

# Cross-border ‘Data Flow With Data Rights’

Going beyond the ‘Data Free Flow with Trust’ (DFFT) framework to include economic rights to data

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## Bringing the Rule of Law to Cross-border Data Flows

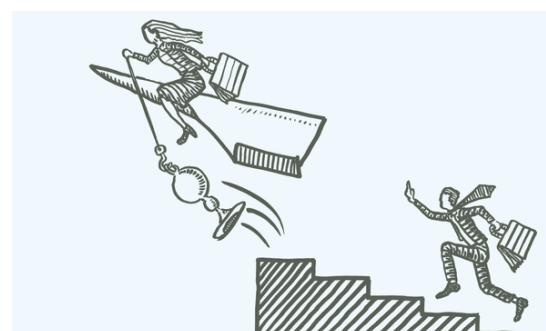


Cross-border data flows (CBDF) is the most hotly contested issue in digital trade. The default approach has been to promote ‘free flow of data’. Data sharing and data flows are indeed fundamental to the functioning of a global digital economy. But data today is deeply and inextricably linked with social, economic, cultural, and political systems in every society. If a society is to be under the rule of law, so must its data. Such rule of law could be national or international. Despite the global nature of the digital society and economy, there is very little global governance of data. Until an appropriate international data governance framework is developed, countries may have no option other than to require localization of various socially sensitive and economically valuable data, in order to protect citizens’ and national interests. There is hardly any country with no cross-border data flow restrictions at all. It is therefore not an issue of whether or not to localize, but which data to, and which not, and with what conditions, if any.

Efforts at enabling easy global data flows must focus on international agreements that

take into account various national needs, sensitivities, and interests, including economic ones, as well as jurisdictional issues. UNCTAD’s 2021 Digital Economy Report recommends developing a holistic global data governance framework that simultaneously addresses data’s non-economic as well as economic aspects. The report inter alia implies that governing data primarily through international digital trade agreements, like the WTO’s Joint Statement Initiative on e-commerce and its many plurilaterals and bilaterals, is not the right way to go. In fact, these just seek to preempt more comprehensive global and national data regulation.

## ‘Data Free Flow with Trust’



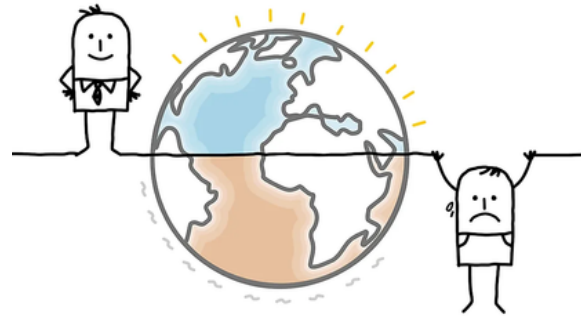
At the 2019 G20 Summit in Osaka, the host country Japan proposed amending the cross-border ‘free flow of data’ doctrine to admit one specific kind of concern, that of privacy and security. A new term, ‘Data Free Flow with Trust’ (DFFT), was coined. However, major developing countries in the G20, South Africa, India and Indonesia, in particular, refused to buy into this new term.

This is because their main issue with the original 'free flow of data' doctrine was not as much to do with privacy and security (although these are concerns too) as it was about economic expropriation, given that data is the most valuable resource today. The new concept of DFFT did nothing to address this central concern of developing countries.

Later, in 2021, at UNCTAD's 15th Session, in adopting the outcome document, 'The Bridgetown Covenant', the compromise was to drop the word 'free' (which, apart from implying unhindered data flow, also has economic implications) and just say 'data flow with trust'. It meant that while trust, in terms of privacy and security, is important, issues of economic rights and 'ownership' too cannot be undermined. Data cannot be 'free'.

The 'Civil Society Declaration for the 15th session of the UNCTAD' made these observations regarding 'data flows':

## What Developing Countries Want is a Right to the Economic Value of Data



In their submissions to the WTO, developing countries' main problem with cross-border free flow of data has related to expropriation of economic value of their data, leading to fears of digital colonization. While some jurisdictions have already created legal economic rights over data, others are actively considering them. Economic rights to data, for instance, exist in the EU's Digital Markets Act and its draft Data Act.

However, the rights and guarantees of data access provided in these laws seem to be at cross purposes with the EU's stance at global trade forums where it promotes global free flow of data. The question arises how such a 'global free flow of data' regime would ensure that EU residents and enterprises are indeed able to access their data that is collected by foreign platforms. Either the promises of these Acts are empty, knowing that most of the EU's data gets collected by foreign platforms, or the EU's positions at global trade forums are insincere. It is possible that the EU is banking on getting special exclusive arrangements with its major digital trade partner, the US, such as the Privacy Shield, that allows some extension of EU's laws over its data in the US. Similar arrangements will never be considered for developing countries. It is also possible that developed countries would finally adopt the same shrewd strategy that they did for agriculture subsidies, and come up with 'green boxes' for data laws of developed countries and 'red boxes' for the data-related approaches that developing countries may want to employ given their

The intensification of digitalization post-Covid-19 and the datafication of cross-border value chains calls urgent attention to the global governance vacuum that enables data and, with it, digital intelligence to flow out of the global South..a new governance regime for data rights, including economic rights, are core to determining the destinies of peoples on the long road to recovery from the ravages of the pandemic.

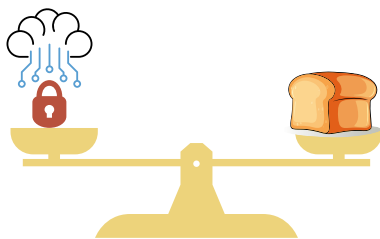
Trade policy discussions, including plurilateral negotiations on digital trade rules at the World Trade Organization...reinforce a data colonialist regime that will reduce developing countries to being mere exporters of raw data.

UNCTAD must promote a dialogue within the multilateral system for a new framework convention on data governance grounded in the indivisibility of rights, including the right to development.

different structured realities.[1]

The draft report of Government of India's Committee of Experts on Non-Personal Data Framework proposes collective economic rights over data for groups and communities. Similar ideas are shaping up in a few other countries like Rwanda and South Africa, in terms of national ownership of a country's data.[2] Discussions on cross-border data flows need to accommodate such new developments around data related economic rights of individuals, small enterprises, groups, and communities, including national communities. The International Covenant on Social, Economic and Cultural Rights gives people a collective right to control and use their resources. If oil and minerals are a society's natural resources, data is a collective social resource (apart from a private one), that arises mostly from social interactions of a community enacted in digital environments. Other data may arise from a community's natural ecology, or from private or common artifacts belonging to the community. People and nations should therefore also have a collective right to their data, and its value. Already, under the Nagoya Protocol of the Convention on Biological Diversity, developing countries have claimed rights to sharing benefits arising from data about gene sequencing related to their flora and fauna.

## Towards 'Data Flow with Data Rights' – Three Generations of Data Rights



1. Developed countries devised trade agreements in such a way as to put their own subsidies into acceptable categories (called 'Green Box' subsidies), and and render the kinds that developing countries focus on as unacceptable ('Red Box').

2. See Rwanda's National Data Revolution Policy and South Africa's draft National Policy on Data and Cloud.

If we apply the schema of three generation of rights to data, privacy, and security can be viewed as first generation data rights (being in the realm of civil and political rights).

Economic rights over data, such as the right to the value generated from one's data, may be considered second generation data rights. Collective data rights of, (1) protection against collective harm, and (2) benefiting from group, community and national data, may be considered third generation data rights.

Any framework on cross-border data flows must incorporate all the aforementioned data rights. If three generations of rights apply to societies in general, they cannot but also apply to data, which today reflects and impacts all parts of the society. There can be no hierarchy among rights[3]; privacy is important, but so is the right to the economic value of one's data. The principle of indivisibility of rights must underpin all data regimes, including those for cross-border data flows (CBDF).

At the meeting of G20's Digital Economy Working Group in September, 2022, developing country members once again refused to endorse the DFFT framework for cross-border data flows. No agreement on the issue could therefore be arrived at. Very interestingly, however, the Working Group "acknowledged the Indonesian G20 Presidency's efforts to initiate discussions on the principles of DFFT and CBDF namely fairness, transparency, and lawfulness". This is a promising breakthrough. Fairness is evidently an economic issue. Indonesia's Minister for Communication and Informatics had earlier emphasized including concepts like 'data sovereignty'[4], 'data benefit-for-all' and 'cross-country reciprocity' in global data governance.[5]

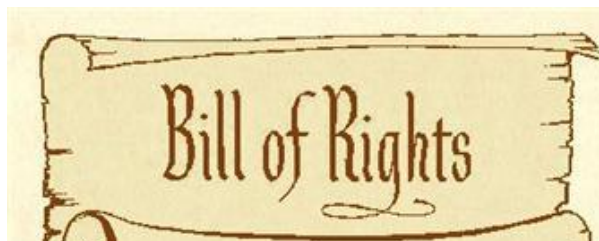
3. "Human rights are indivisible. Whether civil, political, economic, social or cultural in nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status as rights. There is no such thing as a 'small' right. There is no hierarchy of human rights." <https://uni.cf/3Lx31nQ>

4. Nowhere is the term 'data sovereignty' heard more nowadays than in the EU, from the highest echelons of governments. However, its incongruence with EU's advocacy at global forums for global free flow of data is not made clear.

5. <https://bit.ly/3LAmMej>

Any framework for data rights would certainly remain dynamic and evolving, given that the digital society is still in an early stage of development. At this point, an in-principle agreement should be reached on an overall guiding framework of cross-border 'Data Flow with Data Rights'. Only such a framing based on indivisibility of rights can satisfy developing countries as the basis of cross-border data flow related discussions. The global community should use different forums, including the G20, to formally adopt the 'Data Flow with Data Rights' (DFDR) framework. It should then form the basis for all further discussions and rule-making in this area.

## **A Rights-based Framework for Global Data Governance**



We support the call by the UNCTAD for developing a 'global data governance framework' that addresses both non-economic and economic aspects of data. Such a framework must encompass all three generations of data rights as discussed.

An appropriate rights-based data governance framework would enable much better cross-border data flows, because it can assure everyone that data flows will be safe as well as fair. This will strengthen global as well as national digital economies. For instance, money moves around the world with considerable ease because economic rights around money are recognized globally, and mechanisms exist to enforce them. This is also true for intellectual property. Similar recognition of who has 'primary economic rights to data' (or loosely, its 'ownership') would help data move across the globe more easily, securely, and fairly. The primary rights-holder to the economic value of data could be the data subject or data generator as per emerging jurisprudence on the subject, in the EU and elsewhere.

In relation to cross border data flows, collective rights of groups and communities, including national communities, are especially important. We have discussed how such rights are also taking shape. However, much more work is needed in this regard. Very significantly, all these legal efforts seek data rights, for individuals and groups, only and strictly as economic protection for the 'weaker parties'. They do not create new property rights for the already strong digital players like the large platform companies. In fact, almost all of them put asymmetric obligations on large data holders.

It may also be useful to look beyond traditional territorial jurisdiction and seek new principles about applicable jurisdiction for data. Primary jurisdiction over any data, for instance, could be of the place or community of its origin or generation, irrespective of data's physical location. Although data can be physically separated from its subject person or community – and easily flow across the world, its meaning and relevance remains rooted in the individual and/or collective data subject. Data's social mooring in the community of its origin can become the basis of primary jurisdiction over any data. A community's collective right to its data also expresses as its primary role in governing such data. That indeed is the meaning of data sovereignty.

A developing country diplomat recently put it rather persuasively; "We are currently struggling at the WTO to be released from global treaty obligations to be able to develop vaccines, medicines and diagnostics for saving our people from the worst public health crisis in a century. In a few years, we do not want to be in a situation where we are begging for our own health data, all hoarded, say, in the US, to be able to develop digital health interventions for a similar possible crisis". It is for such reasons that countries need sovereignty over their data, and explicit rights to its economic and public value.



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