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### China and e-commerce: The long and winding road

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# China and E-commerce: The Long and Winding Road

Although it joined the World Trade Organization in 2001, China has largely kept silent on the e-commerce discussion and only made its first submission in this regard in 2016.

China is unique when it comes to e-commerce. On the one hand it boasts the **largest** e-commerce market in the world, with some of the top global players such as Alibaba. On the other, it also maintains some of the most restrictive regulations on the internet sector. This strange combination makes it hard to decipher China's positions on e-commerce governance issues, which oscillate between liberalization and restriction in different fora and at different times. This article provides a succinct and independent analysis of the evolution of the Chinese positions in trade agreements, including in the World Trade Organization (WTO), free trade agreements (FTAs), the **Joint Statement Initiative** (JSI) and beyond.

## At the World Trade Organization

The WTO is no stranger to e-commerce governance. It launched its first initiative to regulate e-commerce with the **Declaration on Global Electronic Commerce**, adopted at its second ministerial conference, in May 1998, which “urged the General Council to establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce.” By September — the same month Google was founded — the General Council had conceived the **Work Programme on Electronic Commerce** (Work Programme). The document defined “electronic commerce” broadly to encompass “the production, distribution, marketing, sale or delivery of goods and services by electronic means.” The scope of the Work Programme extended to “issues relating to the development of the infrastructure for electronic commerce.”

Because of e-commerce's many aspects, the **Work Programme** divided the work among a few WTO bodies — the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS (Trade-Related Aspects of Intellectual Property Rights) and the Committee for Trade and Development. These bodies must regularly report their progress to the General Council. The responsibility of reviewing cross-cutting trade-related issues falls to the General Council, which also handles all aspects of the Work Programme relating to the imposition of customs duties on electronic transmissions. These bodies also need to consider the work of other intergovernmental organizations and relevant non-governmental organizations.

In the 23 years since the Work Programme was adopted, the topic of e-commerce has been frequently discussed across these bodies by members of the WTO. Yet, despite the ambitious agenda laid out in the Work Programme, no concrete outcomes have been reached due to the lack of progress in the Doha Round negotiations. The only concrete rules on e-commerce ever achieved in the WTO are contained in the moratorium on customs duties on electronic transmissions, established in the 1998 Declaration and extended many times, most recently in 2019 until the twelfth Ministerial Conference, which has now been postponed **indefinitely**. However, even the simple act of moratorium extension has become controversial in recent years, as India and South Africa have challenged the moratorium by citing potential negative **impacts** on developing countries.

Even though it acceded to the WTO in 2001, China has largely kept silent on the e-commerce discussion and only made its first **submission** on e-commerce at the WTO in 2016. In marked contrast with submissions by major proponents of e-commerce negotiations such as the United States, the European Union and Japan, the Chinese **submission** tried to pre-empt the upcoming e-commerce negotiation.

First, China proposed that the scope of e-commerce discussions “focus on promotion and facilitation of cross-border trade in goods enabled by internet, together with services directly supporting such trade in goods, such as payment and logistics services.” As I [argued](#) in 2018, this position is largely due to differences in the nature of trade between the United States and China, whereby the former focuses on the “digital” issues, such as those relating to digital services by Facebook and Google, while China focuses more on the traditional “trade” side, such as traditional e-commerce by Alibaba.

Second (as I describe in [a recent chapter](#)), China also indicated in its submission its reluctance to negotiate new rules for e-commerce, by noting that e-commerce discussions shall “clarify and...improve the application of existing multilateral trading rules,” which are typically understood to exclude issues such as free flow of data, data localization and so forth.

Third, in the same communication, China also tried to prevent e-commerce negotiations from being used as a way to sneak in “new market access commitments including tariff reductions.” By removing new rules and new tariff concessions from the scope of discussion, the Chinese submission then stated the only issues China might be willing to discuss: trade facilitation, transparency, digital certificates, electronic signatures, electronic authentication, and consumer protection and privacy. The same position was also repeated in China’s [submission](#) to the General Council and the three subsidiary councils on Goods, Services, and Trade and Development in October 2017, which regarded these issues as “elements acceptable to Members.”

China initially was not comfortable discussing e-commerce in the WTO except issues relating to trade facilitation.

### China's Free Trade Agreements

China’s conservative approach to e-commerce is also reflected in its FTAs. E-commerce chapters have been absent from its FTAs until very recently. The first FTAs to include e-commerce provisions were those it signed in 2015 with Australia and Korea. Even then, the provisions remain quite modest, as, for the most part, they cover issues related to facilitating e-commerce trade, such as a moratorium on customs duties on electronic transmission, recognition of electronic authentication and electronic signature, protection of consumers’ personal information in e-commerce transactions, paperless trading, domestic legal frameworks governing e-commerce transactions, and the need to provide e-commerce consumers with protection equal to that of traditional forms of commercial transaction.

A major breakthrough was made in the [Regional Comprehensive Economic Partnership \(RCEP\) Agreement](#), which China signed along with 14 other countries in the Asia-Pacific region in November 2020. Under the chapter on e-commerce, China — like all other RCEP members — agreed to not “require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that Party’s territory” (art. 12.14(2)) or “prevent cross-border transfer of information by electronic means where such activity is for the conduct of the business of a covered person” (art. 12.15(2)). This is the first time China has accepted rules on these issues. Yet, due to China’s obsession with “data security,” the chapter is subject to extensive exceptions on either national security or public policy grounds.

### The Joint Statement Initiative

As I’ve [recently written](#), China initially was not comfortable discussing e-commerce in the WTO except issues relating to trade facilitation. In line with this approach, ahead of the eleventh WTO Ministerial Conference in Buenos Aires in late 2017, China submitted a [draft](#) Ministerial Decision on Electronic Commerce, which proposed that the work be continued in the General Council under the Work Programme on Electronic Commerce, and raised the possibility of renewed, dedicated discussions on “elements acceptable to Members” such as “facilitating cross-border e-commerce; promoting paperless trading; transparency; as well as development and cooperation.” Most of these ideas made their

way into the final Ministerial Decision a few days later, leading Wang Shouwen, Chinese Ministry of Commerce (MOFCOM) vice minister, to [boast](#) that “China has become a participant and even leader in rule-making.”

Yet, China’s success turned out to be just a pyrrhic victory, as the United States abandoned the consensus-based approach and launched the e-commerce JSI at the same Ministerial Conference, catching China by surprise. Nonetheless, when China realized that the JSI would play a major role in e-commerce rulemaking, it quickly decided not to repeat the unpleasant experience of being shut out of discussions on e-commerce rules under the (now-defunct) Trade in Services Agreement, due to the opposition of the United States. Therefore, it shifted course and [joined](#) the negotiation when it was formally launched at the sidelines of the World Economic Forum in January 2019. Since then, China has emerged as one of the most active participants, with [four of the 52 substantive submissions](#) to date.

These JSI submissions outlined China’s [positions](#) in the negotiation, which include the following.

First, in terms of the scope of the negotiation, China proposed that the agreement “apply to measures affecting the production, distribution, marketing, sale or delivery of goods and services by electronic means,” which copies the language from the 1998 WTO e-commerce declaration. Alternatively, China suggests that the agreement “apply to measures adopted or maintained by Members that affect trade by electronic means,” which is identical wording to that used in its FTAs.

Second, in terms of the substantive issues, China prefers to focus on two types of issues. The first are those to “establish a sound environment for electronic commerce transaction,” which include mainly trade facilitation measures, such as those on improvement of customs procedures, electronic payment of customs fees and electronic customs documentation, establishment of free zones and customs warehouses, and a moratorium on customs duties, as well as those creating the necessary legal framework to enable the recognition of electronic signatures, electronic authentication and electronic contracts. The second are measures to “create a safe and trust-worthy market environment for electronic commerce,” which mainly include consumer safety regulations, such as measures for online consumer protection, personal information protection, and fighting spam or unsolicited electronic commercial messages.

Third, in line with its position as a member of the “Friends of E-Commerce for Development” group, China also emphasized development issues and encouraged members to “promote pragmatic and inclusive development cooperation,” including measures to help developing countries improve their e-commerce infrastructure and bridge the digital divide, to share best practices on e-commerce development and help them build up their capacity, and also to “establish an Electronic Commerce for Development Program under the WTO framework.” If successfully implemented, these initiatives could help developing countries boost their e-commerce development, which, in turn, also facilitates the expansion of Chinese e-commerce giants such as Alibaba in these countries, especially in those that are part of the Belt and Road Initiative.

China also specifically reserved its right to invoke with exceptions contained in Article XX of the General Agreement on Tariffs and Trade (GATT) 1994 and Article XIV of the General Agreement on Trade in Services, which “shall be incorporated into and made an integral part of this Agreement, mutatis mutandis.” This provision reflects the bad experiences China had in the *China–Raw Materials* and *China–Rare Earth* cases in the WTO, where due to the lack of explicit references to the GATT general exception clause in its Accession Protocol, China was not allowed to justify its export restrictions under GATT Article XX. In addition, China also emphasized that the new agreement shall not prevent members from adopting or maintaining measures to protect cybersecurity and safeguard cyberspace sovereignty, an issue that has been [elevated](#) to the level of national security and sovereignty and thus is regarded as non-negotiable by China.

China has also made clear in its JSI submissions that it was not ready to discuss the main demands of the United States in that initiative, such as data flow, data storage, treatment of digital products and so forth. Citing the “complexity and sensitivity” of these matters, as well as “the vastly divergent views among the Members,” China stated that “more exploratory discussions are needed before bringing such issues to the WTO negotiation, so as to allow Members to fully understand their implications and impacts, as well as related challenges and opportunities.” However, with its

acceptance of rules on free flow of data and prohibition on data localization requirements in the RCEP, China has now indicated its [willingness](#) to negotiate on these issues.

## Possibilities for Compromise

Despite China's cautious approach on e-commerce issues, I have long [argued](#) this does not mean China would not agree to rules on e-commerce, as such rules, even though under US-sponsored FTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canada-United States-Mexico Agreement, are not as demanding as they might first appear. This is partly confirmed by China's commitments in the RCEP, as well as its recent application to join the CPTPP. In a similar vein, China's participation in the JSI is an opportunity to learn about China's e-commerce regulation, so as to open up for possibilities for compromise and convergence.

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