operations within the country. Depending on the nature of the data and the degree of influence, two different data governance paths have been constructed, forming a "parallel two-track" data governance model.[6] There is no definitive answer to what constitutes important data in Chinese legislation. At the level of personal information outbound, it faces stricter controls; in principle, all personal information generated within China's borders must be stored and processed in China, and can only be provided across borders if specific requirements are met. The subsequent introduction of the Measures for Security Assessment of Data Exit and the Measures for Standard Contracts for Personal Information Exit are refinements of the above provisions. The seemingly perfect institutional design still lacks a directional approach to the cross-border flow of data. [7]

2 The Legitimacy Analysis of China's Data Localization Legislation

2.1 Analytical Model

Nowadays, the regional scope of the higher degree of liberalization of trade agreements are almost all introduced in the prohibition of data localization related content, although

each has its own exceptions, but on the prohibition of data localization of the basic position is the same. [8] The international law challenges to China's digital localization measures mainly come from two aspects, first, the provisions under the WTO framework, and second, China's accession and application for accession to regional trade agreements. Here are the lines of analysis followed in this paper: firstly, sorting out the general obligations or specific commitments of the treaty, and judging whether China's data localization measures are in violation of the above provisions; secondly, judging whether the measures can invoke the exception clause for defense, and in compliance with the exception clause, the measures can be found to be legitimate and not liable.

2.2 Analysis of the Legitimacy of China's Data Localization Measures under the WTO Framework

Applicability analysis of WTO regulations. The General Agreement on Services and Trade (GATS) in the WTO framework is the most relevant rule for digital trade, and its application requires that it constitute a "measure affecting trade in services". It is not clear from the text what is meant by "measures affecting trade in services", but according to the panel in the U.S. Gaming case, when analyzing whether the U.S. measure prohibiting online gambling services violated "market access" obligations, the panel introduced the principle of technology neutrality into the interpretation of the GATS text. The panel in the U.S. Gaming case, in analyzing whether the U.S. measure prohibiting online gambling services violated the obligation of "market access", introduced the principle of technology neutrality into the interpretation of the text of the GATS, and held that unless a member expressly excludes the application of a cross-border mode of service provision, it is deemed to be committed to all modes of service provision, including electronic modes. That is to say, unless expressly excluded by a member, services carried out by digital means should fall within the scope of trade in services. The definition of "impact" considers, among other things, whether the measure has an impact on services or on the capacity of service providers. It is clear that data localization measures will increase the cost of doing business for multinational enterprises and have an impact on their ability to provide services, and therefore data localization measures may be subject to GATS provisions.

General Provisions and Specific Commitments. The degree of deviation of China's data localization measures from the GATS provisions depends on the level of specific commitments made by China, which mainly involves the principle of national treatment in Article 17 and market access obligations in Article 16. As a country's domestic regulatory measure, data localization may also involve Article 6 on domestic regulation. The necessity test is a concrete demonstration of the principle of proportionality in the field of international trade law, which is generally interpreted as the least trade-restrictive measure taken to address a regulatory problem, and is the WTO's threshold criterion for judging the reasonableness and abusiveness of domestic regulation. GATS does not currently adopt a universal necessity standard for judging non-discriminatory domestic regulatory measures. In Korea-Beef case, The Appellate Body described this weighing and balancing test as a test for determining whether there is "an alternative measure, consistent with the WTO, which the Member concerned could

reasonably be expected to adopt". [9] In the case of data localization measures that do not improve data security, subject to the existence of alternative measures, are likely to be found to fail the necessity test and violate Article 6 of GATS.

China's data localization measures may violate the national treatment principle if they constitute unreasonably discriminatory treatment of foreign service providers. The absence of equal opportunity to compete would be considered "unfavorable treatment". Data localization measures require multinational enterprises to set up data centers in their home countries, which obviously increases the cost of doing business, but for domestic data service providers, the policy has little impact on them. Therefore, they are in fact facing different competitive conditions, which may constitute a violation of the national treatment principle.

Under Article 16 of the General Agreement on Services and Trade (GATS), if China has made market access commitments in certain services sectors in its Schedule of Concessions on Specific Commitments, then its data localization measures must be consistent with those commitments, and Article 16(2) of GATS further stipulates that, Member States shall not maintain or adopt measures limiting the number or type of services or service providers, unless otherwise specified in their schedules of concessions. The imposition of absolute localization measures on certain data, in essence a quantitative restriction in the form of a "zero quota", may result in a violation of this provision.

2.3 Exceptions that can be Invoked

Article 14 of GATS provides for a general exception. China's data localization measures may qualify for the general exception under GATS Article 14 if they are necessary to protect national security, the public interest or the privacy of individuals. In applying GATS Article 14, a necessity test is required, i.e., the measures must be necessary to achieve their objectives and no less restrictive alternative measures can exist. China needs to demonstrate that its data localization measures are necessary to achieve the relevant policy objectives and that there are no less restrictive alternatives that could achieve the same results.

3 Reflections on Data Localization in China

The legislator's legislation should not deviate from the facts.[10] Because of the natural mobility of data, flexible measures should be adopted in terms of specific rules to guarantee that each country enjoys sufficient and appropriate discretion in exercising its rights, so as to ensure the security and reasonable use of global data. Against the background of worsening geopolitical environment, the construction of cross-border data flow management system should serve the strategic goal of China's "network power" and the strategic needs of China's overall economic development, and draw a clear "red line" for China's national security and network security. It should also draw a clear "red line" for China's national security and cybersecurity, select appropriate international partners for cross-border data flow, and build a mutual recognition zone for cross-

border data flow to safeguard the global competitiveness of China's digital economy. Compared with the "free flow of data" that Western countries have begun to openly claim, China should advocate a more pragmatic principle of orderly data flow. On the one hand, we cannot simply cut off the "free flow of data" for security purposes, or we may miss out on the huge benefits brought about by the advancement of information technology; on the other hand, we should also open up as much data as possible under the premise of keeping the impact on the domestic economy limited to achieve the purpose of better maintaining information security. Purpose.

As China pursues a non-aligned policy in its international interactions, it is difficult for China to compete with developed Western countries in terms of influence projection. China's influence on a global scale has gradually increased, which has also effectively improved China's comprehensive ability to cope with geopolitical risks. China should fully grasp the favorable opportunity of the "Belt and Road" construction, building a circle of allies to deliver China's voice to the world.

4 Conclusion

The relationship between data and digital trade is like the relationship between blood and the human body; while solidified data has a certain value in itself, it is flowing data that creates new value. The natural reproducibility and mobility of data bring new opportunities for data controllers, while also increasing inequality in data competition. The trend of data flow is unstoppable, as the WTO rules in the pre-trade era are deficient in strain, the universal consensus on the governance of cross-border data flow is difficult to be reached for the time being, and the U.S. model, European model or the new governance model led by China will play a leading role for regional digital trade for a period of time. Of course, we are more looking forward to a fair and universal world rules to reduce the impact of political camp division on data trade, in the field of big data, cloud computing, AI, 5G and other emerging technology industries, countries with stronger data strength tend to strengthen the advantages they have through industrial policy, data localization measures to a certain extent to the data strength of relatively weak countries to provide a protective shell, This is not only due to economic considerations, but also based on national sovereignty and security risk prevention. At present, the rules on cross-border data flows dominated by the West still carry obvious hegemonic overtones, which also creates favourable conditions for our country to create an environment for cross-border data flows that is more welcomed by all countries and depoliticized. In the long run, data flow is not an end in itself, but to better serve economic and social development, so that all countries can share the fruits of the new technologies created in the Internet era, and share the value and benefits embedded in big data. Compared with the "free flow of data" that Western countries have begun to openly proclaim, China should advocate a more pragmatic principle of orderly data flow.

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