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Cross-Border Data Flows and the Life Sciences Industry: How Trade Law Can Help

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Summary

More than 85 governments that are members of the World Trade Organization (WTO) – including Switzerland – are in the final phase of negotiating a set of global rules that aim to facilitate the free flow of digital goods, services and data across national borders. As negotiators develop a legal framework, this is an opportune time for business to shape its rules.

Regulatory barriers to data

Several countries have enacted regulations covering the transfer of personal data, including clinical trial data, outside their territories. These regulations (e.g., the EU General Data Protection Regulation) may prevent companies from transferring personal data to a country where the local legislation does not offer an adequate level of data protection. Other countries require companies to localize personal data in the country where it is collected (e.g., China's Cybersecurity Law, Russia's Law on Personal Data, and Vietnam's Cybersecurity Law). These "data localization requirements" (DLRs) effectively prevent the transfer of data across national borders.

Existing international trade rules can help break down these barriers

Existing rules of the WTO General Agreement on Trade in Services (GATS) can help address some of these hurdles. Under this agreement, regulation of cross-border data flows cannot, in principle, discriminate between "like" services or service suppliers from third countries. In addition, where national governments that are members of the WTO have committed to applying the market access and national treatment obligation to relevant services, regulations of cross-border data flows cannot:

- prevent market access for foreign service suppliers; or
- discriminate between foreign services or service suppliers and like domestic services or service suppliers

Several countries have similarly started including provisions in recently concluded free trade agreements (FTAs) that aim to facilitate the free flow of data between countries that are parties to the FTAs. These FTAs include Australia's agreements with Indonesia, Peru, and Singapore; the Comprehensive and Progressive Trans-Pacific Partnership between 12 Pacific countries; the United States-Mexico-Canada Agreement; the Singapore–Sri Lanka FTA; the Japan–Mongolia FTA; and the Digital Economic Partnership Agreement between Chile, New Zealand, and Singapore. In these FTAs, the parties commit to allowing cross-border data flows and/or not to enact DLRs. Consequently, data flows among these countries benefit from additional protection from regulatory barriers.

Avenues to address barriers to data flows – now, and in future

The life sciences industry can use existing GATS rules to address barriers to data flows by either: including WTO/GATS arguments in its overall advocacy strategy with national governments; or, for "make or break" the company hurdles, having the issue litigated either before the WTO or by invoking relevant dispute settlement provisions in Free Trade Agreements.

A more holistic – and long-term – approach would be to shape the rules that will govern the free flow of data in the foreseeable future, either by engaging in – and shaping – the negotiations of several Free Trade Agreements, or by engaging Switzerland – and other countries – that are in the final phase of negotiating a set of global rules at the WTO that aim to facilitate the free flow of digital goods, services, and data across national borders. As negotiators develop a legal framework, this is an opportune time for business to shape its rules through:

(1) identifying problems in a particular sector, particularly in relation to the topics outlined above; and

(2) offering concrete solutions of how these problems could be effectively addressed.