

CHAPTER I

INTRODUCTION

A. Background

Trade has been practiced by human civilization for millions of years. It comes in different types and forms. In the modern world, with the continuous progression of globalization, along with the development of technology, international digital trade has increased exponentially throughout the years, varying in different forms. However along with its increase, it has not hindered the fact that concerns have raised among States.¹ With data being at the centre of digital transformation of our economy, digitalized data and cross border data flow has become the backbone of the internet.²

Trade on the digital platforms is operated with the help of advance technology and the internet. With the existence of the internet, it is much easier to provide services and trade services from one location to another. Operating through the collection, processing, and transfers of data. The simplicity that comes in the movement of data has raised the concerns on its protection. Given the personal nature of data, it has great value and interest to be protected. This is where States role in regards to their citizens data comes to play. It is within the States interest in protecting their citizens data. The concerns on cybersecurity risks and data protection mechanism falls towards the State to

¹ Henry Gao, “Data Regulation in trade agreements: different models and options ahead,” *Research Collection Yong Pung How School of Law*, Chapter 15 (November 12, 2023): 365.

² Han-Wei Liu, “Data Localization and Digital Trade Barriers: ASEAN in Megaregionalism. ASEAN Law in the New Regional Economic Order,” *Cambridge University Press* (November 12, 2023): 371–391, doi:10.1017/9781108563208.019.

ensure that its citizens data is well protected and secured. The information of personal data is of great value to State in this day and age, and can be used as a tool for other States to attack. Hence, domestic regulations on data protections are applied.

In regards to domestic regulations, States has implemented laws and regulations on how data is being processed within their territory, also known as data localization. Data localization is the act of storing data within the borders of a specific country where the data was generated.³ As regulations around the world have come to understand both the substantial opportunities and risks associated with data use and innovation, some States have begun to pursue “data localization” policies, including explicit requirements to store data in the jurisdiction it was collected in and restrictions on transferring data to other jurisdictions.⁴ Others has applies a less strictive measure such as only limiting certain types of data to be transferred.

With States applying data location regulations in its own ways within their territory, level of strictness may vary between one State to another. The increase concern on the protection of free data flows on the internet and the goals of protecting privacy and cybersecurity has created a contention between creating a free internet and trade policymakers. This is where the issue of data localization regulations rises. First, the application of data localization that

³ Duggal, Pavan, *Data Localization: A Review of Proposed Data Localization Legislation In India, With Learnings For The United States* (Data Catalyst, 2019), 2.

⁴ The “Real Life Harms” of Data Localization Policies, Discussion Paper 1, (Washington DC: Centre for Information Policy Leadership, March 2023), 4.

varies in accordance with State's sovereignty within their territory may create conflicts and differences between the regulation in one State with another. Second, there may be inconsistencies in the implementation of data localization with international regulations on digital trade.

To address the first issue, the inconsistencies on regulation with one State to another is an issue that can only be resolved between the States that are conducting services, putting into consideration that it falls under a state's sovereignty to apply its laws without due regard to other State's domestic laws. However, in regards to the second issue, it is within a States concern as well to maintain its domestic regulation with international law, especially if States are parties to a certain agreement.

The international agreement that governs matters on digital trade in services is the World Trade Organization's (WTO) main agreement, called the General Agreement on Trade and Services (GATS). Under GATS, there exists clauses that prohibits any State's domestic regulation that may impede the process of providing services, also known as trade barriers. As the nature of data localization regulations is to limit the movement of data, which inherently regulates and limits the ability to provide digital services. As a result, data localization regulations may be subject to such trade barrier clauses stated under the GATS.⁵

⁵ Meltzer JP, Governing Digital Trade. *World Trade Review* 18, (2019): 25, doi:10.1017/S1474745618000502.

Data localization regulation that may be subjected to GATS' clauses on trade barriers, include:

1. *National treatment*: Article XVII of GATS provides that Members have to accord to services and service suppliers of any other Member, "treatment no less favourable than it accords to its own like services and service suppliers." Where data localization laws may not provide preferences to locals over foreign nationals and greater burdens could not be imposed on foreign nationals.
2. *Market access*: Article XVI:2 of GATS provides a list of market access commitments to be complied by Members in sectors where market access commitments are undertaken. As per Article XVI:2 (a) Members will not adopt measures which impose limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test. Where Access to a country's market may not be accessible on the condition that data is stored locally.
3. *General exception*: Article XIV of GATS regulates on an exception that a State may implement trade barriers if it is consistent with the general exceptions. There exist two requirements: article XIV (a) which regulates on the necessity to protect public moral and to maintain public order, article XIV (b) which regulates on the necessity to protect human, animal, plant life or health, and article XIV (c) which regulates the necessity to secure compliance with laws and regulations which are not inconsistent with the

previous agreement but is related to: fraudulent activities, protection of personal data, and lastly safety. Here, data localization must be applied if it is necessary on the threshold stated within article XIV (a) and XIV (c)

4. *Security exception*: Article XIV bis of GATS regulates on the exceptions that a State may implement if it is “necessary for the protection of its essential security interest, which includes: the supply of services for the purpose of provisioning its military establishment, or relating to fissionable materials from which they are derived, and or in times of war or other emergency in international relations.” Here, data localization must be applies only if it is necessary for its essential security interest.

Today, data localization policies are present within numerous countries, including Indonesia. As data is a powerful resource that can be processed to gain numerous new information. As a highly valuable data, governments have the obligation to maintain sovereignty over its data within its jurisdiction using policies, creating a barrier to cross-border data flows.⁶ Indonesia has applied data localization laws within Government Regulation Number 82 of 2012 on the implementation of Electronic Systems and Transactions which was further updated within Government Regulation Number 71 of 2019 in regards to Electronic Systems and Transactions. Here, in Indonesia, Within Government Regulation Number 82 of 2012, data localization was mandatory for all

⁶ Claire Scharwatt, “The Impact of Data Localisation Requirements On The Growth Of Mobile Money-Enabled Remittances” (Global System for Mobile Communication Association, March 2019), 5, https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2019/03/GSMA_Understanding-the-impact-of-data-localisation.pdf, accessed on 3 February 2024.

electronic service operators which made it difficult for data trade to be conducted as all data must be stored and process within Indonesia. However, within Government Regulation Number 71 of 2019, Indonesia took a more flexible approach on data localization laws, and allowed private electronic service operators to store its data outside of Indonesia. After the implementation of this regulation, there was a direct increase in Indonesia's digital trade. Hence, it may be concluded that there is a correlation on data localization laws as a trade barrier.

Therefore, this thesis will further discuss if the implementation of data localization laws within States amounts to a trade barrier. Furthermore, we will further discuss the how to overcome data localization as a trade barrier with the WTO trade restrictions, the GATS.

B. Problem Formulation

In accordance with the background of the present paper, a problem that may be identified are as follows:

1. Does the implementation of data localization regulations by States amount to a trade barrier regulated in WTO agreements?
2. How to overcome data localization regulations as an impermissible trade barrier with the WTO agreements?

C. Research Purpose

Following the formulation of problem mentioned above, the purpose of this research includes:

1. Understanding if the implement data localization laws by States amount to a trade barrier.
2. Establishing permissible data localization laws that are consistent with GATS.

Through this research, this paper will be able to establish the direct correlation between data localization laws and its role as a trade barrier within international digital trade. Further in order to enhance an open internet and easier cross border data flow, applying the regulations set forth within WTO treaties towards digital trade. With this research, states would be able to find a balance in protecting their data sovereignty as well as enhancing digital trade in today's world.

D. Research Method

Legal problems arise from all kinds of situations and through circumstances that has never occurred before. This results in a legal vacuum, which refers to a condition that has not been covered by the rule of law. When such situations occur, experts and legal practitioners conducts research and debate until a rule of law can be established. Research on a legal issue can be manifested through a legal paper. A legal paper contains detailed research conducted through specific methods, systematics, and thoughts to solve legal problems through analysis. It is the combination of understanding facts, legal issues, and relevant situations.⁷ The analysis is conducted as an attempt to

⁷ Miftahus Sholehudin, "Understanding Legal Research: Comprehensive Guide to Methods, Theories, and Scope," (Research Depository Universitas Islam Negeri Maulana Malik Ibrahim, 2022), 1, <http://repository.uin-malang.ac.id/12884/>.

understand the problem and find a solution as a way out of the problem. Here, the writer uses the following methods for the present paper:

1. Approach Method

The research method that will be used here is the juridical normative approach. Juridical normative research will focus on case-law, statutes, laws, regulations and other legal sources. It differs from other methodologies in that it looks at the law within itself. Further examines law as a written body of principles which can be discerned and analysed using only legal sources. Research into legal doctrines through an analysis of a pre-existing statutory provisions and state practices, applied by reasoning to new circumstances. Secondary forms of data otherwise known as library research, in locating data through doctrines that has existed prior to the research. This research will rely on existing regulations, creating a comparison and understanding between these regulations. Creating a further understanding through pre-existing doctrines and further elaborating through analysis and comparisons or regulations.⁸

2. Research Specification

The research method specification is a descriptive analytics method. Through this method, the writer will use the process of using current preexisting data to create and identify a correlation on the object of research through trends and relationship. It has been understood that the descriptive

⁸ Prof. Khushul Vibhute and Filipos Aynalem, "Legal Research Methods Teaching Materials," (Justice and Legal System Research Institute, 2009): 71-72, <https://chilot.blog/wp-content/uploads/2011/06/legal-research-methods.pdf>.

analytics method is used to describe and provide results on a topic that is being research on through data or samples that has been garnered as it is, without making any conclusions that is legally binding to the public.⁹ In this research, the writer will further analyse the effects and legality of data localization conducted by States with the WTO agreements on trade barriers.

3. Sources and Data Type

This research will be conducted on the basis of normative law research along with secondary data. The term normative law research refers to the process of research to find legally binding rules such as: Convention, Treaties, Regulations, Principles, and Doctrines that correlates with the topics discussed in the present paper, in order to find a solution to a legal issue.¹⁰ Furthermore, secondary legal material will be used to support the primary data, which includes: journals, articles, and opinion of highly qualified practitioners of the law. Lastly, tertiary data, as an additional source. The data that will be used by the writer will include:

- a. Primary legal material, which acts as the main basis that is legally binding, which include:
 1. WTO's General Agreement on Trade and Services 1995 (GATS)
 2. WTO's General Agreement on Tariffs and Trade 1947 (GATT)

⁹ Sugiyono, *Metodelogi Penelitian Kuantitatif, Kualitatif Dan R&D* (Bandung: Alfabeta, 2013).

¹⁰ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2010), 30.

3. Indonesia's Government regulation No. 82 of 2012 in regards to Electronic Systems and Transactions
 4. Indonesia's Government regulation No. 71 of 2019 in regards to Electronic Systems and Transactions
 5. Russia Federal Law No. 152
 6. The (Indian) Companies Act 2013 and the Companies (Accounts) Rules 2014
 7. The Reserve Bank of India's Directive 2017-18/153 issued under the Payment and Settlement Systems Act 2007
 8. The Insurance Regulatory and Development Authority of India or Maintenance of Insurance Records Regulation 2015
 9. The China Personal Information Protection Law
- b. Secondary legal material would include be included within the current paper. As literature and writings of highly qualified publicists are used to support and assist the primary legal material to create a cohesive writing. The sources would include journals, articles, doctrines, and other related sources in relation to data localization and digital trade under the WTO.
- c. Non-legal material which includes additional data which does not fall under primary or secondary source of data. These data would be used to add additional information and complete the writing as a whole. The data include dictionaries, the internet, and encyclopaedia.

4. Data Collection Method

The data collection method that will be used within the present thesis is through a literary review also commonly known as library research. A literary review is a compilation, classification, and evaluation of what has been written before by previous writers regarding a certain topic. It combines results and analysis of different studies through the identification of patterns and relationships that appears in the context of multiple studies of the same topic.¹¹ Within this paper, the method would be conducted through the collection of previous writings with a similar topic. A data can be found through an online data base on scientific writings, or through a traditional method of a library research to find books, journals, and articles that are related to the topic.

5. Data Analysis Method

As the last step in forming a research paper, a data analysis is used to elaborate the outcome of the research. In the present paper, the writer will use a qualitative analysis approach. The qualitative analysis approach is the process of analysing and systemizing data that has been collected. This method is used to identify a pattern and themes that may be seen through data.

¹¹ Hannah Snyder, "Literature review as a research methodology: An overview and guidelines" *Journal of Business Research* 104, (November, 2019): 333–339.

E. Research Framework

In accordance with IUP – Undergraduate Thesis Guidebook 2023 Faculty of Law, Universitas Diponegoro, this thesis will be written on following its guidelines. The research will be constructed of four chapters for the purpose of discussing the problem formulation within this thesis. The research framework of this thesis includes the following:

CHAPTER I INTRODUCTION

Chapter I includes background, problem formulation, research purpose, research method conducted through a specific approach method, research specification, sources of data type, data collection, and analysis of data. The overall thesis would be further regulation within the research method.

CHAPTER II LITERATURE REVIEW

Chapter II would further discuss on the general review of data through a general review on data which includes digital data, data sovereignty, cybersecurity, and data localization. The overall review on data from its definition, views of States, and finally how it is regulated within the law. Furthermore, Chapter II would further regulate on the general review on Trade which includes, a review on traditional trade, digital trade, and finally the world trade organization.

CHAPTER III RESEARCH AND DISCUSSIONS

Chapter III would be an analysis of the research and data that has been collected within the previous chapters. This chapter would further answer the formulated question of the thesis through the analysis of data, which is regarding if in fact

data localization is consistent with international digital trade, and how to ensure that data localization does not amount to a violation of international trade law.

CHAPTER IV CONCLUSION

Chapter IV would be a conclusion of the aforementioned chapters and the result of analysis that has been conducted. The conclusion would conclude the entirety of the thesis from each of the chapters.

F. Research Originality

Table 1. 1. Research Originality

Previous Research				Current Research
No.	Researcher's Name (Year, University)	Research Title	Research Result	Novelty
1	Varadharajan Sridhar, Shrishra Rao, and Sai Rakshith Potluri (2021, International Institute of Information Technology Bangalore)	Effects of data localization on digital trade: An agent-based modelling approach	In the application of data localization requirements, there exists different degrees in its practice. The practice of data localization, depending on its level of strictness, will have different effects. The stricter the degree of data localization requirement, the greater the effects	Within the current thesis, the author discusses on how the existence of data localization is inconsistent with the WTO's GATS market access and national treatment, further not justifiable under the general exception and security

			occur towards foreign service providers.	exceptions. Understanding the fact that there does exist negative impact of data localization, the writer utilizes that knowledge in proving the negative impact data localization has within international trade.
2	Nikita Melashchenko (2022, Victoria University of Wellington)	Data Barriers to International Trade	Within international trade, the advancement of technology has increased its role and position within trade. The different types of data barrier come in different forms which could amount to an inconsistency with different international trade regulations. This	Within the current thesis, the author discusses specifically on data localization and how it is inconsistent with WTO's GATS on national treatment and market access. Here, the writer will not dive deep into the technical aspect of data localization.

			thesis dive deep into how certain data barriers along with its technicality are not effective to achieving its legitimate purpose and effected the free flow of data.	
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