A SYSTEM WITHOUT OWNERSHIP:

HOW CHINA'S NEW DATA PROPERTY RIGHTS SYSTEM WILL IMPACT DIGITAL TRADE

DIGITAL TRADE ALLIANCE

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Introduction

China announced an unprecedented data property rights system to promote data commercialization in December 2022 and issued implementation rules in 2023. The property rights system attempts to clarify data handlers' rights over "big data" (i.e. data derived or constituted from personal or non-personal data). It also establishes parameters for China's regulations concerning data handlers (i.e. those entities who collect, process, and store personal and non-personal data). This policy brief explains the data property rights system and highlights its innovations and challenges. It also explains why this data property rights system deliberately avoids addressing issues related to data ownership. The brief further analyses how the data property rights system may impact digital trade from two aspects:

(a) How the system will be enforced, particularly with respect to data that has been exported from China?

(b) Whether and how the data property rights system will apply to foreign parties or the data of foreign companies.

What is the Data Property Rights System?

The value of data comes from its aggregation rather than separation.[1] Big data (i.e. aggregated data) is much more commercially valuable than isolated individual data. However, big data is not created on its own. Data handlers need to devote time, money, and other resources to collect and process individual data points and convert these into productive and value-added big data.

The Chinese Civil Code and the Personal Information Protection Law (hereinafter "PIPL") provide that natural persons enjoy a personality right to their data.[2] However, neither law clarifies what right a data handler has to the personal data that it collects and processes. Examples of this include whether the data handler has a right to big data produced from smaller data sets, whether such big data sets are jointly owned with (or independent from) data subjects, and whether the nature of the data handler's rights are personality, property, contractual, or other rights.

In addition to personal data, there is a tremendous amount of non-personal data, such as industrial data (e.g. a company's financial data and electricity usage data) and data in the public domain (e.g. weather data). If a data handler spends resources to collect and process such data, what right does the handler have to this data?

These issues were addressed by the Central Commission for Comprehensively Deepening Reforms, "a 'control tower' for the top-level design" in December 2022,[3] in the "*Opinions on Building a Foundational*

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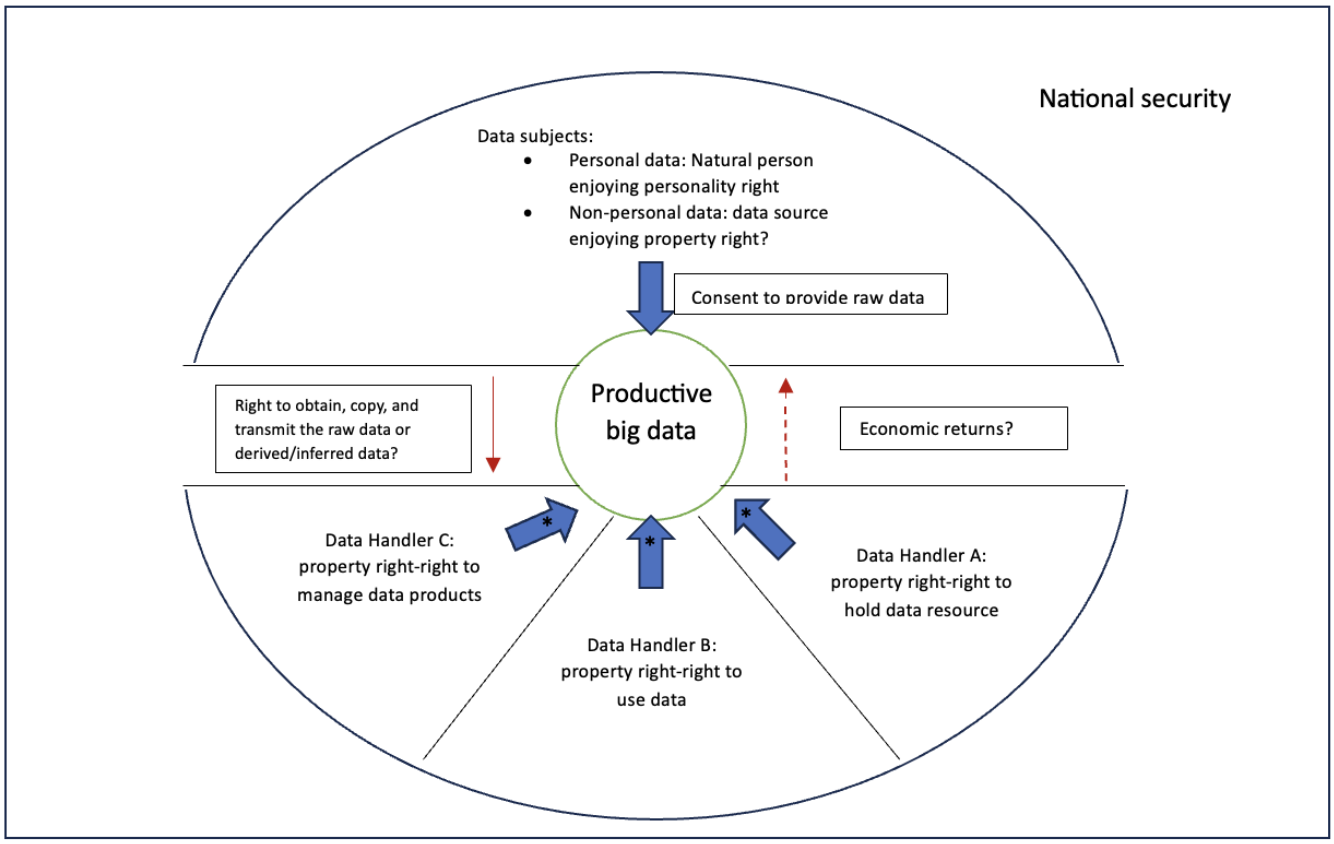
[1] In this paper, "data" is used as an equivalence to "information".

[2] This personality right refers to the legal rights that individuals have to control the commercial use of their name, image, likeness, and other aspects of their personal identity. Chapter VI of the Civil Code of China. Chapter II-VI of the Personal Information Protection Law.

[3] Norihiko Sasaki, *Functions and Significance of the Central Leading Group for Comprehensively Deepening Reforms and the Central Comprehensively Deepening Reforms Commission*, 11 J. CONTEMP. EAST ASIA STUD. 229, 236 and 241 (2022).

System for Data to Enhance the Role of Data Factor" (hereafter, 'the Opinions').[4] The Opinions establish a novel data property rights system to advance data commercialization, which emphasizes the economic importance of data as a production factor[5] and promotes the efficient circulation and use of data without harming national security.[6] The data property rights system is illustrated in the Chart below.

Chart: The Data Property Rights System in China



*Input labour and other resources to make raw data into productive data

[4] Opinions on Building a Foundational System for Data to Enhance the Role of Data Factor, https://www.gov.cn/zhengce/2022-12/19/content_5732695.htm.

[5] In March 2020, the Communist Party of China Central Committee and the State Council announced data as the fifth major production factor, alongside land, labor, capital, and technology.
In the same year, the Communist Party of China Central Committee with the State Council again required the acceleration of "the cultivation and development of the data factor market." These are the sources of data as a production factor. See "Opinions on Building a More Perfect Factor Market-Based Allocation System and Mechanism", https://www.gov.cn/zhengce/2020-04/09/content_5500622.htm; Opinions on Accelerating the Improvement of the Socialist Market System in the New Era, https://www.gov.cn/zhengce/2020-05/18/content_5512696.htm.

[6] Bingwan Xiong, Jiangqiu Ge & Li Chen, *Unpacking Data: China's 'Bundle of Rights' Approach to the Commercialization of Data*, 13 INT. DATA PRIV. LAW 93, 93 (2023).

a. Big Data is not Owned by any Party.

The Chart above indicates the design of rights under the Data Property Rights System. Big data is at the centre of the Chart, as it is not owned by any party (i.e. the data handlers or the entities from whom raw data is sourced). The blue arrows indicate inputs from data subjects (raw data) and data handlers (labor and other resources).

Inspired by the "Bundle of Rights" property theory in the U.S.,[7] the data property system designed by the Opinions is essentially a system that deliberately avoids identifying the data owner and the assignment of ownership rights over data. Instead, it emphasizes the rights to use data and the ability to transfer such rights.

The data property rights system recognises three separate but related property rights:

(a) The right to hold data resource (数据资源持有权, Shuju Ziyuan Chi You Quan),

(b) The right to process and use data (数据加工使用权, Shuju Jiagong Shiyong Quan), and

(c) The right to manage data product (数据产品经营权, Shuju Chanpin Jingying Quan).[8]

Data handlers obtain these property rights by "original acquisition", the process of "creation" of "new" data using raw data supplied by data subjects. Because data handlers obtain property rights by original acquisition as opposed to gaining or deriving rights from data subjects, the rights are not a joint property right shared between data subjects and handlers.

Each of the aforementioned rights may vest with the same or multiple data handlers. Further, if a data handler acquires raw data (either personal or non-personal) and turns this into big data on behalf of a third party, the entity in which the property rights created through original acquisition would vest would be determined by way of a contract between these two parties.

The Bundle of Rights theory generally includes five separate rights: possession, control, exclusion, enjoyment, and disposition. The Opinions do not distinguish between possession and control. Neither do they lay out clear rules for data handlers to exclude, enjoy, or dispose of data. This is because the Opinions are a high-level, central government policy document, with implementation left to local governments. Notably, 22 provincial governments have released implementation rules in 2023, with more provinces and municipalities expected to follow suit in the coming year.[9]

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[7] The "Bundle of Rights" theory was proposed by Professor Wesley Hohfeld in the U.S. He believed property rights are not a human-object relationship but a human-human relationship. The relationship is constituted by a series of complicated rights, namely claim, privilege, power, and immunity. "Bundle of rights" means there are multiple rights combined bundled together on a piece of property, just like a bundle of flowers. Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economic Essay, 111 Yale Law Journal 357 (2001).

[8] "Data 20 Provisions" is Published, Construct a Basic Data System: Strengthen, Enhance, and Expand Digital Economy, https://www.gov.cn/zhengce/2022-12/21/content_5732906.htm.

[9] Hainan Province Develop Data Factor Market Three-Year Action Plan (2024-2026), promulgated by Hainan Province People's Government on December 6, 2023, Qiong Fu Ba (2023) 33 Hao, https://www.01caijing.com/article/338973.htm; Notice of the Comprehensive Deepening Reform Committee of the Guangzhou Municipal Committee of the Communist Party of China issued the "Implementation Opinions on Better Using Data Factor to Promote High-Quality Development in Guangzhou" (hereinafter "Guangzhou Implementation Rules"), promulgated on December 1, 2023, Sui Gai Wei Fa [2023] No. 8,

https://www.gz.gov.cn/xw/tzgg/content/post_9357343.html; Notice from the General Office of the Shanghai Municipal People's Government on the issuance of the "Action Plan for Promoting the Innovation and Development of the Data Element Industry Based on

To further understand the data property system in China, it may be useful to compare it with two data-related legal regimes in the European Union: the EU's Data Act and the sui generis database rights system.

The EU's Data Act "puts *obligations* on manufacturers and service providers to let their users…access and reuse the data generated by the use of their products or service… (emphasis added)".[10] The Chinese data property rights system differs from this by creating *rights* for data handlers. On the other hand, the Chinese system is similar to the EU's *sui generis* database rights in at least two aspects. First, they share a similar goal. The former aims to recognize the value of resources that a data handler contributes to converting raw data into value-added productive big data; the latter applies "if a substantial investment was made in obtaining, verifying and presenting" the contents of a database.[11] Secondly, China also allows data holders or data handlers to register data intellectual property rights (though the time period of protection is significantly different, with the EU granting exclusive rights to the creator of a database for 15 years while China grants a data intellectual property registration for only three years).[12]

b. Data Subjects Enjoy a Statutory Right to Raw Data.

Data subjects are placed in the top/upper portion of the Chart, as the Opinions protect the data subject's statutory right to raw data. Data subject includes both personal data subjects and non-personal data sources. They both enjoy statutory rights of data protection, which are "explicitly granted by law and take precedence over other rights to use the data for commercial purposes".[13] According to the Opinions, the legitimate rights and interests of data subjects shall be sufficiently protected.[14] In practice, this implies that without their informed consent or statutory circumstances, data access and commercialization shall not be allowed. [15] The interactions between data subjects and data handlers are two-fold, represented by the red solid and the red dotted lines in the Chart.

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the New Track of the Digital Economy (2023-2025)" (hereinafter "Shanghai Implementation Rules"), promulgated on July 22, 2023, https://www.shanghai.gov.cn/nw12344/20230814/e946902bdcaf40e292602ac6e8818f61.html; Notice of the Beijing Municipal Committee of the Communist Party of China and the Beijing Municipal People's Government on issuing the "Implementation Opinions on Better Using Data Factor to Further Accelerate the Development of the Digital Economy" (hereinafter "Beijing Implementation Rules"), promulgated on June 20, 2023, https://www.beijing.gov.cn/zhengce/zhengcefagui/202307/t20230719_3165748.html.

[10] Data Act: Council adopts new law on fair access to and use of data, https://www.consilium.europa.eu/en/press/press-releases/2023/11/27/data-act-council-adopts-new-law-on-fair-access-to-and-use-of-data/.

[11] What are the conditions for the *sui generis* protection of a database? https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-frequently-asked-questions_en#Database_Protection_Domain_Protection.

[12] For example, Article 2 of the "Beijing Data Intellectual Property Registration and Management Measures (Trial)" stipulates that data holders or data processors that collect data in accordance with laws and regulations or contract agreements, apply certain processing rules or algorithms to data, have commercial value and intellectual property attributes, and protect data confidentiality, can apply for data intellectual property registration. The Beijing Data Intellectual Property Registration and Management Measures (Trial), promulgated by the Beijing Intellectual Property Bureau on May 30, 2023, https://www.beijing.gov.cn/zhengce/zhengcefagui/202311/t20231115_3301983.html. Also refer Article 13 of the the Beijing Data Intellectual Property Registration and Management Measures Trial, which along with similar measures in various provinces, does not address what intellectual property right that data holders or data processors have and whether such right can be renewed after three years.

[13] Xiong, et al, *supra* note 6, at 101.

[14] Art. 7 of the Opinions on the Foundational System for Data.

[15] *Id.*

(i) Exercising Data Subject Rights

The red solid arrow indicates that data subjects can exercise rights on the raw data and the big data pertaining to them and processed by a data handler. Data subjects have rights to obtain, copy, and transmit the relevant raw data as recognised under the PIPL and other statutes.[16] An individual data subject will not have access to data not pertaining to them in the big data set produced by the data handler. This is because the big data may include data collected from other data subjects who do not provide consent to parties other than the data handler to access their data.

Data handlers get property rights in the big data they create (by virtue of the effort they put in in the creation process). However, it is unclear whether they would have (property) rights in the raw data. Notably, the Beijing Implementation Rules seems to limit the data handler's property rights to market entities which collect, hold, process, and sell data that neither contain personal information nor involve public interest.[17] In contrast, the Opinions and the Guangzhou and the Shanghai Implementation Rules do not impose such limitations.[18] Moreover, Article 7 of the Opinions is confusing. It can be translated as "[the data property rights system should] ensure that data subjects have the right to obtain, copy or transmit the data they facilitate in generating [保障数据来源者享有获取或复制转移由其促成产生数据的权益]". Whether this means a data subject can exercise the right to obtain, copy, and transmit derived or inferred data produced from the subject's raw data is an open question.[19] The answer is likely negative because if a data subject has the right to do so, it would be detrimental to the purpose of creating the data handlers' property rights over productive big data. Moreover, Article 45 of the PIPL allows a data subject to access or copy his or her personal data from a personal data handler, which seems to be limited to the raw data rather than including derived or inferred data. In cases of non-personal data, the contracts between data subjects and data handlers should regulate what rights the data subjects have to productive big data derived from their raw data. Notably, there is a debate now with AI training, where the original data has been turned into a mathematical matrix and cannot be unpicked. It is unlikely that China would allow a data subject to obtain, copy, and transmit the matrix.

Finally, the Chart above only includes three data handlers. In practice, there may be more data handlers because a data handler may entrust multiple handlers to process the data. This raises the question of whether data handlers further downstream can be bound by the data subject's rights, and if so, how they can even map the data back to the origin correctly and economically. These two issues can be addressed by the consent requirements imposed by PIPL. Namely, a data handler needs to obtain data subjects' consent to entrust other handlers to process their data and provide other handlers' names, contact information, the purpose and methods of processing data, and the scope of data provided to data subjects.[20] Further, cross-border data transfer also requires data handlers to comply with the security assessment, data protection certification, standard contracts, or other conditions stipulated by law, administrative regulations, and the State cyberspace administration.[21]

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[16] Although the red solid arrow is on the left in the Chart, the data subjects can exercise their rights against any data processors in the Chart. Art. 7 of the Opinions on the Foundational System for Data.

[17] Art. 4 of the Beijing Implementation Rules.

[18] Art. 3 of the Opinions on the Foundational System for Data. Art. 1 of the Guangzhou Implementation Rules. Art. 2 of the Shanghai Implementation Rules.

[19] Derived or inferred data are obtained by using statistical methods, machine learning algorithms, or other analytical techniques to extract additional meaning or patterns from the raw data, e.g. based on an individual purchasing records on a website, a data handler may impose analytical techniques to find that this individual may be interested in a certain product and at a certain price range; based on a person's education, professional experience, website browsing history, etc, a data handler may impose analytical techniques to find this person's political preference.

[20] E.g. Art. 6 of the Opinions on the Foundational System for Data; Arts 20-23 of the PIPL.

[21] E.g. Art. 38 of the PIPL.

(ii) Economic Returns From Data:

The red dotted arrow in the Chart represents the economic returns that data subjects may receive from conversion of their raw data to big data by a data handler. The Opinions adopt a three-tier system to distribute economic returns to the data subjects and the general public:[22]

(a) The initial distribution phase, following the principle of "who invests, who contributes, who benefits," aims to promote a fair distribution of returns towards creators of data value and utility.[23] Although the Opinions intend to ensure that investments in various stages of data collection, processing, circulation, and application result in proportional returns,[24] they do not clearly state that data subjects can enjoy economic returns directly from data handlers' use of their raw data.

(b) The secondary distribution phase refers to the process where the government reallocates government revenue derived from taxing data companies to data subjects (over and above the initial distribution), either in cash or in kind, to compensate for the inadequacies of the initial distribution.

(c) The tertiary distribution phase implies donations, sponsorships, or other charitable initiatives by data handlers who voluntarily distribute their resources and wealth to data subjects or the society at large. Like the secondary distribution, the tertiary distribution aims to focus on public interest and weaker parties in the economy to avoid the monopoly of capital in the market.[25]

The lack of clarity on how this system will be operationalized is a significant point of concern for the following reasons:

(a) The initial distribution phase focusing on the contribution and investment in data collection, processing, circulation, and application appears to favour data handlers rather than data subjects as the latter will usually not be involved in data processing, circulation, and application. Thus, the question of how economic benefits are to be provided to the data subjects remains unclear.

(b) One may question whether the need for secondary and tertiary distribution of the economic benefits would reduce the value of the property right created for data handlers. This appears unlikely because there is no sign that China would impose higher or additional taxes on data companies to increase secondary distribution. Instead, with the expansion of China's digital economy through data commercialization, the government can obtain more revenues even

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[22] According to General Secretary Xi's report at the 20th National Congress of the Communist Party of China, initial distribution means data subjects' income based on the contributions of data as a factor of production in the market.[22] Redistribution refers to the process where the government reallocates government revenue to data subjects on top of the initial distribution, either in cash or in kind, to compensate for the inadequacies of the initial distribution. Tertiary distribution means donations, sponsorships, or other charitable initiatives by data handlers who voluntarily distribute their resources and wealth to data subjects or the society at large. One Hundred Questions on the Guidance of the 20th Party Congress Report: How to Understand the Establishment of a Coordinated and Complementary System for the First Distribution, Redistribution, and Tertiary Distribution?" https://www.12371.cn/2023/03/02/ARTI1677755948047657.shtml.

[23] Art. 12 of the Opinions on the Foundational System for Data.

[24] *Id.* Art. 12.

[25] *Id.,* Art. 13.

by levying the same tax rate. However, if the secondary and tertiary distribution phases do not impose 'burdens' additional to existing regular taxation on data handlers, why are they relevant at all in the data property context given that any company must pay compulsory taxes and is allowed to voluntarily contribute to charities? The exact answers are unclear. One possibility is that the Opinions create special property rights for data handlers, and in order to reconcile with the need to protect data subjects and the general public, it is necessary to mention secondary and tertiary distribution of the economic benefits to soothe public concerns. Another possibility is that big data created by data handlers could be used by third parties such as the State under certain conditions for free or at a discounted price for public interest purposes. Moreover, China may encourage data handlers to make charitable donations, and it is yet to be seen how such "encouragement" may be reconciled with the voluntary nature of the tertiary distribution.[26]

(c) Another concern is that data is non-rivalrous, so many people could benefit by opening data for public interest. A similar argument applies to government data for public governance and social welfare. The Opinions provide that such data should be freely accessible to the public subject to various conditions, such as the need to indicate the purpose of use.[27] In order to protect the public interest in the supply and use of government data, using public data for commercial reasons is unlikely to be free.[28] According to the Beijing Implementation Rules, the Beijing Municipal Bureau of Economy and Information Technology will set the data usage terms and conditions, procedure, rates, profits division, auditing, etc.[29] The Guangzhou Implementation Rules aim to adopt the model of "government management + enterprise operation" and establish an organ to operate government data; however, it is unclear whether the organ would be a government agency or a state-owned or private enterprise.[30]

(iii) National Security

In 2023, the Yueyang Sanhe Airport in Hunan province in central China banned Tesla electronic cars from entering the airport parking lot in the restricted area (which is considered to contain classified information).[31] The concern arose from the fact that Tesla's Sentry Mode can record the surrounding environment, potentially leading to information leakage.[32] Sentry Mode is designed to activate the car's cameras and record any suspicious activities in the vicinity of the vehicle when the driver is not present.[33] The ban was later lifted after Tesla clarified that all data generated from its vehicles sold in Mainland China will be stored in China.[34] The Tesla example illustrates the existing Chinese legal framework is security-centred. The data property system is not an exception.

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[26] E.g. Art. 14 of the Guangzhou Implementation Rules (promote big data enterprises to actively shoulder social responsibility and promote public-interest-oriented data service).
[27] Art. 4 of the Opinions on the Foundational System for Data.
[28] *Id.*
[29] Art. 10 of the Beijing Implementation Rules.
[30] Art. 7 of the Guangzhou Implementation Rules.
[31] Chinese Airport Lifts Tesla Ban After Sentry Mode Clarification, https://www.sixthtone.com/news/1013528.
[32] China's Yueyang Airport Lifts Bans on Tesla's Entrance, https://www.sixthtone.com/news/1013528.
[33] Vehicle Safety and Security Features, https://www.tesla.com/en_hk/support/vehicle-safety-security-features.
[34]Chinese Tesla Data to be Stored on Mainland, http://www.ecns.cn/business/2023-08-15/detail-ihcsemmm4540765.shtml.

The entire data property rights system is bound by a broader national security rubric, indicated in the Diagram above by the large square in the chart. This implies that data handlers and data subjects will only be able to exercise their rights if this does not conflict with China's national security interests.[35]

How Would the Implementation of China's new Data Property Rights System Impact Digital Trade?

According to the Opinions, the property rights-based data regulatory system should be the foundation for data commercialization in China. In December 2023, the Hainan Free Trade Island became the first province to enact a three-year action plan to implement the Opinions.[36] At the central government level, the State Council, the China National Data Bureau, and the Supreme People's Court will likely be at the forefront of issuing implementation rules. There are at least two important issues to be addressed at the implementation stage.

How the System will be Enforced, Particularly With Respect to Data that has been Exported from China

It is unlikely that this system, once enacted by national or provincial laws, will have retrospective effects on data that has been exported from China before the enactment day. However, it will impact outbound data transmission from China post-implementation. The pivotal question for digital trade is what the property rights system means for China's entry into free trade agreements (FTAs) containing data flow-related clauses. Specifically, what kind of provisions is China likely to want in FTAs regarding cross-border data flows?

Among all the FTAs signed by China, RCEP is the only one that regulates cross-border data transmission and data localization. However, under the Opinions, the provisions on electronic cross-border data transmission and data localization under the CPTPP and DEPA may better cater to China's data commercialization needs.

a. Cross-Border Data Transmission

Article 14.11 of the CPTPP imposes a compulsory obligation on its member states to enable a covered person to freely transfer information (including personal data) cross-border for the conduct of commerce.[37] Article 12.15 of the RCEP and Article 14.11 of the CPTPP share similarities in two aspects. Firstly, both provisions have broad coverage. Although the terms "business" in the electronic

[35] Art. 7 of the Opinions on the Foundational System for Data.
[36] The General Office of the People's Government of Hainan Province, The Hainan Version of the Data Twenty Provisions is Published and the 2026 Will be a Milestone, https://www.01caijing.com/article/338973.htm.
[37] Art. 14.11 of the CPTPP.

commerce chapters of CPTPP and RCEP are not explicitly defined, this term is internationally recognized and has broad coverage.[38] Secondly, the scope of applicability of RCEP Article 12.15 and CPTPP Article 14.11 should be considered in conjunction with non-conforming measures listed in the investment chapter, cross-border services trade chapter, and financial services chapter. Therefore, if the non-conforming measures do not prohibit cross-border data transmission in a particular industry, the cross-border transmission of data for business purposes should be allowed.

RCEP, CPTPP, and DEPA also explicitly state that a contracting party may deviate from the free flow of data across borders by electronic means for legitimate public policy objectives, provided that the restrictive measures are appropriate, are not arbitrary or unjustifiable discrimination, and do not constitute disguised restrictions on trade.[39] It is worth noting that for legitimate public policy objectives, even if the measure cannot guarantee its results with absolute certainty, non-conforming measures can still be adopted. China's data security assessment, personal data protection certification, and the standard contracts requirement have been applied to both domestic and foreign entities without discrimination.

Besides public policy objectives, RCEP, CPTPP, and DEPA all allow member states to restrict cross-border data transmission to protect essential security interests. However, a significant difference exists between RCEP on one hand and CPTPP and DEPA on the other.[40] Unlike CPTPP and DEPA, RCEP specifies that a member state may take any measures necessary to restrict cross-border data transmission to protect its essential security interests, and other member states cannot object to such measures.[41] This provides RCEP member states with significant flexibility in restricting cross-border data transmission because other states cannot object to measures taken for this purpose. Firstly, it does not define what constitutes "essential security interests." In contrast, Article XIV bis of GATS restricts essential security interests to those relating to fissionable and fusionable materials, war or other emergency in international relations, and obligations under the United Nations Charter for the maintenance of international peace and security.[42] Secondly, RCEP does not place any restrictions on measures taken by member states to restrict cross-border data transmission based on essential security interests. Thirdly, from the wording of Article 12.15.3.2 of RCEP, it appears that other member states can object to the scope of "essential security interests" and measures taken by the member states to restrict cross-border data transmission. However, the scope of such objections is limited.

Therefore, compared with CPTPP and DEPA, RCEP respects the sovereignty demands of contracting countries more, providing them with greater flexibility in implementing measures to restrict cross-border information transmission. Nevertheless, it also introduces uncertainty regarding the stability and continuity of cross-border data transmission, which cannot fully align with China's data companies' expansion of global business.

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[38] E.g. in the UNCITRAL Model Law on Electronic Commerce, the term "business" is widely interpreted to encompass a variety of matters arising from relationships of a commercial nature, whether contractual or non-contractual. Art. 1 of the UNCITRAL E-commerce Model Law.

[39] Art. 14.11.3 of the CPTPP. Article 4.3.3 of the DEPA. Art. 12.15.3 of the RCEP.

[40] Article 12.15.3 of RCEP, Article 14.11.3 of the CPTPP, Article 4.3. of the DEPA. D.1 of the WTO Leaked Text regulates the cross-border flow of information covering definitions, no prohibition of the cross-border flow of data and exceptions, etc. Besides a general article for cross-border transfer of information, the WTO Leaked Text has a special article for financial information and the location of financial computing facilities.

[41] Art. 15.3 of the RCEP.

[42] Article XIV bis of GATS.

b. Localisation of Computing Facilities

The provisions on the free cross-border transmission of data should be read together with the provisions to prohibit data localization. CPTPP and DEPA member states cannot require a covered person to use or locate local computing facilities as a precondition for doing business in their territories.[43] Banning the localisation of computing facilities is a compulsory obligation for CPTPP and DEPA members and is also subject to the same exceptions as the cross-border data transmission.[44]

Among China's FTAs, only RCEP includes a provision regarding the prohibition of computational facility localization.[45] Like CPTPP and DEPA, RCEP similarly requires member states not to require users to use computational facilities located within the territory of a member state or to place such facilities within the territory of the member state as a condition for engaging in commercial activities within that territory.[46] However, different from CPTPP and DEPA, RCEP allows its contracting parties to take any measures to protect essential security interests, and other contracting parties cannot object to such measures.

Therefore, regarding cross-border data transmission and localization of computing facilities, RCEP allows a member state to take any measures necessary to restrict cross-border data flows or impose data localization rules to protect its essential security interests without being objected to by other member states. This rule provides a safe environment for China to develop its security-centered data transmission requirements without being challenged by other member states. However, this rule is a two-edged sword because other states can also reject transmission data to China, which goes against China's pursuit to commercialize data. Data commercialization often requires less restriction on data localization. China will wait to see how the exceptions in Article 14.11.3 of the CPTPP and Article 4.3.3 of the DEPA will be interpreted in practice and whether the international commitment to cross-border transfer of data may challenge China's domestic restrictions on freedom of speech. Nevertheless, in the long term, the CPTPP and DEPA seem to strike a better balance between security and efficiency than RCEP under the data commercialization vision of the Opinions. That said, it is important to note that **this analysis considers merely two normative interests: state security and economic development (which are the primary focus of the Opinions). While the CPTPP and DEPA may balance these considerations in a more efficient manner than the RCEP (i.e. these are more in line with the current Chinese economic goal of data commercialization), this does not suggest that they are preferable from a broader perspective that considers the effects of data flows on other normative concerns (such as human rights and consumer protection). Several critics have provided evidence that the CPTPP and DEPA do not sufficiently account for such interests.**[47]

[43] Art. 14.13.2 of the CPTPP. Art 4.4 of the DEPA.
[44] Art. 14.13.3 of the CPTPP.
[45] Art. 12.14 of the RCEP.
[46] *Id.*
[47] See for example, Pablo Kramcsak and Michelle Benoit, The (Potential) impact of the DEPA on the future of cross-border personal data flows, DTA, October 2023, https://dtalliance.org/2023/10/05/the-potential-impact-of-the-digital-economy-partnership-agreement-on-the-future-of-cross-border-personal-data-flows/; Mariano Delli Santi, The CPTPP: Trading Away Your Privacy Rights, Open Rights Group, July 2023, https://www.openrightsgroup.org/blog/the-cptpp-trading-away-your-privacy-rights/

Whether and how the Data Property Rights System will Apply to Foreign Parties and the Data of Foreign Companies.

The exact scope of extraterritorial jurisdiction of the property rights system is unclear at this point of time. The system would likely only apply to entities that process data within the territory of China.[48] For foreign-data companies, a critical issue is whether the special data property system may help them enter the Chinese market.

China's implementation of the new financial service clause in RCEP can be used as an example to analyze the interplay between the special property rights system and foreign companies' market access trade rules.

RCEP adopts the so-called "new finance service clause" to cope with fintech innovations which often create new modes of service. It defines "new financial service" as "any financial service which is not supplied in the territory of a Party but is supplied and regulated in the territory of any other Party. This may include a service related to current and new products, or how a product is delivered."[49] Every host Party "shall endeavor to permit financial institutions of another Party established in the territory of the host Party to supply a new financial service in the territory of the host Party that it would permit its own financial institutions, in like circumstances, to supply without adopting a law or modifying an existing law."[50]

On June 1, 2023, to implement the Opinions, the State Council of China published *Several Measures to Apply International High Standards at the Pilot Free Trade Zones and Free Trade Port to Promote Institutional Opening Up* (hereinafter "Several Measures").[51] Article 13 of the Several Measures is the first Chinese regulation to apply the new service clause of RCEP in China. It indicates, except for certain types of new financial services, that when a Chinese financial institution is allowed to offer a new financial service, foreign financial institutions established in pilot free trade zones shall be allowed to offer similar services.[52] The financial regulation authorities can decide the type and nature of the institution that offers the new financial service and require the institution to obtain a relevant license.[53] The authorities should make their decisions in a reasonable time and can only reject applications due to prudential reasons.[54]

Therefore, in the example of the new financial service, the implementation of a special property rights system increases the market access for foreign companies. The underlying rationale is that market access of trade in data is closely linked to market access of trade in services. For example, digital trade

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[48] Both the PIPL and the China Data Security Law apply to all entities that process data within the territory of China, Art 2 of the PIPL and Art 2 of the China Data Security Law.
[49] Art. 1(c) of Annex 8A (Financial Services) of RCEP.
[50] *Id.,* Art. 3.
[51] *Several Measures to Apply International High Standards at the Pilot Free Trade Zones and Free Trade Port to Promote Institutional Opening Up,* promulgated on June 1, 2023, by the China State Council, https://www.gov.cn/zhengce/zhengceku/202306/content_6889027.htm. China has established 17 pilot free trade zones and one free trade port since September 2013. They are in Heilongjiang, Liaoning, Hebei, Tianjin, Shandong, Jiangsu, Shanghai, Zhejiang, Fujian, Guangdong, Shanxi, Henan, Hubei, Sichuan, Chongqing, Yunnan, and Guangxi provinces. The free trade port is the Hainan Island.
[52] Art. 13 of *Several Measures to Apply International High Standards at the Pilot Free Trade Zones and Free Trade Port to Promote Institutional Opening Up,* promulgated on June 1, 2023, by the China State Council, https://www.gov.cn/zhengce/zhengceku/202306/content_6889027.htm.
[53] *Id.*
[54] *Id.*

in law data will not prosper if market access to legal services is not allowed. The Opinions aim to make it easier for data to enter both the domestic and foreign markets,[55] which often requires providing Chinese market access for foreign companies in the relevant trade in service sectors.

Conclusion

The new data property rights system recently announced by China will set the parameters for China's regulations concerning data handlers.

(a) The data property rights system recognizes the co-existence of multiple property rights and interests claimed by data handlers on the same data without identifying who is the owner or who has ownership rights over data.

(b) Although this system is innovative, it requires clarification on many issues such as the scope of application, the protection of data subjects, and the profit allocations, etc.

(c) In the long term, the CPTPP and DEPA seem to strike a better balance between security and efficiency than RCEP regarding cross-border transmission of data and data localization according to the Opinions. However, **it must be kept in mind that this analysis considers merely two normative interests: state security and economic development. While the CPTPP and DEPA may balance these considerations in a more efficient manner than the RCEP (i.e. these are more in line with the current Chinese economic goal of data commercialization), this does not suggest that they are preferable from a broader perspective that considers effects of data flows on other normative concerns (such as human rights and consumer protection). Several critics have provided evidence that the CPTPP and DEPA do not sufficiently account for such interests.**

(d) China will increase market access for foreign digital service providers.

[55] Art. 11 of the Opinions on the Foundational System for Data.