

CPTPP Cross-Border Data Flow Exception Rules and China's Response Study

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Abstract

In the era of digital trade, cross-border data flow rules have gradually become an important part of each FTA and are valued by all countries. China's 2021 application for accession to the CPTPP also contains this rule, and has become one of the difficulties in China's accession to the CPTPP negotiations. The CPTPP emphasizes the free flow of data and, while providing for three exceptions, is strictly limited in its use. However, the FTA concluded by China generally lacks cross-border data flow rules, and the management of cross-border data flows is chaotic, the supervision of enterprises is lacking, the legislation focuses on data localization protection, and the provisions for the free flow of data are lacking. In order to smoothly join the CPTPP and improve the level of cross-border data flow mechanisms, China can strengthen international cooperation, classify and manage cross-border data in accordance with the law, strengthen the ability and responsibility of enterprise data management, and balance security and development in legislation. From multiple perspectives, we will safeguard China's data sovereignty and data security, while promoting the free flow of data and contributing Chinese wisdom to the world economy.

Keywords

CPTPP; Cross-border Data Flows; Exception Rules; International Cooperation.

1. Background

In the era of digital trade, data has become a key element in commercial activities while promoting commercial exchanges between countries. And after analyzing a country's data, the social landscape of a country will be digitized and accurately portrayed by other countries, posing a major threat to the national security of that country. Based on this, all countries have begun to attach importance to the legislation and judicial practice of cross-border data flow, and cross-border data flow rules have increasingly become an important part of international law.

Only circulating data can produce value, and the regulation of circulating data is the core of the entire data governance system. Therefore, with the frequent exchanges between countries in the economic field, provisions containing cross-border data flows can be seen in various super-large free trade agreements: The United States-Mexico-Canada Agreement, hereinafter referred to as "USMCA" It stipulates that the data transmission of digital trade shall not be restricted under certain circumstances, and the means of restricting data transmission in certain circumstances shall not form disguised trade restrictions; 2 In 2021, China signed the Regional Comprehensive Economic Partnership, hereinafter referred to as "RCEP", as the largest free trade agreement in the Asia-Pacific region, which stipulates relatively complete cross-border data flow provisions. RCEP prohibits Parties from implementing data localization in the area of commercial activities, and stipulates that Parties shall promote the free flow of data and shall not unreasonably restrict the movement of data across borders. 2 In September 2021, China officially proposed to join the Formal and Progressive Agreement For Trans-Pacific Partnership,

hereinafter referred to as "CPTPP", is the first international trade agreement to make clear provisions for cross-border data flows. Among them, the exception rules for cross-border data flows have aroused heated discussion, and if China wants to successfully join the CPTPP, it must attach great importance to the exception rules for cross-border data flows in the CPTPP and think about China's countermeasures.

2. CPTPP Exception Rules for Cross-Border Data Flows

CPTPP, as a higher level and more liberalized regional trade agreement than RCEP, is also relatively well-regulated for cross-border data. The overall rules for cross-border data flows are epitomized in Chapter 14 (Electronic Commerce) of the CPTPP, and in Chapter 29 (Exceptions and General Provisions).) provides for some exceptions to cross-border data flows. Exceptions to cross-border data flows fall into two categories, one being the specific exceptions provided for in Chapter 14 and the second being 29 The general exceptions set out in clause 1.3 and the basic security exceptions set out in clause 29.2 together constitute exceptions to cross-border data flows.

2.1. Specific Exceptions

First, from the provisions of Chapter 14 of the CPTPP, an exception is provided for in Article 14.11, paragraph 3, that is, "a Party shall not be prevented from taking or maintaining measures inconsistent with paragraph 2 in order to achieve the objectives of a legitimate public policy, As long as the measure does not constitute arbitrary or unjustified discrimination or a disguised restriction on trade, and does not impose restrictions on the transfer of information beyond the limits necessary to achieve the objectives. From these two provisions, we can conclude that "the free flow of data across borders is the principle, and the restriction of flow is the exception". The second is that trade must not be discriminated against or restricted. A country restricts the flow of cross-border data for the sake of a country's stable development, but if this measure causes discrimination against other countries or disguises the development of free trade, it violates the principles of free trade and is inconsistent with the purpose of the CPTPP, so from the perspective of protecting free trade, the restriction of cross-border data flow must not cross the red line set by the principle of free trade.

Finally, the limits required to achieve the goal are not exceeded. Data is now greatly affecting the development of international trade, if the restriction of cross-border data flows, then it is bound to have an impact on trade to a certain extent, so the scope of the restriction is set to the minimum to achieve the goal, not only to achieve public policy objectives, but also to have the least impact on trade.

2.2. General Exceptions and Security Exceptions

2.2.1. General Exceptions

Based on the unique position of the WTO in maintaining the global multilateral free trade system, in some articles of the CPTPP, in addition to following some provisions of the TPP and improving them, some provisions of the GATs under the WTO system are also quoted. A typical example is the general exception for cross-border data flows.

In accordance with CPTPP 29.1.3, for the purposes of Chapter 14 (Electronic Commerce), Paragraphs (a), (b) and (c) of GATs Article 14 are incorporated into the CPTPP with the necessary modifications in detail to become part of the Agreement. According to the content of the general exception in article 14 of the GATs, the general exception is mainly provided for in the protection of the stability of a country's society. However, in terms of general exceptions, many WTO cases have shown that they are not easy to invoke, and restrictions on cross-border data flows based on basic security exceptions have attracted increasing attention.

2.2.2. Basic Safety Exceptions

Article 2 9.2 of the CPTPP stipulates that neither recipients nor providers of cross-border data shall prejudice their fundamental security interests when carrying out cross-border data movements. The CPTPP has partially modified the most politically sensitive security exception provisions in the W T O and listed them separately as one (29.2), which is enough to prove that in the CPTPP, in addition to taking into account efficiency and trade liberalization, Basic security is also an important consideration. However, in recent years, the scope of basic security has tended to expand, resulting in the invocation of security exceptions exceeding the necessary limits, and the continuous expansion of the scope of basic security has also hindered free trade. In the WTO dispute settlement mechanism, there are many cases in which the security exception clause is invoked, as shown in the following table:

Table 1. Reference contract conditions

Reference contract conditions table Terms of reference	case
Article 21(b) of the GATT (1994). TRIPs 73(b) other	DS512. DS567. DS526. DS544. DS547. DS548. DS550. DS551. DS552. DS554. DS564. DS576. DS590

In accordance with international practice, in the case of security exceptions, Members may impose restrictions on the movement of cross-border data on the basis of public health, public morality, privacy, national security or intellectual property rights, provided that such restrictions are necessary, minimal and do not constitute discrimination. However, it should be noted that security exceptions and basic security exceptions are two different concepts, and the WTO expert group believes that basic security interests are more narrow than security interests and should be interpreted in a narrow sense. However, all aspects related to national security cannot be enumerated exhaustively, because "national security" itself is very vague, so the security exception clause is also called "dynamic" international law. The original intention of the security exception clause is to seek a balance under the trade game, that is, to allow parties to take measures to restrict trade in order to maintain national security, and to prevent parties from indiscriminately abusing trade protection means.

In summary, the CPTPP provides for three types of cross-border data flow exceptions that, when applicable, may result in multiple restrictions on cross-border data flows. At the same time, the application of national security exceptions may not be limited to cross-border data flows themselves, but will also restrict cross-border data flows in disguise. This is also something that the current CPTPP does not take into account, and there are certain limitations in its application. In addition, the CPTPP exception rule does not enumerate the circumstances that meet its protection goals, which makes it difficult for the CPTPP expert group to determine whether it meets the standard.

3. China's Cross-Border Data Flow Rules are Insufficient

3.1. The FTA Concluded by China Generally Lacks Cross-Border Data Flow Rules

As of February 2022, China has signed 19 ftAS with 26 countries and regions. Trade accounts for about 35% of the trade. However, at present, only RCEP directly stipulates the cross-border

data flow clause, and the rest of the FTA does not stipulate the cross-border data flow. Although there are separate e-commerce chapters in China-Korea FTA, China-Australia FTA, China-Singapore FTA, China-Cambodia FTA, However, most of the data protection focuses on personal information protection and online information protection, and does not mention cross-border data flows. The e-commerce chapter and data flow rules are becoming increasingly important in various FTA, and China, as the second largest economy in the world, has concluded e-commerce chapters in FTA and cross-border data flow clauses that are far from meeting the needs of trade.

3.2. Chaotic Management of Cross-Border Data Flows

China does not strictly classify cross-border data, nor does it make specific distinctions between data in existing legal documents, but only stipulates the nature of the data and the classification method of non-exhaustive enumeration of personal information in principle. Although the scope of each legal document for personal information is listed in more detail, the descriptions of each law are inconsistent, and when there is a competition of legal liabilities in a case, there will be disagreements as to which law to apply, which will hinder the process of hearing and ruling the case and even the occurrence of different judgments in the same case. In addition, the management standards for the hierarchical classification of data in China are not clear. Due to the different requirements for cross-border data flow in different categories, the security assessment rules for data flow lack operability to a certain extent, which brings no small challenge to the review of cross-border data flows.

3.3. Lack of Enterprise Supervision

The lack of responsibility for data supervision has also led to enterprises not paying attention to the data collected, and even using the collected data as profit-making capital. According to the "Five Typical Cases of Infringement of Citizens' Personal Information Issued by the People's Court of Jingjiang City, Jiangsu Province", there is an exchange of owners' information for the purpose of developing business; 29 people participated in the trading of thousands of Alipay account information; A large number of parents' and students' information has been leaked by education and training personnel; More than 70,000 pieces of personal information were put on the "dark web" for resale. In the "Zhou Yuchan v. Guangdong Kuaike E-commerce Co., Ltd. and Dongguan Yide Network Technology Co., Ltd. Network Infringement Liability Dispute Case", the defendants failed to keep the collected user information strictly confidential and established and improved the user information protection system, resulting in the leakage of Zhou Yuchan's detailed shopping information, which was taken advantage of by lawbreakers Zhou Yuchan committed fraud, resulting in a loss of 4,9990.96 yuan. The lack of enterprise supervision is one of the main reasons for data insecurity, and what role Chinese enterprises should play in the process of cross-border data flow deserves our serious consideration.

3.4. Imbalance in Legislative Value Objectives

It is difficult to find a balance between data security, data sovereignty and free flow of data, and the game between these three is ultimately a matter of security and development.

Returning to China's cross-border data flow legislation, many of China's laws involve cross-border data flow, establishing a relatively secure principle for cross-border data flow, but on the whole, China's legislation pays more attention to security issues and is more prudent for development regulations. For data governance, it is biased towards the principle of territorial jurisdiction, and in the process of rule of law, the state's control of data has been continuously strengthened. According to Article 38 of the Personal Information Protection Law, the need to provide personal information across borders meets one of the following conditions: security assessment, information protection certification, compliance with the standards of the Internet information department, and participation in the conclusion of live activities international

treaties and other conditions. The above provisions have similar provisions in the Data Security Law, and different processing methods are divided according to different data processing subjects. At the same time, in the "Measures for Network Security Review (Draft Amendment for Solicitation of Comments)", it is stipulated that if the personal information of users in control exceeds 1 million, it must undergo a security review before it can be listed overseas.

4. China's Response Plan

4.1. Strengthen International Cooperation

Due to different factors such as geographical factors, cultural factors, and political factors, the attitudes towards cross-border data flows will also be different, and two different positions of "cooperation or competition" will arise. However, in the long run, international cooperation in e-commerce is bound to become the only way to promote the regulation of cross-border data flows, and China, as the largest developing country, cannot implement the measures of "closing itself off and standing still" in terms of data flow, but should actively participate in international cooperation to promote the development of its own economy with data.

At present, there are 10 free trade zones under negotiation in China and 8 free trade zones under study. The countries and regions involved are widely distributed, and if the FTA is successfully concluded, China's foreign trade will develop to a new height and a new stage. Therefore, it is wise to negotiate with cross-border data flows as one of the priorities of the negotiations. At the same time, we can start to promote the Asia-Pacific Economic Cooperation (APEC) negotiation topics, incorporate "e-commerce" into the informal meeting of leaders, and promote China's cross-border data flow position.

4.2. Cross-border Data Classification and Grading Management in Accordance with Law

According to the source of the data, it can be divided into personal information (data) and non-personal information (data); According to the nature of the data, it can be divided into general data, important data, and core data. China's Data Security Law provides for stricter management of core data, the determination of a specific directory of important data and key protection. However, the data involved in various industries is small or even detached, and the management of data is also very different. This requires each department to refine and classify the data and improve the specific directory. When the same kind of data has different levels of division in different industries, from the perspective of basic security interests, determine the level of data, and at the same time need to pay attention to the differential treatment of personal information, because some personal information leakage will also lead to the basic security interests can not be guaranteed, should avoid associating personal information with basic security interests, but can not be completely stripped.

4.3. Strengthen Enterprise Data Management Capabilities and Responsibilities

Enterprises shall, in accordance with the relevant laws of our country, collect and use the data within the minimum scope required for the business, use it reasonably, and delete the data that is not necessarily retained in a timely manner after the end of the business or the termination of the contract. At the same time, establish a data confidentiality system, cooperate with relevant departments to establish a list of specific important data, and carry out key protection of important data and core data. Enterprises should give full play to their own advantages, actively participate in the process of cross-border data flow, strictly follow the security risk assessment, judge their own data security protection standards, and optimize the level of data protection. In terms of legal liability, the punishment of enterprises should be strengthened, and for intentional or gross negligence caused by data leakage, resulting in serious damage to

citizens' property or basic security, administrative penalties or even criminal penalties should be given.

4.4. Seek a Balance of Legislative Values

As mentioned above, China is a more typical country that adopts the "data localization" model for data storage, and the orientation of legal regulation is more focused on protecting the country's data sovereignty and security, but there are fewer provisions for the free flow of data. Today's international data flow trend is to encourage data flow, not to advocate data localization. Therefore, China should adapt to the main theme of the international community, follow the trend, and ensure the free flow of data across borders while ensuring that data security and national data sovereignty are not infringed.

5. Conclusion

In the era of digital trade, the importance of data as a new means of production has been recognized by various countries. As Chen Xiaohong, an academician of the Chinese Academy of Engineering, said, with the vigorous development of the global digital economy, the cross-border flow of data has gradually become the focus of the game between countries and regions. As the highest level of free trade mechanism in the Asia-Pacific region, CPTPP's provisions on cross-border data flow deserve our study and reference. While constantly moving closer to the CPTPP rules, China also needs to start from itself, innovate the old, constantly innovate the relevant rules of China's cross-border data flow, ensure that all aspects of cross-border data flow are safe and orderly, safeguard China's data sovereignty externally, ensure data security internally, and promote China's cross-border data flow The system is moving towards a new stage of higher quality, higher level and more freedom.

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References

- [1] MA Guang. Three exceptions to the regulation of cross-border flow of FTA data are applicable [J]. Forum on Political Science and Law, 2021,39(5).
- [2] Hong Zhigang,Huo Junxian. The regulation of cross-border data flow by RCEP and its important impact [J].Southwest Finance, 2022(4).
- [3] Shi Yewei. International Trade Rules in Cross-Border Data Flows: Regulation, Compatibility and Development[J].Comparative Law Research, 2020(4).
- [4] He Bo. Challenges and Responses of China's Participation in International Rules for Cross-Border Data Flow[J/OL].Administrative Law Research, 2022(4).
- [5] Yan Yuhong. Exceptions to legitimate public policy objectives in the regulation of cross-border data flow and China's response[J].Lanzhou Academic Journal, 2022(3).
- [6] LI Wenqing,ZHENG Lingli. Reasonable Application of WTO National Security Exceptions[J].Customs and Economic and Trade Research, 2021,42(2).
- [7] Permission. Freedom and Security: China's Approach to Cross-Border Data Flow[J].Global Law Review, 2021, 43(1).
- [8] LI Yanhua. The Regulatory Path of Global Cross-Border Data Flow and China's Choice[J].Times Law, 2019,17(5).

- [9] WEI Yuanshan. Research on the Problems and Countermeasures of Cross-border Data Flow from the Perspective of Game Theory[J].Journal of Xi'an Jiaotong University (Social Science Edition), 2021,41(5).
- [10] PENG Yue. Digital Trade Governance and Its Regulatory Path[J].Comparative Law Research, 2021 (4).
- [11] RAN Congjing, HE Mengting, LIU Xianrui. Research on Governance and Countermeasures of Cross-border Data Flow in China from the Perspective of Data Sovereignty[J].Library and Information, 2021 (4).
- [12] WANG Meimei. The Global Governance Framework for Cross-Border Data Flows: Divergences and Compromises[J].International Economic and Trade Exploration, 2021,37(4).
- [13] XIE Zhuojun, YANG Shudong. Regulation of Cross-Border Data Flows in Global Governance and China's Participation: A Comparative Analysis Based on the WTO, CPTPP and RCEP[J].International Watch, 2021(5).
- [14] YANG Shudong, XIE Zhuojun. Exception Clauses for Trade Regulation of Cross-border Data Flow: Positioning, Paradigm and Reflection[J/OL].Journal of Chongqing University (Social Science Edition): 1-15[2022-06-01].
- [15] MA Guang. The development of international rules for cross-border data flow and China's response [J]. Journal of International Law, 2020(2).
- [16] FENG Jiehan, ZHOU Meng. Regulation of Cross-border Data Flow: Core Issues, International Solutions and China Responses[J]. Journal of Shenzhen University (Humanities and Social Sciences Edition), 2021, 38(4).
- [17] LIU Jinrui. Toward Global Regulation of Cross-Border Data Flows: Fundamental Concerns and China's Solution[J/OL], Administrative Law Research, 2022(4).