

Why China Should Be Disqualified From Participating in WTO Negotiations on Digital Trade Rules

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Chinese policymakers cling to a strident view that national sovereignty in the cyber realm supersedes the need to enable data flows or cooperate with trading partners on important international norms.

KEY TAKEAWAYS

- Ambitious new rules for digital trade are overdue because current WTO rules on e-commerce are either outdated or inadequate, most having been agreed to in the mid-1990s when the Internet was in its infancy.
- Ideally, China would be part of negotiations given its growing digital economy. But its restrictive approach to data governance and clear resistance to e-commerce commitments show it's not up to a similar level of ambition as other countries.
- Until China gives up its strident view of national cyber sovereignty and cooperates with trading partners on the most critical data-related issues, it should be disqualified from playing a role in global rule-setting activities for digital trade.

OVERVIEW

In response to a question about ongoing e-commerce talks at the World Trade Organization (WTO), U.S. Trade Representative Lighthizer said last February that, “I think bringing China in will not help these negotiations.”^[1] That was an understatement if there ever was one. Indicative of the challenge, recent media reports indicate China has refused to relax its tight restrictions on data flows in bilateral talks with the United States.^[2] With multiparty negotiations on new global e-commerce rules moving forward in Geneva, the European Union, Japan, Australia, Singapore, the United States, and other participants should exclude China from the effort on grounds that its domestic data governance and international trade policies demonstrate that it is far from committed to putting in place the ambitious rules that are needed on data flows and other issues to foster an open, competitive global digital economy.

In an ideal world, China would be part of negotiations given its growing domestic digital economy. But a clear-eyed, realistic assessment shows that China’s extensive and restrictive approach to data governance and data flows (which should be a litmus test for a country’s involvement in digital rules-setting activities), along with its limited commitments on e-commerce in past trade agreements and its refusal to join the Asia Pacific Economic Community’s (APEC) Cross-Border Privacy Rules (CBPR) regime all suggest that it’s not up to a similar level of ambition as other countries. This isn’t to say that the issues China raises as part of its narrow view of e-commerce (explained below, such as on e-signatures and customs facilitation) shouldn’t be addressed, but that these represent a bare minimum that other countries should far exceed as they consider the scope of WTO negotiations.

Ambitious new rules are overdue because current WTO rules in the area of e-commerce are either outdated or inadequate, most having been agreed to in the mid-1990s when the Internet was in its infancy. The cross-border transfer of products, services, and data over the Internet—a broad definition of “digital trade”—is now changing global commerce and in many ways reducing the relevance of traditional at-the-border barriers to trade, like tariffs, which have traditionally been the focus of attention at the WTO.^[3] While there is no single agreed-upon definition of digital trade, it tends to cover a broad view of digital economic activity, as opposed to the concept of e-commerce, which generally tends to be associated with digital platforms and services involved in selling physical goods (e.g., Alibaba and Amazon).^[4] However, such debates over exact terminology, while important when deciding on text in a trade agreement, should not be (and have not been for the United States and others) an excuse to delay talks on the real barriers that firms are increasingly facing as they engage in digital trade.

Data is the lifeblood of the modern global economy. The increased digitalization of organizations, driven by the rapid adoption of technologies such as cloud computing and data analytics, has increased the importance of data as an input to commerce, impacting not just information industries, but traditional industries as well.^[5] Businesses use data to create value, and many can only maximize that value when data can flow freely across borders. Firms and customers rely on the uninterrupted flow of data to deliver digital goods (like music and software) and services (like

cloud storage and data analytics services), as well as to complement trade in physical things (whether for manufacturing or for package deliveries of e-commerce purchases). Globally, the McKinsey Global Institute has found that, over the past decade, data flows have increased world GDP by 10.1 percent.^[6]

Despite the significant benefits to companies, consumers, and national economies that arise from the ability of organizations to easily share data across borders, dozens of countries at every stage of development have erected barriers to cross-border data flows, such as data-residency requirements that confine data within a country's borders, a concept known as "data localization." As the Information Technology and Innovation Foundation (ITIF) explains in "Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?" these policies represent a new barrier to global digital trade.^[7] Cutting off data flows or making the flow of data harder or more expensive puts foreign firms at a disadvantage in domestic markets. This is especially the case for small and solely Internet-based firms and platforms that do not have the resources to deal with burdensome restrictions in every country in which they may have customers. In essence, these tactics constitute "data protectionism," because they keep foreign competitors out of domestic markets.^[8]

This policy briefing examines China's approach to e-commerce and digital trade. Its primary lens is economics and trade, not national security and sovereignty; however, there is the need to mention the latter given how closely China associates these concepts with digital governance and data flows. This briefing starts by analyzing some key disputes, commitments, and statements China has been involved with at the WTO in relation to e-commerce and digital trade as well as China's bilateral trade agreements and involvement in regional initiatives at APEC. It then analyzes some of China's domestic digital governance policies and how these relate to international engagement. In conclusion, it makes the case for why China's inability to reconcile its view of national sovereignty and data flows—as well as its continued insistence on using digital trade barriers to mercantilist ends—should disqualify it from participating in global rule-setting activities for digital trade.

CHINA AND DIGITAL TRADE: WTO STATEMENTS, SUBMISSIONS, AND DISPUTE CASES

China's approach to the WTO's long-running e-commerce program (discussions for which started in 1998, with China joining the WTO in 2001) has focused on what could be called a "traditional" view of e-commerce—physical goods bought via digital platforms that need to be shipped overseas and through customs clearance into foreign markets.^[9] The analysis below works chronologically (past to present) through key cases, statements, and events that relate to China's engagement and approach to e-commerce and digital trade issues.

One of China's initial experiences with digital trade under the WTO came in the form of a trade dispute. In 2009, in "China—Publications and Audiovisual Products," a WTO dispute panel determined that China's commitments on sound recording distribution services extended to those distributed in nonphysical form, such as over the Internet and smart phones.^[10] This case was

important as it clarified WTO rules, in that products can be both tangible and intangible goods, as well as services and that distribution can cover both physical and nonphysical forms.^[11] China tried (and failed) to argue that it could not have made a commitment on digital distribution as this business did not exist when it joined the WTO in 2001.

Then, in 2012, in “China—Electronic Payments,” a WTO dispute panel interpreted China’s commitment on “all payment and money transmission services” finding that this commitment included those services that “‘manage’, ‘facilitate’, or ‘enable’ the act of paying or transmitting money... The term ‘all’ manifests an intention to cover comprehensively the entire spectrum of payment and money transmission services.”^[12] Furthermore, that “[a]ll payment and money transmission services’ refers to those services that are essential to the processing and completion of transactions using payment cards.” This means that a commitment on “all” of an offline service also includes not just its digital equivalent, but the entire range of support services that make these offline and online services possible.^[13]

In November 2016, China made its first submission (jointly with Pakistan) to WTO e-commerce discussions.^[14] In so doing, it raised the concept of its electronic World Trade Platform (eWTP) and its focus on the promotion and facilitation of cross-border trade in goods enabled by the Internet together with services directly supporting such trade in goods, such as payment and logistics services. The eWTP is an initiative created and championed by Alibaba CEO Jack Ma (who initially called it the “e-WTO”).^[15] Ma and Alibaba envisage the eWTP as a private-sector-led platform that would focus on small and medium-sized enterprises (SMEs) and on sharing best practices on the customs and tax procedures that act as a barrier to their involvement in goods-based e-commerce trade.^[16] The eWTP would not be an organization (like the WTO) or negotiation-based initiative (like a trade agreement), even though Ma has engaged with the WTO and others in discussing the initiative.^[17]

Beyond this eWTP idea, China’s 2016 submission prioritizes the current mandate for e-commerce discussions and on efforts to enable developing countries and their SMEs to benefit from goods-based e-commerce, a worthy goal which many multilateral organizations are working toward. Furthermore, the submission supports an extension of the WTO moratorium on duties on electronic transmissions (also a worthy goal), which is increasingly under threat as Indonesia, India, and others try to overturn the moratorium so they can levy tariffs on imports of digital products.^[18] However, these two worthy goals do not represent a comprehensive, ambitious framework that accounts for the trade issues that arise due to the increasingly digital nature of trade.

Instead, China’s statement outlines its limited and narrow focus on traditional e-commerce issues. China makes clear in the statement its view that the e-commerce discussions are to “clarify and to improve the application of existing multilateral trading rule” and that China is not open to new market access commitments, including tariff reductions. Avoiding new rules (such as on data flows) and market access commitments (such as on tariffs) leaves China’s efforts focused on trade and customs facilitation issues for the import, export, and transit of goods related to e-commerce transactions, such as through “paperless” trading regulations. Rather disingenuously, it also suggests exchanging information on services directly involved in supporting cross-border e-

commerce, such as electronic and online payments (where China severely restricts foreign providers at home).^[19] Similarly, it endorses efforts to improve regulatory transparency by publishing laws, regulations, and administrative measures related to cross-border e-commerce (despite the fact that China systemically fails to do exactly this in relation to its WTO transparency commitments).^[20]

In December 2017, when 71 WTO members (not including China) came together to launch an effort to explore future negotiations on e-commerce, China released a statement that reiterated many of the points outlined above, including that talks should “take up trade-related electronic commerce elements acceptable to Members, including but not limited to facilitating cross-border e-commerce; promoting paperless trading; transparency; as well as development and cooperation.”^[21]

On November 8, 2018, China’s WTO representative provided an updated view and summary of China’s approach in a statement to the WTO.^[22] It called for an open and inclusive process, without any preconditions for participation (as this would mean talks would likely remain stuck around discussions, and not negotiations, much the same as they have been at the WTO since 1998) and that talks be on its preferred issues (as it does not want to deal with other issues, such as data flows). As it relates to data flows, China outlined how a “members’ right to regulate” should be respected and that countries should be allowed to implement “reasonable regulation in this regard, including allowing lawful and orderly free flow of information on the precondition of protecting privacy and public interests, as well as safeguarding national security and network security.”

The problem is that central to China’s “reasonable” framework is local data storage. China even highlights this dichotomy in this statement, outlining how China’s new cybersecurity law requires personal data to be stored locally. China’s approach to data and data flows is restrictive, focusing on access, control, and mercantilist goals.^[23] China operates an extensive range of restrictions on both data imports and exports. Whatever you want to call it—the Great Firewall or the Digital Iron Curtain—China’s policies represent a form of digital protectionism in that widespread and permanent blocks on certain websites and digital services are in breach of current WTO rules (because China’s broad blocking of access is arbitrary and disproportionate).^[24] As to cross-border data flows, China requires local data storage for a range of data, including health, mapping, financial, and personal data.^[25]

In conclusion, the statement repeats the issues China is happy to address: e-signatures, e-authentication, e-contract, paperless trading, consumer protection, anti-spam, international regulatory cooperation, and facilitation of trade in goods enabled by the Internet, among some others. Ironically, even if the United States and others did exclude China from negotiations, China wants to benefit (as a free rider) from any agreement that comes out of the WTO subgroup initiative. China’s statement asserts that it would prefer they take place on a “most-favored nation basis,” which would mean that any outcome would extend to all members, regardless of whether they are a party to negotiations or not, although non-acceding nations would not be bound themselves to enact an agreement’s commitments.

China has attended (as an observer) every one of the meetings held under the newly launched WTO e-commerce subgroup and was a (surprise) last-minute addition to the group of countries that came together in late January 2019 to announce their intention to commence e-commerce negotiations.^[26] Nevertheless, China's continued and unremitting use of a wide range of digital trade barriers, and its limited appetite to foster the development of more stringent rules to open global data flows, means it simply shouldn't be invited to the table as leading nations work to establish new disciplines and market-access commitments to expand global digital trade.

CHINA'S EXISTING TRADE COMMITMENTS ON E-COMMERCE AND DIGITAL TRADE ISSUES

China's approach to digital trade is largely focused on applying existing WTO rules (which are increasingly irrelevant) and a few narrow, non-binding technical provisions. (See the appendices to this briefing for further details.) For example, China recognizes commitments related to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996, which is the bare minimum in terms of establishing a predictable legal framework for e-commerce. China's trade agreements with Australia, New Zealand, and South Korea are indicative of this approach. They include commitments on technical issues (e.g., digital certificates and signatures) which are not enforceable (as they're excluded from the agreement's dispute settlement mechanism), and to the extent they conflict with provisions in other chapters of the agreement, the other chapters take precedence (meaning the e-commerce-related provisions are not a priority).^[27]

Some key examples:

- In its trade agreement with New Zealand, China made minor commitments on technical barriers to trade and on conformity assessments. New Zealand was the first developed country to negotiate a free trade agreement (FTA) with China in 2008. It will be interesting to see whether China agrees to more extensive e-commerce provisions in its current negotiations with New Zealand to upgrade its FTA.^[28]
- The Australia-China FTA includes transparency-related commitments on e-commerce, requiring parties to promptly publish or make available all e-commerce-related measures and respond promptly to all requests by the other party for specific information on such measures (which seems ironic given China consistently fails to live up to its WTO transparency requirements in reporting trade-related policy changes). Both parties also agreed to include electronic authentication processes and technologies (e.g., digital certificates and signatures, based on UNCITRAL model laws).

- The closest China gets to a new and meaningful commitment in its trade agreement with Australia is where it agrees to not impose customs duties on electronic transmission between the two countries (reinforcing the WTO moratorium on customs duties on data transmissions, but only subject to the WTO moratorium remaining in place).^[29] Likewise, the parties’ commitment to “endeavor to ensure that bilateral trade through electronic commerce is no more restricted than other forms of trade” is commendable in putting digital and traditional trade on the same level.
- In both the China-Australia and China-South Korea FTAs, in the event of any inconsistency between e-commerce commitments and other chapters, the other chapters take precedence and dispute settlement is not applicable.^[30] Therefore, the actual utility of these e-commerce provisions is limited.

China is a party involved in trade negotiations under the Regional Comprehensive Economic Partnership (RCEP), which includes the 10 member states of the Association of Southeast Asian Nations (ASEAN) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam) plus Australia, China, India, Japan, South Korea, and New Zealand. Not surprising given its large and diverse membership, RCEP negotiations have dragged on for some time, partly due to disputes over whether to include provisions covering data flows and digital trade as in the Trans-Pacific Partnership/Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP/CPTPP), which is favored by Japan and others.^[31] Ultimately, it’s hard to see China taking a different approach to e-commerce and digital trade in this forum, as its trade policy track record shows a studious avoidance of dealing with cross-border data flows.

China’s active avoidance and opposition to such provisions is remarkable given the central role of data in today’s digital economy, not to mention China’s vision of becoming a global leader in digital technologies. Rules enabling data flows facilitate digital enterprises’ global ambitions, whether these be firms from countries with a large domestic economy that can help firms scale up domestically before going international—such as in China and the United States—or firms from small countries that have found a niche competitive advantage that could benefit from global markets at scale, such as firms from Singapore, Estonia, and Peru.

As policymakers at the WTO and elsewhere consider the economic and societal value of data and data flows, they should recognize that data will naturally flow across borders unless governments erect artificial barriers to stop it. While cross-border data flows can raise legitimate public policy issues, such as data privacy or cybersecurity, policymakers need to carefully consider all of the available policy options to ensure they address data-related issues while still allowing it to flow freely. This is not unusual in trade, given phytosanitary issues for agricultural goods or safety standards for cars. It then becomes a matter of how countries work together to enact rules that maximize the potential benefits from digital trade and data flows, while allowing countries to enact regulations only when they are necessary, proportionate, and minimally trade-distorting. This is part of the challenge facing policymakers working on digital trade issues in the upcoming WTO negotiations, such as on privacy, to ensure that countries don’t use these public policy concerns as a cover for digital protectionism.

Given its central role in digital trade and e-commerce, a willingness to negotiate on data flows should be a litmus test for a country's involvement in the WTO negotiations. For the United States, Japan, and others, data flows are the norm, and barriers to them are the rare exception. These countries recognize that businesses use data as a matter of course to create value, and they can only maximize that value when data flows freely across borders. These countries' trade agreements reflect this central fact. China's base policymaking position is the opposite—treating local data storage as the norm and data flows as the exception, as China's policymakers prioritize other non-trade and economic goals.

CHINA AND THE ASIA PACIFIC ECONOMIC COOPERATION'S CROSS-BORDER PRIVACY RULES

Beyond trade agreements, an alternative system that China could join to build consumer, business, and regulator trust in cross-border flows of personal information is the Asia Pacific Economic Cooperation's (APEC) Cross-Border Privacy Rules (CBPR).^[32] CBPR was established in 2011 and is based on the APEC Privacy Framework in 2005 (updated in 2015), which provides a principles-based system for national privacy laws that recognize the importance of “effective privacy protections that avoid barriers to information flows.”^[33] Australia, Canada, Chinese Taipei, Japan, Mexico, Singapore, South Korea, and the United States have all signed on to the CBPR.

The CBPR is a voluntary, accountability-based system that facilitates “privacy-respecting” data flows across borders. CBPR-compliant firms are able to transfer (both inter- and intra-company) personal data across borders. The CBPR system requires participating businesses to implement data privacy policies consistent with the APEC Privacy Framework, such as those on accountability, notice, choice, collection limitation, integrity of personal information, uses of personal information, and preventing harm. The participating economy appoints an APEC-approved third-party agent to audit and certify that companies have compliant data privacy policies.

The APEC CBPR system is attractive to a diverse range of countries in the region as it focuses on core principles and accountability. It recognizes that there is no one-size-fits-all approach to privacy protections, as different countries have different legal and societal values and approaches to the issue. But given the globally distributed nature of the Internet, every country's data governance regime needs to be interoperable so that both privacy protections and data flows can take place at the same time—objectives that are not mutually exclusive. What CBPR helps ensure is that a country's privacy rules travel with the data and that a company can commit to abide by these rules, wherever it stores the data. CBPR also helps ensure that these rules are enforced.^[34] For a business, being CBPR-compliant means it is subject to one privacy regime for data transfers between APEC member economies that have joined the system.

Yet, China has never signed up to the CBPR system. Dr. Yanqing Hong, a leading commentator on China's data governance (who, among other positions, is involved in standard-setting at the National Information Security Standardization Technical Committee of China) likely reflects the view of many Chinese policymakers in portraying the CBPR as a U.S. strategic tool to allow the free flow of data to the United States and limitations on a country's ability to restrict data flows as

undermining state sovereignty.^[35] Along these same lines, Dr. Hong has mischaracterized ITIF's own research on the spread of costly and misguided barriers to cross-border data flows to try to justify and normalize China's restrictive data governance and data localization policies.^[36]

This view overlooks the fact that CBPR is based on internationally agreed principles (modelled upon the Organization for Economic Cooperation and Development's privacy guidelines) and that many countries have voluntarily signed up to this arrangement (i.e., this initiative is much bigger than the United States). Others, such as the Philippines, have expressed an interest in joining. Countries are drawn to it partly because it is not prescriptive or specific to any particular policy framework or political system, but is focused on addressing core issues and processes around providing a clear and consistent regulatory framework for firms managing personal data across the region. These countries trust the system and the other members of the CBPR system to abide by these common rules and processes, and in doing so, share the economic and social benefits that come from CBPR's role in facilitating data flows involving personal data. Further evidence that this is much larger than the United States, these CBPR members and other countries have agreed to similar approaches in bilateral and regional trade agreements, which allow privacy protections to flow with data, such as the Comprehensive and Progressive Agreement for Trans-Pacific Trade. (Dr. Hong also saw the CPTPP's predecessor, the Trans Pacific Partnership, as another U.S. strategic tool for the same ends, even though it now doesn't even include the United States.)^[37]

CHINA'S DOMESTIC AND INTERNATIONAL CYBER GOVERNANCE (INCLUDING DATA FLOWS)

China's digital and data governance framework has undergone significant change in recent years, with changes to laws and regulations related to data privacy, protection, cybersecurity, artificial intelligence, and other issues. For example, China's International Strategy of Cooperation on Cyberspace sets out broad statements of principles and ambitions, some of which relate to digital trade, but not in great detail.^[38] There's also the National Cyberspace Strategy and various five-year plans (for informatization and major science and technology projects) and technology-specific plans (such as for artificial intelligence and cloud computing).^[39] While each plan relates to digital trade in some way, they do so indirectly, in governing rules for data flows and key technologies and services. There is definitely no comprehensive digital trade strategy, such as the "Digital Two Dozen" published by the Obama administration.^[40]

Internationally, Chinese President Xi Jinping wants China to become a "cyber superpower," which includes being free and independent from foreign technology (which has obvious trade implications), and to (re)write the rules for global cyber governance.^[41] As outlined, as these rules relate to digital trade, they are very different from those included in the CPTPP and the U.S.-Mexico-Canada Trade Agreement (USMCA). More broadly, as it relates to governance of the global Internet and digital economy, China's preferred governance model is at odds with those of the many other countries that recognize the value provided by an open, innovative, global digital economy. In essence, China is pushing an alternative to the current open Internet.

There has no doubt been some level of debate between Chinese government officials and representatives from its leading tech firms about the issue of data flows, but it has not yet led to any major changes in China's approach. Formal, public comments that contradict China's broad, restrictive approach to data flows have been few and far between. For example, on July 20, 2018, a vice chairman of the Chinese People's Political Consultative Conference (CPPCC), Luo Fuhe, criticized the impact that online censorship has had on socio-economic development and scientific research, and he introduced a measure to make it easier and faster to access foreign websites.^[42]

Another curious anomaly in China's otherwise restrictive view of data and digital trade was a speech by Wang Huning (a member of the Communist Party of China's top leadership, on the Politburo Standing Committee) at the Chinese-government hosted World Internet Conference (WIC) in December 2017.^[43] Despite its name, the WIC is not "worldly" in focus or participation, but rather is about China's achievements in technology and conceptualization of cyber and data sovereignty. However, it does provide insights into China's view of digital issues.^[44] As part of a broad-ranging speech, Wang outlined the need to promote openness and cooperation, and he noted that the former is the foundation of the Internet. On data flows, Wang made a few interesting comments:

"Studies show that in the past 10 years, global cross-border data flows have increased by 45 times. Data and information have made an important contribution to development. We should give play to data as a key factor of production, and more broadly and deeply promote an open, sharing flow of data resources, so that the full value of data and information can be realized. We should deepen opening and cooperation in the Internet domain, building a mutually beneficial and win-win online market, creating more points of common interest, and growing cooperation and win-wins. General Secretary Xi Jinping has emphasized in his work report [to the 19th Party Congress] that opening up has brought progress while closure has brought backwardness....

"China will promote the Internet and the digital economy, properly implement the Internet and digital economy line and the APEC Cross-Border E-Commerce Facilitation Framework, and focus on the Belt and Road Initiative, to strengthen cooperation on the data economy, so as to make the achievements of the Internet greater and to better bring countries together.

"The digital economy is an important breakthrough point to move forward reform of the global Internet governance system, and a crucial force in building a community of common destiny in cyberspace. *China is willing to, together with international society, formulate and perfect norms and standards in areas such as cross-border e-commerce and cross-border data flows* (emphasis added). China promotes the construction of global data economy value chains, the stimulation of coordinated and linked development, and the realization of common prosperity."^[45]

The speech correctly recognizes the critical role of data and data flows in innovation and economic growth and the need for countries to work together to manage legitimate issues that arise due to

cross-border data flows, such as access to data for law enforcement purposes. However, given its context within China's state-directed and -controlled view of cyber and data sovereignty, it's hard to know what to make of this speech, especially given that it was never officially released, does not seem to have led to any obvious policy changes, and has not been repeated in subsequent remarks.

CONCLUSION

China has not made substantive or enforceable commitments on e-commerce or digital trade, especially on data flows, as part of its trade agreements. Nor has it signed up to other mechanisms, such as the APEC Cross-Border Privacy Regime. China sees e-commerce through the lens of traditional trade issues, where e-commerce platforms sell physical goods that need facilitation through customs, while the United States, Japan, and many other nations see it much broader, encompassing both purely digital products and the digitally enabled delivery of goods and services.

This shows that China doesn't accept that responsibility for privacy, cybersecurity, or other issues should flow with data wherever it is stored, but that data governance should be dependent on the location of data storage and government access and control of it. Many Chinese policymakers can't reconcile their strident view that sovereignty in the cyber realm supersedes the need to voluntarily limit it as part of international trade agreements or other international norms. It's important to note that some Chinese officials, academics, and private-sector representatives privately recognize the need for, and benefits of, such a perspective, but that key decision makers—especially in China's national security apparatus—don't share this same view.

This inevitably leads to formal remarks by Chinese policymakers that they do not negotiate on issues related to national sovereignty. But that is exactly what trade agreements are—voluntary agreements to limit sovereignty (in the forms of tariff reductions and other limitations on regulations) in exchange and pursuit of mutually beneficial arrangements with other countries. As yet, China has not signaled a willingness to do this in the digital trade realm. Perhaps this will change. However, if Chinese policymakers only associate sovereignty with social and political control, and do so unequivocally, then they essentially exclude themselves from the type of cooperation, such as on digital trade, that is necessary to maximize the potential benefits of a distributed technology like the Internet and an interconnected system like the global digital economy.

China does raise relevant issues that deserve to be included as part of WTO negotiations and other efforts to broaden engagement in the global digital economy, especially in terms of helping small- and medium-sized enterprises and developing countries engage in the global digital economy. However, these are not the ambitious and necessary goals that the international community needs to achieve to create a framework for a truly open, competitive, and innovative digital economy. At the heart of this ambitious outcome should be rules that protect data flows, and until China shows it is willing to make clear and enforceable commitments on this, it should be excluded from global digital trade negotiations.

APPENDIX 1: CHINA’S E-COMMERCE AND DIGITAL TRADE COMMITMENTS

Table 1: Index of commitments China has made on e-commerce and digital trade.^[46] (Also see Appendix 2 and the WTO’s June 2017 report titled “Provisions on Electronic Commerce in Regional Trade Agreements.”^[47])

Trade Agreement	Date	Provisions and Chapters Covering Them in China’s Various Trade Agreements							
		Prohibits duties on digital products	Non-discrimination of digital products	Cross-border data flows	Prohibits data localization	UNCITRAL Model Law	Consumer protection	Privacy protection	E-signatures
Australia (detailed below)	2015	12.3				12.5	12.7	12.8	12.6
Korea (detailed below)	2015	13.3						13.5	13.4
Hong Kong	2017	Very similar agreements. No mention of data or privacy in the respective services chapters. Personal privacy exception in the investment agreement. Both agreements include an article on e-commerce in the cooperation agreement, which mentions strengthening exchanges on “cross-boundary data flow” and forming a “working group” to study policy measures.							
Macao	2017								
ASEAN	2005	No mention of e-commerce, but an exception for personal privacy law is included in both the services and investment agreement. Upgraded several times since 2005.							
Chile	2006	No mention of e-commerce in the original PTA. The only relevant mention in the original PTA is an exception for a party’s law protecting personal privacy. Upgraded PTA recently signed and reportedly includes an e-commerce chapter, but the text of the agreement is not yet available.							
Costa Rica	2011	No mention of e-commerce or data flows.							
Georgia	2018	The only mention of e-commerce is article 12.2 in the areas of cooperation chapter.							
New Zealand	2008	Upgrade under negotiation. No e-commerce chapter in the original PTA.							
Singapore	2009	No mention of e-commerce or data flows in the original PTA. An upgraded PTA reportedly includes an e-commerce chapter (but it isn’t yet available online).							
Iceland	2013	This is the first PTA China signed with a developed country, but it includes no mention of data or e-commerce. No mention of e-commerce or data flows.							
Pakistan	2007	No mention of e-commerce but an exception for personal privacy law. Upgrade under negotiation.							
Peru	2010	No mention of e-commerce or data flows, but there are reportedly discussions to upgrade the agreement.							
Switzerland	2014	No mention of e-commerce, but there is a general exception for personal privacy law ((8.15(c)(ii)) in the Trade in Services chapter).							

Summary of China’s Trade Policy Approach to Specific Digital Issues

Dedicated Digital Trade and E-commerce Chapters

China has a dedicated e-commerce chapter in just two trade agreements—called either a free trade agreement (FTA) or preferential trade agreement (PTA)—which were currently in force as of December 2018. Those agreements are with Australia and South Korea and both entered into force at the end of 2015. However, e-commerce chapters are expected to be a component of several upcoming Chinese trade agreements. For instance, reports indicate that China recently signed

upgrades to its agreements with both Chile and with Singapore, but neither text is yet available.^[48] E-commerce chapters are expected to be in both agreements. Additionally, China is undertaking preferential trade negotiations with a number of countries, including Norway, Israel, Panama, and others, and all of those agreements are expected to include e-commerce chapters.

Customs Duties on Electronic Transmissions

China has agreed to maintain the current practice of not imposing customs duties on electronic transmissions in line with the WTO Ministerial declaration on e-commerce in two of its PTAs—those with Australia and Korea. This differs from the high-standard and best-practice approach used in other agreements like the U.S.-Mexico-Canada Agreement, the Trans-Pacific Partnership, the Comprehensive and Economic Trade Agreement between the EU and Canada (CETA), and many other agreements, which is to simply exempt electronic transmissions from customs duties. In contrast, China maintains the flexibility in its digital trade commitments to impose tariffs on electronic transmissions in accordance with the WTO work program on electronic commerce. This means that if discussions on the issue break down at the WTO, China's trade partners could find that their digitally enabled firms would become subject to tariffs.

Dispute Settlement

China has made no commitments related to e-commerce that are subject to dispute settlement. In both the Australia PTA and Korea PTA—the only Chinese PTAs that include dedicated electronic commerce chapters—neither is subject to dispute settlement. Thus, even in those agreements that include commitments on custom duties for electronic transmissions, China cannot be held to account for changes in policy. In other agreements where no dedicated chapter exists, digital trade can be mentioned in a cooperation chapter, as in the case of the Georgia PTA.

Privacy Exceptions

China has had three standard approaches in dealing with privacy exceptions in preferential trade agreements outside of distinct e-commerce chapters, which only began to appear in 2015 with the Korea and Australian agreements. The three approaches are exemplified by agreements with (1) Hong Kong and Macao; (2) Switzerland, Singapore, and ASEAN; and (3) Chile, Pakistan, and New Zealand.

In China's respective investment agreements with Hong Kong and Macao, a provision sets out the exceptions (Article 22), one of which is that, "Nothing in [the] Agreement shall [...] be contrary to that side's laws protecting confidential information of the government, personal privacy, the confidentiality of the financial affairs and accounts of individual customs of financial institutions." However, it is subject to the provision that the "measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on trade or investment."

The language used in the agreements with Switzerland, Singapore, and ASEAN differs from that with Hong Kong and Macao but is ultimately similar. It again opens with the requirement that "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties Other." It allows a party to adopt or to enforce measures which

relate to “the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.”

The third approach taken in agreements with Chile, Pakistan, and New Zealand is to include a provision that is either called “disclosure of information” or “confidential information” in the exceptions chapter. The text of the provision states that “Nothing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information [...] or would be contrary to [...] the Party’s law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.”

The language relating to privacy in the PTA with Australia is weak. Although it calls on each party to take account of international standards in developing data protection standards, it also states that “each Party shall take such measures as it considers appropriate and necessary to protect the personal information of users of electronic commerce” (Article 12.8). Hence, any measure related to data localization could be justified under this provision given the broad nature of the exception.

The privacy provision included in the PTA with Korea is an improvement. It requires each party to maintain measures to protect “the personal information of the users of electronic commerce,” but includes no mention of the “differences in existing systems for personal information protection” as the Australian PTA does. However, regardless of the improvement in the language, neither chapter is subject to dispute settlement meaning these provisions cannot be enforced.

APPENDIX 2: EXCERPTS FROM CHINA'S VARIOUS FTAS AND PTAS

This appendix provides e-commerce excerpts from specific parts of China's various free trade and preferential trade agreements.

Australia—Ch.12 Electronic Commerce^[49]

Article 12.1: Purpose and Objective

1. The Parties recognise the economic growth and opportunities provided by electronic commerce, the importance of avoiding barriers to its use and development, and the applicability of relevant WTO rules.
2. The objective of this Chapter is to promote electronic commerce between the Parties, including by encouraging cooperation on electronic commerce.
3. The Parties shall endeavour to ensure that bilateral trade through electronic commerce is no more restricted than other forms of trade.

Article 12.2: Definitions

For the purposes of this Chapter:

- (a) digital certificates are electronic documents or files that are issued or otherwise linked to a party to an electronic communication or transaction for the purpose of establishing the party's identity;
- (b) electronic signature means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message;
- (c) electronic version of a document means a document in electronic format prescribed by a Party, including a document sent by facsimile transmission;
- (d) personal information means information about an individual whose identity is apparent, or can reasonably be ascertained, from the information;
- (e) trade administration documents means forms issued or controlled by the Government of a Party which must be completed by or for an importer or exporter in relation to the import or export of goods;
- (f) UNCITRAL means the United Nations Commission on International Trade Law; and - 131 –
- (g) unsolicited commercial electronic message means an electronic message (including a voice service) which is sent for commercial purposes to an electronic address without the consent of the recipient (including where consent has been explicitly refused or withdrawn) using an internet

carriage service or other telecommunications service.

Article 12.3: Customs Duties

1. Each Party shall maintain its practice of not imposing customs duties on electronic transmissions between the Parties, consistent with paragraph 5 of the WTO Ministerial Decision of 7 December 2013 in relation to the Work Programme on Electronic Commerce (WT/MIN(13)/32-WT/L/907).

2. Each Party reserves the right to adjust its practice referred to in paragraph 1 in accordance with any further WTO Ministerial Decisions in relation to the Work Programme on Electronic Commerce.

Article 12.4: Transparency

1. Each Party shall promptly publish, or otherwise promptly make publicly available where publication is not practicable, all relevant measures of general application which pertain to, or affect, the operation of this Chapter.

2. Each Party shall respond promptly to all requests by the other Party for specific information on any of its measures of general application within the meaning of paragraph 1.

Article 12.5: Domestic Regulatory Frameworks

1. Each Party shall maintain domestic legal frameworks governing electronic transactions based on the UNCITRAL Model Law on Electronic Commerce 1996 and taking into account, as appropriate, other relevant international standards.

2. Each Party shall: (a) minimise the regulatory burden on electronic commerce; and (b) ensure that regulatory frameworks support industry-led development of electronic commerce.

Article 12.6: Electronic Authentication and Digital Certificates

1. Each Party shall maintain laws regulating electronic signatures that permit: (a) parties to electronic transactions to mutually determine the appropriate electronic signature and authentication methods; and (b) electronic authentication service providers, including agencies, to have the opportunity to prove before judicial or administrative authorities that their electronic authentication services comply with the relevant legal requirements.

2. The Parties shall work towards the mutual recognition of digital certificates and electronic signatures.

3. Each Party shall encourage the use of digital certificates in the business sector.

Article 12.7: Online Consumer Protection

Each Party shall, to the extent possible and in a manner it considers appropriate, provide protection for consumers using electronic commerce that is at least equivalent to that provided for consumers of other forms of commerce under their respective laws, regulations and policies.

Article 12.8: Online Data Protection =

1. Notwithstanding the differences in existing systems for personal information protection in the territories of the Parties, each Party shall take such measures as it considers appropriate and necessary to protect the personal information of users of electronic commerce.
2. In the development of data protection standards, each Party shall, to the extent possible, take into account international standards and the criteria of relevant international organisations.

Article 12.9: Paperless Trading

1. Each Party shall accept the electronic versions of trade administration documents as the legal equivalent of paper documents except where: (a) there is a domestic or international legal requirement to the contrary; or (b) doing so would reduce the effectiveness of the trade administration process.
2. The Parties shall cooperate bilaterally and in international forums to enhance acceptance of electronic versions of trade administration documents.
3. In developing initiatives which provide for the use of paperless trading, each Party shall endeavour to take into account the methods agreed by international organisations.
4. Each Party shall endeavour to make all trade administration documents available to the public as electronic versions.

Article 12.10: Cooperation on E-commerce

1. The Parties shall encourage cooperation in research and training activities that would enhance the development of electronic commerce, including by sharing best practices on electronic commerce development.
2. The Parties shall encourage cooperative activities to promote electronic commerce, including those that would improve the effectiveness and efficiency of electronic commerce.
3. The cooperative activities referred to in paragraphs 1 and 2 may include, but are not limited to: (a) sharing information about regulatory frameworks; (b) sharing information about on-line consumer protection, including unsolicited commercial electronic messages; and (c) further areas as agreed between the Parties.
4. The Parties shall endeavour to undertake forms of cooperation that build on and do not duplicate existing cooperation initiatives pursued in international forums.

Article 12.11: Dispute Settlement Provisions

The provisions in Chapter 15 (Dispute Settlement) shall not apply to the provisions of this Chapter.

Korea—Ch.13 Electronic Commerce^[50]

Article 13.1: General

The Parties recognize the economic growth and opportunity that electronic commerce provides, the importance of promoting its use and development, and the applicability of the WTO Agreement to measures affecting electronic commerce.

Article 13.2: Relation to Other Chapters

In the event of any inconsistency between this Chapter and other Chapters, the other Chapters shall prevail to the extent of the inconsistency.

Article 13.3: Customs Duties^[51]

Each Party will maintain the current WTO practice of not imposing customs duties on electronic transmissions.^[52]

Article 13.4: Electronic Authentication and Electronic Signatures

1. Neither Party may adopt or maintain legislation for electronic signature that would deny a signature legal validity solely on the basis that the signature is in electronic form.
2. Each Party shall maintain domestic legislation for electronic signature that permits: (a) parties to electronic transaction to mutually determine the appropriate electronic signature and authentication method; and (b) electronic authentication agencies to have the opportunity to prove in judicial or administrative authorities a claim that their electronic authentication to electronic transaction comply with legal requirements with respect to electronic authentication.^[53]
3. Each Party shall work towards the mutual recognition of digital certificates and electronic signatures.
4. Each Party shall encourage the use of digital certificates in the business sector.

Article 13.5: Protection of Personal Information in Electronic Commerce

Recognizing the importance of protecting personal information in electronic commerce, each Party shall adopt or maintain measures which ensure the protection of the personal information of the users of electronic commerce and share information and experience on the protection of personal information in electronic commerce.

Article 13.6: Paperless Trading

1. Each Party shall endeavour to make trade administration documents available to the public in electronic form.
2. Each Party shall explore the possibility of accepting trade administration documents submitted electronically as the legal equivalent of the paper version of those documents.

Article 13.7: Cooperation on Electronic Commerce

1. The Parties agree to share information and experience on issues related to electronic commerce, including, inter alia, laws and regulations, rules and standards, and best practices.
2. The Parties shall encourage cooperation in research and training activities to enhance the development of electronic commerce.
3. The Parties shall encourage business exchanges, cooperative activities and joint electronic commerce projects.
4. The Parties shall actively participate in regional and multilateral fora to promote the development of electronic commerce in a cooperative manner.

Article 13.8: Definitions

For the purposes of this Chapter: electronic authentication means the process or act of providing authenticity and reliability verification for the parties involved in electronic signature to ensure integrity and security of electronic communication or transaction; electronic signature means data in electronic form that is in, affixed to, or logically associated with a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message. Data message means information generated, sent, received or stored by electronic, optical or similar means; and trade administration documents means forms a Party issues or controls that must be completed by or for an importer or exporter in connection with the import or export of goods.

Article 13.9: Non-Application of Dispute Settlement

Neither Party shall have recourse to Chapter 20 (Dispute Settlement) for any matter arising under this Chapter.

Hong Kong^[54]

Agreement on Economic and Technical Cooperation: Article 14 Cooperation in Electronic Commerce

The two sides agree to adopt the following measures with a view to further strengthening cooperation in the area of electronic commerce:

1. Cooperate in specialised projects in respect of the study and formulation of rules, regulations and standards of electronic commerce, with a view to creating a favourable environment for promoting and ensuring the healthy development of electronic commerce.
2. Strengthen exchanges and cooperation in areas such as corporate application, promotion and training. Make full use of the relevant government departments of the two sides in promotion and coordination, foster interaction between the relevant government departments and enterprises of the two places, and facilitate the launching of electronic commerce among enterprises through demonstration projects.
3. Strengthen cooperation in implementing e-government, intensify exchanges and cooperation in the development of e-government at various levels.
4. Cooperate in economic and trade information exchanges, expand the breadth and depth of cooperation, and strengthen the connection of e-commerce logistics information with Guangdong-Hong Kong-Macao as the core to support the rapid development of electronic commerce in the region.
5. Continue the cooperation in promoting electronic signature certificates that comply with the mutual recognition certificate policy to ensure the security and reliability of cross-border electronic transactions.
6. Capitalise on the advantages of the two places to promote the development of cross-boundary electronic commerce for key industries and bulk commodities.
7. Strengthen exchanges between the two places regarding cross-boundary data flow, and form a joint working group to study feasible policy measures and arrangements.

Macao^[55]

Cooperation Agreement: Article 13: Cooperation on Electronic Commerce

The two sides agree to adopt the following measures with a view to further strengthening cooperation in the area of electronic commerce:

1. Cooperate in specialised projects in respect of the study and formulation of rules, regulations and standards of electronic commerce, with a view to creating a favourable environment for promoting and ensuring the healthy development of electronic commerce.
2. Strengthen exchanges and cooperation in areas such as corporate application, promotion and training. Make full use of the relevant government departments of the two sides in promotion and coordination, foster interaction between the relevant government departments and enterprises of

the two places, and facilitate the launching of electronic commerce among enterprises through demonstration projects.

3. Strengthen cooperation in implementing e-government, intensify exchanges and cooperation in the development of e-government at various levels.
4. Cooperate in economic and trade information exchanges, expand the breadth and depth of cooperation, and strengthen the connection of e-commerce logistics information with Guangdong-Hong Kong-Macao as the core to support the rapid development of electronic commerce in the region.
5. Continue the cooperation in promoting electronic signature certificates that comply with mutual recognition policies such as the “Certificate Policy for Mutual Recognition of Electronic Signature Certificates Issued by Guangdong and Macao” to ensure the security and reliability of cross-boundary electronic document signing and electronic transactions in respect of service and trade.
6. Capitalise on the advantages of the two places to promote the development of cross-boundary electronic commerce for key industries and bulk commodities.
7. Strengthen exchanges between the two places regarding cross-boundary data flow.

Georgia^[56]

Article 12.2: Electronic Commerce

1. The Parties recognize the economic growth and opportunity provided by electronic commerce, the importance of promoting its use and development, and the applicability of the WTO Agreement to measures affecting electronic commerce.
2. The Parties agree to share information and experience on issues related to electronic commerce, including, inter alia, laws and regulations, rules and standards, and best practices.
3. The Parties shall encourage cooperation in research and training activities to enhance the development of electronic commerce.
4. The Parties shall encourage business exchanges, cooperative activities, and joint electronic commerce projects.
5. The Parties shall actively participate in regional and multilateral fora to promote the development of electronic commerce in a cooperative manner.

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